LEGAL ISSUES IN CANNABIS PRACTICE

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Basic Concepts of American Jurisprudence:

Based on **federalism**, or decentralization

Combines a central (federal) government with regional governments (states) in a single political system, dividing the powers between them

The **Supremacy Clause** (Article VI, clause 2) of the United States Constitution states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The federal government has broad powers under the Supremacy Clause to create, regulate, and enforce federal laws of the United States

Doctrine of Preemption:

Federal law preempts state law, even when the laws conflict

Supersedes, or ***preempts***, state law, making the state law invalid

Federal courts may require a state to stop certain behavior that it believes interferes with or conflicts with federal law

10th Amendment - Congress may **not** make a law that forces a state government to take some action that it would not have otherwise taken

All state judges must follow the Constitution, laws, and treaties of the federal government "in matters which are directly or indirectly within the federal government's control"

Doctrine of Preemption:

In the absence of federal law, or if a state law provides more protections than the existing federal law, state law holds

Tripartite sovereign system (fed govt, states, and Indian reservations are all “sovereign”)

States are ‘plenary sovereigns’ with their own constitutions

Federal sovereign only has the limited supreme authority granted in the US Constitution

US law (civil law) is mostly state law, which varies between states

Complex relationship and set of rules that govern how federal and state sources of law interrelate

Express and Implied Powers

US Constitution sets boundaries of federal law – express & implied powers

Express ("enumerated") powers are specifically spelled out in the U.S. Constitution

i.e., the right to regulate commerce, declare war, levy taxes, and establish immigration and bankruptcy laws

Implied (“inferred”) powers are powers not specifically mentioned in the Constitution

The Constitution does not expressly grant a right to privacy; however, these rights can be ***inferred*** by the Constitution itself, or from the Bill of Rights

“Penumbra of Rights:”

Refers to a group of rights that are not explicitly stated in the Constitution, but can be inferred from other enumerated rights

Definition of the term derived from its scientific meaning:

> "A space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light"

Rights existing in the Constitution's penumbra can be found in the "shadows" of other portions of the Constitution

Griswold v. Connecticut, 381 U.S. 479 (1965):

Published on June 7, 1965

7–2 decision held a CT state law criminalizing contraception was unconstitutional

The “right to marital privacy” exists in the penumbra of the constitution and is a fundamental constitutional right

Justice Douglas argued that the Court could infer a right to privacy by looking at "zones of privacy" protected by the 1st, 3rd, 4th,5th, and 9th Amendments

Griswold v. Connecticut, 381 U.S. 479 (1965):

“Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Whether express or implied, federal law will **almost always** prevail when it interferes or conflicts with state law, **except** in circumstances where:

1. The federal law is deemed unconstitutional, or
2. Where the Supremacy Clause does not apply

- Many areas where tension between state and federal law remains unresolved, particularly regarding cannabis

Sources of laws:

Constitution, statutes, common law (federal and state)

Constitutional – protect rights of fundamental importance

- Statutes & Administrative Regulations – Both fed & state

    Legislative branch creates laws by enacting statutes governing the rights/duties of people

    Fed & State legislatures also allow the creation of administrative agencies to issue rules and regulations that interpret and clarify statutes

- Common law – derived from judicial decisions
- Originally based on English law; now have 250+ years of American legal decisions

Civil v. Criminal Law

- Civil law refers to settling disputes between parties

  Includes contract law, torts, family law, estates & trusts, probate law, etc.

- Criminal law – offense against society –

  Rules codified as statutes/codes

  Prosecuted by the State, as the offense is against ‘all of us’

  Represented by the State Attorney General or Prosecuting Attorney

Precedent and *stare decisis*

American legal system predicated on the concept of ***stare decisis***

Defining principle of common law – requires that courts follow decisions of higher courts *within the same jurisdiction*

Case law from another jurisdiction can be persuasive, but not binding on another jurisdiction

- Case law sets a **precedent** for future judgments
- Allows consistency and predictability for citizens

Legal History of Cannabis in the United States

- Medicinal preparations of cannabis available in American pharmacies in the 1850s
- Government efforts to regulate the use and sale of pharmaceuticals, particularly “narcotics,” began about the same time in the US
- “Patent” medicines began appearing in the late 17th century

  Originally issued “letters patent” by the Crown
- Few if any actually “patented” – chemical patents not available until 1926 in US
- OTC/non=prescription preparations manufactured and sold with no oversight or ingredient disclosures
- Some advertised as containing “snake oil” – the efficacy frequently depended more on the seller of the medicines than its contents

1850's – states began passing their own consumer protection laws regarding medicines

Pure Food and Drug Act of 1906

- required that certain drugs, including cannabis, be accurately labeled with their contents; -

-updated in 1938 to the Federal Pure Food, Drug, and Cosmetics Act of 1938

-still in effect today

CA - Poison Act in 1907

amended 1913 to include cannabis,

Revised in 1915 to restrict cannabis like other poisons; other states followed with marijuana laws

1914 - New York state passed the Towns-Boylan Act

The Turn of the Century and Social Upheaval

U.S. immigrant population increased dramatically

Many factors, including wars and the Industrial Revolution

- Mexican immigration increased after the 1910 Mexican Revolution
- 1914 “Sonoratown” raid in LA was first cannabis drug raid in the US

The Great Depression (1929) increased tensions as jobs and resources became scarce

PROHIBITION: 1920-1933

- 18th Amendment ratified in 1919; implemented as Volstead Act; started January 1920
- 21st Amendment passed in 1933; repealed the 18th Am & ended Prohibition
- Highly unsuccessful from a governmental perspective:

  Increased crime; solidified organized crime

  Allowed the development of clandestine shipping routes all over the country and into Canada and Mexico

  Created an underground economy for alcohol
- Speakeasies popular
- Migration due to the Great Depression dispersed jazz music from New Orleans north to Chicago and NY
- United mostly black musicians with mostly white audiences
- Jazz musicians ‘known’ for using cannabis

Harrison Narcotics Act of 1914:

- Passed in 1914 to control narcotics trafficking by taxation

- Required anyone who transported, sold, or possessed narcotics to report it to the Internal Revenue Service (IRS) and to pay certain taxes

- Provided for financial penalties for violations of the Act, but didn't give the ***individual states*** the authority to exercise their own police powers regarding the seizure of drugs used in illicit trade or to punish those responsible

SO…

Narcotic Drug Import and Export Act of 1922

Federal Narcotics Control Board - made drug possession a federal crime

> “The most important feature of this initial prohibitory phase is that marihuana was inevitably viewed as a “narcotic” drug, thereby invoking the broad consensus underlying the nation’s recently enunciated antinarcotics policy. This classification emerged primarily from the drug’s alien character. Although use of some drugs— alcohol and tobacco—was indigenous to American life, the use of “narcotics” for pleasure was not. Evidently, drugs associated with ethnic minorities and with otherwise “immoral” populations were automatically viewed as “narcotics.”

Cannabis was classified as a narcotic and was outlawed as well

Federal Bureau of Narcotics (FBN) - 1930

Congress abolished the Federal Narcotics Control Board in June 1930

Replaced with the Federal Bureau of Narcotics (FBN) under the Treasury Department

In July 1930, President Hoover and Treasury Secretary Andrew Mellon appointed Harry J. Anslinger (Mellon's wife's nephew) commissioner of the FBN (1930-1962)

Uniform State Narcotic Drug Act of 1934 (USNDA)

Designed to replace inadequate and conflicting state laws:

- "***Called into full exercise the powers that reside in the states alone***," allowing states to prosecute cases such as illegal possession, over which the federal courts had no jurisdiction;
- Divided the responsibility of narcotic law enforcement between the federal and several state governments;
- Coordinated enforcement through mandatory cooperation of state with federal officers;
- Prohibited sales and transfers of narcotic drugs except under state licenses, which is a requirement solely within the power of the states;
- Prohibited production of narcotic drugs within state borders, except by specific license and under strict regulation, and include within the definition of narcotic drugs those narcotics that may be prepared synthetically;
- Provided for revocation of licenses for violations of the state narcotic law, making direct control of this phase of enforcement beyond the power of the federal government;
- Strengthened enforcement by making admissible as evidence what are normally privileged communications when they are used to procure unlawfully a narcotic drug;
- Required the return of the unused portion of a narcotic drug to the practitioner when no longer required as a medicine by the patient; and
- Permitted prosecution in all cases of those obtaining narcotic drugs by fraud or deceit, and particularly in those cases where narcotics are obtained by means of false or altered prescriptions

The Marihuana Tax Act of 1937:

- First national regulation of cannabis
    - Use of cannabis and other drugs came under increasing scrutiny after FBN formation in 1930
    - Part of the government's broader push to outlaw all recreational drugs
- Anslinger claimed cannabis use was increasing; that cannabis caused people to commit violent crimes, and to act "irrationally and overly sexual"
- The FBN produced propaganda films promoting Anslinger's views and launched a nationwide campaign declaring that marijuana causes temporary insanity, with ads showing young people suffering from "Reefer Madness."
- Incidentally, the Marihuana Tax Act of 1937 legitimized the use of the term "marijuana" as a label for hemp and cannabis plants and products
    - Prior to 1937, "marijuana" was slang; it was not included in any official dictionaries and was not used by the medical profession to refer to cannabis

The Marihuana Tax Act of 1937:

The American Medical Association (AMA) opposed the taxation

Dr. Woodward doubted their claims about marijuana addiction, violence, and overdosage

He further asserted because the word Spanish word *"marijuana"* was largely unknown at the time, the medical profession did not realize they were losing cannabis.

"Marijuana is not the correct term ... Yet the burden of this bill is placed heavily on the doctors and pharmacists of this country."

On October 1, 1937, the Federal Bureau of Narcotics and Denver City police arrested Moses Baca for possession and Samuel Caldwell for “dealing in marijuana”

First marijuana convictions under U.S. federal law for not paying the marijuana tax

Baca was sentenced to 18 months & Caldwell to 4 years in Leavenworth

1938 LaGuardia Committee:

LaGuardia convened the first US commission to investigate the effects of smoking cannabis and commissioned the New York Academy of Medicine to prepare the report

Released in 1944 after more than 5 years of research, the report systematically contradicted claims made by the U.S. Treasury Department that smoking marijuana results in insanity, deteriorates physical and mental health, assists in criminal behavior and juvenile delinquency, is physically addictive, and is a "gateway" drug to more dangerous drugs

The LaGuardia Committee concluded:

- “Marihuana is used extensively in the Borough of Manhattan but the problem is not as acute as it is reported to be in other sections of the United States.
- The introduction of marihuana into this area is recent as compared to other localities.
- The cost of marihuana is low and therefore within the purchasing power of most persons.
- The distribution and use of marihuana is centered in Harlem.
- The majority of marihuana smokers are Blacks and Latin-Americans.
- The consensus among marihuana smokers is that the use of the drug creates a definite feeling of adequacy.
- The practice of smoking marihuana ***does not lead to addiction in the medical sense of the word***.
- The sale and distribution of marihuana is not under the control of any single organized group.
- The use of marihuana ***does not lead to morphine or heroin or cocaine addiction and no effort is made to create a market for these narcotics by stimulating the practice of marihuana smoking***.
- Marihuana is ***not the determining factor in the commission of major crimes***.
- Marihuana smoking is not widespread among school children.
- Juvenile delinquency is ***not associated*** with the practice of smoking marihuana.
- **The publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded**.”

LaGuardia Report infuriated Anslinger

Said it was “unscientific”

Publicly denounced Mayor LaGuardia, the NYAM, and the physicians who performed the research

Anslinger said that they should not conduct more experiments or studies on marijuana **without his personal permission**

Between 1944 and 1945, Anslinger stopped all research on cannabis and its derivatives, and personally commissioned the AMA to prepare a report that would reflect the government’s negative opinions & disprove the LaGuardia Report

The AMA study leveraged again on racism, asserting that:

“Of the experimental group, thirty-four men were black, and only one was white," and stated ‘those who smoked marijuana became disrespectful of white soldiers and officers during military segregation."

In 1972, the Shafer Commission admitted that "these stories were largely false" and that:

> "with careful consideration of the documentation there is no confirmation of the existence of a causal relationship between marijuana use and the possible use of heroin," and declared that the ban on cannabis was imposed and still subsisted "without any serious and comprehensive research having been conducted on the effects of marijuana.“

By the mid-1930s, cannabis was regulated as a drug in every state.

Five years later, the American Medical Association no longer supported cannabis as a medicine, and it was removed from the USP

Leary v. United States, 395 U.S. 6 (1969):

The Marijuana Tax Act was overturned in 1969 by *Leary*

Replaced by Congress in 1970 with the CSA

In *Leary v. United States*, part of the Marijuana Tax Act was found to be an unconstitutional violation of the Fifth Amendment, since a person seeking the tax stamp would have to incriminate himself by applying for one

Unanimous opinion of the Court by Justice John Marshall Harlan II

Declared the Marihuana Tax Act unconstitutional, and

Dr. Leary's conviction was overturned

Congress responded by replacing the Marihuana Tax Act with the Comprehensive Drug Abuse Prevention and Control Act of 1970, under which cannabis was officially outlawed for any use (medical included)

Comprehensive Drug Abuse Prevention and Control Act of 1970 (CSA):

Enacted to protect the public

"Illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."

Title II, the Controlled Substances Act of the Comprehensive Drug Abuse Prevention and Control Act of 1970 created five "schedules" of controlled substances based on their:

Currently accepted medical use

Relative abuse potential

Likelihood of causing dependence when abused

Controlled Substances Act:

During House subcommittee drafting, it was suggested that marijuana **temporarily** be placed in Schedule I pending the Commission's report

Cannabis is still listed in Schedule I of the CSA, which indicates that cannabis has no accepted medical value and presents a high potential for abuse and dependence

Racism and bias played a huge role in Nixon administration politics

Shafer Commission Report – 1972

1970 – Nixon appointed the National Commission on Marihuana and Drug Abuse, a/k/a The Shafer Commission

Chaired by former PA Governor Raymond P. Shafer

March 22, 1972 - Shafer presented "Marihuana, a Signal of Misunderstanding," calling for a policy "which prohibits commercial distribution of the drug but does not apply criminal sanctions to private possession or use nor casual, non-profit distribution incidental to use."

This approach was soon dubbed "decriminalization"

The Commission's report said that while public sentiment tended to view marijuana users as dangerous, the Committee actually found users tend to be more "timid, drowsy and passive"

From "Marihuana, a Signal of Misunderstanding:"

“No significant physical, biochemical, or mental abnormalities could be attributed solely to their marihuana smoking… No valid stereotype of a marihuana user or non-user can be drawn… Young people who choose to experiment with marihuana are fundamentally the same people, socially and psychologically, as those who use alcohol and tobacco… No verification is found of a causal relationship between marihuana use and subsequent heroin use…. Most users, young and old, demonstrate an average or above-average degree of social functioning, academic achievement, and job performance…”

“The weight of the evidence is that marihuana does not cause violent or aggressive behavior; if anything marihuana serves to inhibit the expression of such behavior… Marihuana is not generally viewed by participants in the criminal justice community as a major contributing influence in the commission of delinquent or criminal acts… Neither the marihuana user nor the drug itself can be said to constitute a danger to public safety… Research has not yet proven that marihuana use significantly impairs driving ability or performance…”

From "Marihuana, a Signal of Misunderstanding:"

"No reliable evidence exists indicating that marihuana causes genetic defects in man... Marihuana's relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it."

Graham, Fred P; "National Commission to Propose Legal Private Use of Marijuana," Special to The New York Times, Feb. 13, 1972:

"The National Commission on Marijuana and Drug Abuse has unanimously decided to recommend that all criminal penalties for the private use and possession of marijuana be eliminated."

"The commission's conclusions were based on the results of studies that made three points: That marijuana is not addictive and cannot be shown to be physically or psychologically harmful, even after long use; that its use does not appear to lead to the use of hard drugs, such as heroin, and that its use does not lead to crime."

Baum, Dan, "Legalize It All – How to Win the War on Drugs," Harper's Magazine, April, 2016:

"You want to know what this [war on drugs] was really all about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."

~ John Ehrlichman, Assistant to the President for Domestic Affairs under President Richard Nixon; statement to Dan Baum in 1994 interview

Important Cases

United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001):

1996 - CA Proposition 215 allowed a patient or his primary caregiver to cultivate or possess marijuana on the advice of a physician

Patient caregiver groups formed, like the Oakland Cannabis Buyers' Cooperative

- Plaintiffs argued that the CSA's categorical prohibitions as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeded Congress' authority under the Commerce Clause
- U.S. Supreme Court ruled that federal anti-drug laws do not permit an exception for medical marijuana
- The Court expressly noted that it **did not** decide whether federal law could override a California law allowing the local cultivation and distribution of marijuana

Gonzales v. Raich, 545 U.S. 1 (2005):

The U.S. Supreme Court ruled 6-3 that:

Under the **Commerce Clause**, the federal government has a right to regulate and criminalize cannabis, and that Congress may criminalize the production and use of homegrown cannabis ***even if*** state law allows its use for medicinal purposes

- Under the **Supremacy Clause**, federal law ***pre-empted*** CA state law
- If a single exception were made to the Controlled Substances Act, it would become unenforceable in practice
- Court also said that “consuming one's locally grown marijuana for medical purposes affects the interstate market of marijuana” and “the federal government may thus regulate and prohibit such consumption”

Gonzales v. Raich, 545 U.S. 1 (2005):

Justice O'Connor dissented, joined by Chief Justice William Rehnquist:

“We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. (citations omitted). One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." (citations omitted)

“Relying on Congress’ abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one’s own home for one’s own medicinal use. ***This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently.”***

Gonzales v. Raich:

Justice Thomas also wrote a separate dissent, stating in part:

“Respondents…use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. ***If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.***

“If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite.”

The Rohrabacher–Farr (Blumenauer) Amendment, Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, tit. V, div. B, § 538 (2014):

- §538 prohibits the Justice Department from spending funds to interfere with the implementation of state medical cannabis laws
- Passed the House in May 2014 after six failed attempts
- Became law in December 2014 as part of an omnibus spending bill
- First time either house of Congress had voted to protect medical cannabis patients
- Does not change the legal status of cannabis
- Must be renewed by Congress each fiscal year in order to remain in effect
- Has been renewed every year since

Ogden and Cole Memoranda
(2009 Ogden Memo; Cole Memos of 2011, 2013 and 2014)

DOJ released four memoranda regarding federal prosecution of cannabis cases

2009 Ogden Memo; Cole Memos of 2011, 2013 and 2014

> "It is not likely an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers."

2013 Cole Memorandum priorities:

- Preventing the distribution of marijuana to **minors**;
- Preventing **revenue** from the sale of marijuana from going **to criminal enterprises**, gangs and cartels;
- Preventing the **diversion** of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or **pretext** for the trafficking of other illegal drugs or other illegal activity;
- Preventing **violence** and the use of firearms in the cultivation and distribution of marijuana;
- Preventing **drugged driving** and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on **public lands** and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on **federal property**.

2018 - AG Jeff Sessions “rescinded” these guidance memos, and encouraged the DOJ to enforce the CSA

Limited Enforcement of Federal Marijuana Prohibition:

- **August, 2016** - *US v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016): Ninth Circuit ruled that the DOJ cannot take action against an individual who is participating in medical marijuana–related activity in **strict compliance** with their state laws unless there is evidence that the individual is in clear violation of state law.

- **July 30, 2021** – *US v. Trevino*, No. 20-1104 (6th Cir. 2021): Defendant claimed he was registered as a caregiver under MI MMA, but prior felony conviction was a statutory bar to lawful registration as such. The 6th Circuit Ct App said he did not “strictly comply” with the Blumenauer Amendment. 188 months imprisonment (over 15 years) as a minimum sentence.

Limited Enforcement of Federal Marijuana Prohibition:

January 6, 2022 - *United States v. Bilodeau*, Nos. 19-2292, 20-1034, 20-1054 (1st Cir. Jan. 26, 2022). Second case asking federal circuit courts to interpret the Rohrabacher amendment following *McIntosh*, asking that DOJ be enjoined from prosecution as they were state-compliant

- State-sanctioned caregiver status won't necessarily shield one from federal prosecution
- 2 "legal" caregivers were allowed 6 plants each; had **895** and were selling across state lines

1st Circuit didn't mandate "strict compliance," but said defendants were "egregiously in violation of state law"

> "Congress surely did not intend for the [Rohrabacher amendment] to provide a safe harbor" to those with facially valid documents "without regard for blatantly illegitimate activity."
>
> "In this case, the evidence clearly showed that the growers' outward appearance of compliance with Maine's medical marijuana laws was a façade, employed for the purposes of selling marijuana to unauthorized users."

Conundrum for HCP's:

Discrepancies between state & federal MMJ laws place HCP's and patients in a difficult situation:

- To provide their patients with medicinal marijuana, doctors must risk violating federal law and, potentially, the revocation of their Drug Enforcement Agency (DEA) licenses
- Still Schedule I drug; illegal for physicians to ***prescribe***
- Prescribing it would (theoretically) constitute "aiding and abetting the acquisition of marijuana," which could result in revocation of DEA licensure and prison time
- Can write a ***recommendation*** if the patient suffers from one of the state-enumerated conditions
- Possession of a State MMJ card allows a patient to obtain, possess, or grow medicinal marijuana without violating state law, **but** provides no shield against violations of federal law

Issues in Cannabis Practice:
What Health Care Providers Should Know

Issues in Cannabis Practice:

Biggest barriers to adoption of medical cannabis (2019 CBE survey):

- Lack of clinical trials prevents physicians from recommending MCT to patients (69%)
- 2/3 of physicians (65%) are concerned about legal exposure
  - Theoretical risk of malpractice
  - Federal Schedule I status and DEA licenses

Also:

- Lack of reliable guidance (from professional associations or colleagues)
- Concern that patients will be punished by their employer
- Professional/social stigma of being known as a MCT endorser

Conant v. Walters, 309 F3d 629 (9th Cir.2002):

9th Circuit Court of Appeals held that:

A physician's discussion of the potential benefits of medicinal cannabis and making such recommendations ***constitute protected speech under the First Amendment***

The *Conant* Court stated that:

- Doctors should not be held liable for conduct that patients might engage in after leaving the office, and that
- Open and unrestricted communication is vital in preserving the patient-doctor relationship and ensuring proper treatment

To date, no court in the US has considered potential malpractice liability for a physician certifying or recommending medical cannabis.

Employment and Cannabis Use:

Both state and federal courts have upheld firing an employee for medical cannabis use

- State medical cannabis laws ordinarily protect medical cannabis users from the adverse consequences of the **state's** laws as an affirmative defense, **BUT**
- State laws do not provide a "right" that can be used affirmatively against a private entity

The Americans with Disabilities Act (ADA) and similar state anti-discrimination in employment statutes are predicated upon discrimination based on ***lawful activity***

The Controlled Substances Act (CSA) has consequently proven to be an insurmountable obstacle to these cases thus far

So, how does a conscientious HCP minimize their legal liability?

U.S. HCP associations are developing guidelines for use and monitoring of MCT

Most advocate:

- Individualized approach to cannabinoid recommendations/use, with
- Careful monitoring of beneficial and adverse effects

AMA:

- Advocating for the re-scheduling of cannabis to facilitate large, well-controlled clinical trials of cannabinoids
- But, slow to modify their published recommendations about MCT

MSMA:

- Vehemently opposed to MCT and unwilling to discuss

Provider Practice Acts

Are not “checklists” for practice -

- Contain general statements of appropriate professional actions
- Provider should incorporate the practice acts with their educational background, previous work experience, institutional policies, and technological advancements
- Main purpose of practice acts is to protect the public from unsafe practitioners, and the ultimate goal is competent, quality healthcare care provided by qualified practitioners.

Federation of State Medical Boards (FSMB)
Guidelines for practitioners considering the use of MCT for patients
April 2016

- 1. Assure that a collaborative effort has been established between physician and patient.
- 2. Document the patient medical evaluation and relevant clinical history.
- 3. Provide the patient with information about the known and unknown risk/benefits of MCT.
- 4. Develop a written treatment plan agreed upon by the patient
- 5. Verify qualifying conditions
- 6. Ongoing monitoring and adaptations to the treatment plan
- 7. Consult & refer patients with substance abuse history or mental health disorders
- 8. Maintain accurate and complete medical records
- 9. Eliminate conflicts of interest between physician and cannabis supply.

The NCSBN National Nursing Guidelines for Medical Marijuana July 2018

NCSBN Six Principles of Essential Knowledge:

1. The nurse shall have a working knowledge of the current state of legalization of medical and recreational cannabis use.
2. The nurse shall have a working knowledge of the jurisdiction's MMP.
3. The nurse shall have an understanding of the endocannabinoid system, cannabinoid receptors, cannabinoids, and the interactions between them.
4. The nurse shall have an understanding of cannabis pharmacology and the research associated with the medical use of cannabis.
5. The nurse shall be able to identify the safety considerations for patient use of cannabis.

   "Administration of medical cannabis can only be carried out by the certified patient, or the designated caregivers registered to care for the patient according to the MMP. Health care professionals may administer medical cannabis according to the MMP and facility policy (NCSL, 2017)."

6. The nurse shall approach the patient without judgment regarding the patient's choice of treatment or preferences in managing pain and other distressing symptoms.

Patient Considerations in Cannabis Therapy

Clinical indications, such as diagnosis, history, goals for use of medical marijuana, probability of success, and other options for care

- Patient's personal preferences based on information of benefits and risks
- Attention to decision making by the patient's proxy, parent, or guardian (if the patient is incapacitated in decision making or is a minor)
- Quality of life based on the patient's subjective viewpoint
- Situational context, such as family and other important relationships, economic factors, access to care, and potential harm to others.

HCP's responsibility to understand MCT

- Affirmative duty to understand and be knowledgeable about what patients are using
- No different than any other medication
- May even decide to recommend use in your practice
  - Administration should have P&P's re cannabis
  - Know professional Position Papers and guidelines for practice
  - Update diagnosis and billing codes – ICD-10, CPT codes only for CUD encounters
  - Can't enter it as a medication on most EMR's because not "on the list" – enter manually which prohibits it being cross-checked with other medications
  - Learn about cannabis and keep current
  - May need to disclose to malpractice insurance

Patient Teaching and Cannabis

- Our patients are going to use cannabis, and as healthcare providers, we need to understand how this affects their health, & how to help them understand and avoid any risks that may exist
- We as practitioners need to teach patients to treat cannabis as medicine
- This includes listing it as a medication and not an illicit drug
- Huge opportunity for patient teaching here
- Remember that you CAN talk to your patients about cannabis
- Up to us to help change attitudes about cannabis
- Teach patients how to talk to HCP's about cannabis

Patient Teaching and Cannabis:

HCP’s Responsibilities:

Let your patients know that you are accepting of their cannabis use

NO JUDGMENT – watch for prejudice and unconscious bias

Learn about cannabis as medicine

Educate fellow nurses, physicians, HCP’s, **and** patients about cannabis

Will start seeing positive results from patients’ use of cannabis

Not just less dependence on opiates and other medications in general, but

Healing the ECS and returning the body to homeostasis and health

THANK YOU