

Peaceful feeling, or up in smoke? Medical marijuana in medicolegal context

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Dear Dr. Mossman,
I practice in a state that allows medical marijuana use. A few of my patients have asked me to help them obtain marijuana for their conditions. How risky would it be to oblige?

Submitted by “Dr. J”

In recent years, public debate about marijuana has acquired 2 new dimensions: (1) the wishes and medical needs of people who seek marijuana for its purported health benefits, and (2) the role of physicians who practice where “medical marijuana” is legal. This article, the authors’ joint effort to address Dr. J’s concerns, hits 3 topics:

- the intersection of marijuana policy and health care in the United States
- the risks and possible benefits of marijuana use
- the medicolegal problems faced by physicians who might advise patients to use marijuana.

Legal haze

Two cannabinoids—dronabinol and nabilone—have received FDA approval as appetite enhancers and anti-nausea agents. Third-party payors usually cover these types of medications, but no insurer pays for medical marijuana.¹ The Controlled Substances Act of 1970² classified marijuana as a Schedule I drug because of its abuse potential, lack of accepted medical applications, and uncertain safety. The FDA has not approved marijuana use for any medical condition.

Although people commonly speak of “prescribing” marijuana, physicians cannot legally do this in the United States. What physicians may do, in the 23 states that allow medical marijuana, is *recommend* or *certify* a patient’s marijuana use—an action that has constitutional protection under the First Amendment’s freedom of speech clause.^{3,4}

A physician may complete documentation that a patient has one of the qualifying medical conditions for which the jurisdiction has legalized medical marijuana. Either the patient or the physician then submits that documentation to the appropriate government agency (eg, the state’s department of health).

If the documentation receives approval, the agency will issue the patient a registration card that allows possession of medical marijuana, with which the patient can obtain or grow a small amount of marijuana. The cannabinoid content of marijuana products varies considerably,⁵ and physicians who certify marijuana typically defer dosage recommendations to the patient or the dispensary.¹

In states that allow medical marijuana, users may assert an affirmative defense of medical necessity if they face criminal prosecution.^{3,6} Possession of marijuana remains illegal under federal law, however, regardless of one’s reason for having it.^{7,8} Since

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Disclosures

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Clinical Point

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Table 1

Side effects and health risks of marijuana

Side effects	<ul style="list-style-type: none"> • Intermittent use: dry mouth, nausea, anxiety, dizziness, disorientation, sedation, euphoria, dysphoria, paranoia, confusion • Regular use: poor sleep, problems with attention, memory, and verbal learning
Health risks	<ul style="list-style-type: none"> • Myocardial infarction (middle-aged and older men during the hours after smoking) • Bronchitis, respiratory impairment • Testicular cancer, possibly other cancers • Low-birth weight babies in mothers who use <i>Cannabis</i> • Childhood leukemia, astrocytoma, and rhabdomyosarcoma (associated with parental marijuana use) • Problems with perceptual organization, memory, verbal performance, delinquency, and behavior in children whose mothers are users • Suicidal ideation and unplanned attempts • Psychosis (adolescents)

Source: References 4,14-20

October 2009, the Attorney General’s office has discouraged federal prosecutions of persons “whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁹ But given the remaining conflicts between state and federal laws, “the legal implications of certifying patients for medical marijuana remain unclear.”¹⁰

Physicians have few resources to instruct them on the legal risks of certifying medical marijuana. When Canada legalized medical marijuana, the organization that provides malpractice insurance to Canadian physicians told its members that “prescribing medical marijuana cannot be compared to prescribing prescription drugs” and recommended that physicians obtain signed release forms documenting that they have discussed the risks of medical marijuana with patients.¹¹ For some risky approved drugs, the FDA has established a risk evaluation and mitigation strategy, but no such guidance is available for marijuana.

Highlighting the benefits and risks

Proponents of medical marijuana claim that *Cannabis* can help patients, and dispa-

sionate experts acknowledge that at least modest evidence supports the benefits of using “marijuana for nausea and vomiting related to chemotherapy, specific pain syndromes, and spasticity from multiple sclerosis.”¹⁰ For several other conditions—HIV/AIDS, depression, anxiety disorders, sleep disorders, psychosis, Tourette syndrome—evidence of benefit is poor.¹² Rigorous evaluation of medical marijuana is difficult because the plant contains hundreds of active chemical compounds. The chemical content of marijuana is highly variable, depending on its preparation and administration,^{10,13}—one reason why only a few good randomized controlled trials of marijuana have been conducted.

Marijuana has several side effects and carries many health risks (*Table 1*).^{4,14-20}

On the highway: Marijuana and driving

Marijuana use impairs driving ability.¹⁴ Following enactment of more lenient marijuana laws, several states have reported higher numbers of fatally injured drivers who tested positive for *Cannabis*²¹⁻²³ and had a positive screen of tetrahydrocannabinol (THC) in driving under the influence

Table 2

Before you recommend medical marijuana, ask yourself 9 questions

- What am I being asked to do: Prescribe? Recommend for a medical card? Give general advice?
- Does the patient have an appropriate medical indication?
- How will my patient obtain marijuana?
- What type will be used: dronabinol, nabilone, or other cannabinoids?
- How will the dosage be regulated?
- Have I explained the risks adequately?
- Have I documented this explanation and the informed consent process?
- What does my malpractice coverage say about my actions?
- Have I consulted with an attorney or risk mitigation specialist knowledgeable about this practice?

Source: References 1,32,37,38

cases.^{24,25} One study showed that a blood THC concentration >5 ng/mL (comparable to a blood alcohol concentration of 0.15%) increased the crash odds ratio to 6.6.^{25,26}

Marijuana impairs reaction time, information processing, motor performance, attention, and visual processing.^{14,16,27,28} Drivers who are under the influence of marijuana make more driving errors, despite being cautious about how they react to traffic.²⁹ Even after weeks of abstinence, previous daily users of marijuana display some cognitive processing and driving-related impairments.^{30,31}

Courts have found physicians negligent if their patients' treatment-induced driving impairments injured others when the risk of driving-related injury was foreseeable.³² The Massachusetts case of *Coombes v Florio*³³ likened the physician's duty to that of a liquor store that sells alcohol to a minor who subsequently crashes, or to a father who did not lock his firearms away from his violent adult son.

Three variables influence a court's judgment about whether risk is "foreseeable": "the relative knowledge of the risk as between lay persons and physicians, whether the patient has previously used the medication and/or experienced the adverse effect, and whether a warning would otherwise have been futile."³⁴ A physician who certified a patient to use marijuana without

adequately explaining the risks of driving might be vulnerable to a lawsuit if the patient's driving accident occurred while the patient was under the influence of the drug. Recommending marijuana as a treatment also could lead to a malpractice action if a patient experienced and was harmed by the drug's adverse effects.

Other drags

Another malpractice risk stems from marijuana's addiction potential. Although many people think *Cannabis* isn't addictive, nearly 10% of all marijuana users develop dependence.^{10,17} Regular *Cannabis* users are more likely to use alcohol, tobacco, and "recreational" drugs,^{17,35} and using alcohol and marijuana together greatly heightens the risk of driving accidents.^{14,15} Although we know of no case that relates directly to marijuana, physicians have faced lawsuits for injuries stemming from a patient's addiction to prescription drugs,³⁶ particularly when the patient's behavior should have led the physician to suspect abuse or overuse.³⁷

When certifying marijuana use, physicians have the same obligations that apply to more conventional medical treatment:

- establishing a proper physician-patient relationship
- taking an appropriate history
- conducting a proper examination

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Unlike some risky approved drugs, the FDA has not established a risk evaluation and mitigation strategy for marijuana

Clinical Point

Courts have found physicians negligent if their patients' treatment-induced driving impairments injured others when the risk was 'foreseeable'

Table 3

Steps to mitigate medicolegal risk if you decide to recommend medical marijuana

- Take a history and perform a good-faith examination
- Develop a treatment plan with clear objectives
- Obtain informed consent
- Discuss risks, side effects, and potential benefits
- Review treatment effectiveness periodically
- Consult other professionals (eg, an addiction specialist), as necessary
- Keep proper records that support your recommendation
- Have a bona fide physician–patient relationship (ie, a pre-existing and ongoing relationship with the patient as a treating physician)
- Don't let issuing marijuana "recommendations" be a large (let alone exclusive) aspect of your practice
- Don't issue a recommendation unless you have adequate information regarding the composition and dose of the *Cannabis* product
- Have adequate training in identifying substance abuse and addiction

Source: Adapted from reference 13

- reviewing records
- developing a comprehensive treatment plan
- weighing risks and alternatives
- providing follow-up care.

Neglecting these steps could lead to medical board sanctions and suspension or revocation of a medical license.¹³

The blunt reality

We advise against recommending marijuana for your patients. But if you have exhausted the alternatives, see marijuana as the last resort, and believe that taking the risk is worth the potential benefit, you can take some steps to reduce your legal risk (*Table 2, page 51*,^{1,32,37,38} and *Table 3*¹³).

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Bottom Line

Medical marijuana is a controversial topic that demands more rigorous research and regulatory consideration. In the present climate, cautious physicians will avoid recommending marijuana to their patients. If you think that a patient has a medical indication, with no treatment option better than medical marijuana, be sure to understand the medical and legal ramifications before you authorize its use.

Malpractice Rx

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