



Medical Marijuana: Ethics and Risk Management Issues

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Objectives:

- Understand professional liability protections and exposure
- Identify workforce issues surrounding employee use of medical marijuana

Conflict Between Federal and State Law

- Marijuana use is illegal under the federal Controlled Substances Act.
 - Schedule 1 – high potential for abuse, no accepted medical use
 - **Providers may not prescribe, administer or dispense, aid or abet cultivation, distribution or possession.**
- Many physicians are unwilling to recommend medical marijuana for fear of jeopardizing their DEA registration/participation in Medicare and Medicaid.
 - DEA pressure on physicians connected to cannabis industry

Federal Enforcement Concerns

- U.S. Supreme Court ruling - federal law enforcement agencies can investigate and prosecute activities that are legal under state law, if they violate the Controlled Substances Act.
- Obama and Trump enforcement policies differ.
 - Current status – Attorney General Barr testified to Congress he is against legalization but advocates for a federal framework.
 - Rohrabacher-Blumenauer amendment defunds enforcement activity – stopgap measure effective until November 21, 2019.

Tension Among Federal Agencies

- August 2019 - U.S. Food and Drug Administration and National Institutes of Health advocate for increase in licensed cultivators for cannabis research and “larger body of rigorous research.”
- August 2019 - Surgeon General advisory warned against marijuana use by adolescents and pregnant women.
- Veteran’s Administration – lawful medical marijuana use by non-active military does not affect eligibility for VA services, but VA physician may not recommend or prescribe medical cannabis.

Legal Risks of Recommending Medical Cannabis to Patients

- To date, unaware of any federal enforcement action against a physician for recommending medical marijuana in accordance with state law
- Ninth Circuit Court of Appeals – Physicians have a First Amendment right to discuss medical marijuana with patients, which is not aiding and abetting under Controlled Substances Act.
- DHSS letter to MHA – no intent to share information about certifying physicians with the Bureau of Narcotics and Dangerous Drugs/DEA.

Liability Protections under Missouri Law

Amendment 2 protects physicians from civil or criminal liability, sanctions or discipline of a professional license arising from

- Owning, operating, investing in, being employed by or contracting with a medical marijuana dispensary or a cultivation, manufacturing or testing facility
- Issuing a certification to any patient diagnosed with a qualifying medical condition
 - Consistent with Amendment 2 and standards of professional conduct

Liability Protections under Missouri Law

Section 334.100, RSMo generally authorizes the Board of Healing Arts to discipline physicians for certain conduct relating to controlled substances:

- “Performing or prescribing medical services which have been declared by board rule to be of no medical or osteopathic value”
- “Violation of the drug laws or rules and regulations of this state, including but not limited to any provision of chapter 195, or the federal government”

Amendment 2 would prevent licensure action under these provisions for recommending medical marijuana

Liability Concerns

Amendment 2 **does not protect** against discipline for unprofessional or negligent conduct under Section 334.100:

- Misrepresenting that a condition can be cured by a particular medicine
- Prescribing a controlled substance without sufficient examination/failing to establish a valid physician-patient relationship – i.e., failure to follow certification requirements
- Use of any controlled substance to the extent that it impairs the ability to practice medicine

Liability Concerns

Amendment 2 does not protect actions while under the influence that constitute negligence or professional malpractice and expressly prohibits employees from working while under the influence

- Anticipate discovery regarding provider's status as medical marijuana user in malpractice litigation

Malpractice pitfalls

- Contraindications/interactions with other drugs
- Side effects
- Coverage exclusions

Marijuana and the Patient/Physician Relationship

- Amendment 2 permits physicians to recommend medical marijuana
 - Does not require physicians to certify qualifying conditions
 - Employed physicians may be restricted from certifying by hospital?
- What if a physician does not believe medical marijuana has medical benefit?
 - Lack of scientific research to make data-driven decisions

Marijuana and the Patient/Physician Relationship

Patients are subject to possession and cultivation limits unless two independent physicians certify the patient would benefit from ability to purchase/grow amounts exceeding the legal limits

- Certification form requires recommended dose
- Dosage begins to look more like a prescription!

Medical Marijuana and Hospital Administration

DHSS states hospital **cannot** allow medical marijuana on its premises without violating federal law

- Allowing possession/consumption would violate Controlled Substances Act
- Storage/administration violates Conditions of Participation
- Cannot certify compliance with federal health care laws, including Controlled Substances Act

Amendment 2 prohibits consumption in a “public place” unless authorized by law

Medical Marijuana and Hospital Administration

- Adopt policies prohibiting patients from possessing/using on premises
- Do not store on patients' behalf – require removal or destruction
 - DHSS states law requires patients/caregivers to securely store marijuana at all times – hospital cannot store on their behalf
- Disincentive to discuss marijuana use with patients?
 - Adapt treatment plan to disruption in use?
 - Consider discharge planning

Medical Marijuana and Hospital Administration

Additional Legal Issues

- Cost report certifications
- False Claims/Corporate Compliance
- Mandated reports of child abuse/neglect

Medical Marijuana and the Workforce

- Certain federal contractors must maintain a drug-free workplace policy and a drug-free awareness program
 - Prohibit the use, manufacture, distribution, dispensation or possession of controlled substances in the workplace
 - Require employees to notify employer within five days of any criminal conviction relating to drug use, possession or distribution in the workplace
 - Discipline employees who are criminally convicted of a drug offense or require them to participate in a treatment program

Medical Marijuana and the Workforce

Missouri's law prohibits an employee from being under the influence at work or attempting to work while under the influence; therefore, an employer can provide reasonable accommodations without violating the Drug Free Workplace Act

- Identifying employees who are impaired:
 - How do you identify impairment now?
 - Compare to unauthorized/unsafe use of prescription opiates

Medical Marijuana and the Workforce

The Americans with Disabilities Act does not consider the illegal use of controlled substances to constitute a disability.

- Individual suffering from addiction to illegal substance is not qualified to perform the job.
- Under federal Controlled Substance Act, marijuana use is illegal.
- Federal law ~~does~~ [should] not require an accommodation for using medical marijuana.

Medical Marijuana and the Workfoce

- The Missouri Human Rights Act, like the ADA, requires employers to make reasonable accommodations for individuals with a qualifying disability.
- Conditions that qualify patients for medical marijuana use will likely qualify as disabilities under Missouri employment discrimination law
- Off-duty use of medical marijuana **may** be a reasonable accomodation.

Discussion/Questions

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