



HEALTH CARE ALERT

OKLAHOMA'S MEDICAL MARIJUANA ACT: WHAT PHYSICIANS NEED TO KNOW

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August 7, 2018

On June 26, 2018, Oklahoma voters approved State Question 788 (codified in the Oklahoma Statutes as Sections 420A-426 of Title 63 and titled the Oklahoma Medical Marijuana Act ["OMMA"]). The OMMA legalizes the cultivation, processing, distribution, prescribing, possession, and use of medical marijuana, provided that such activities are conducted within the framework established by the OMMA and the implementing regulations adopted by the Oklahoma State Department of Health ("OSDH"). With so much federal and state red-tape already in place (and more on the way), physicians should be knowledgeable about the role they have been asked to play in Oklahoma's budding new industry.

THE FEDERAL PROHIBITION

The Controlled Substances Act, 21 U.S.C. §§ 801-904 ("CSA"), governs federal drug control and enforcement. Among other things, the CSA sets forth "a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."¹ Marijuana is classified as a Schedule I drug under the CSA, meaning—in the eyes of the federal government—marijuana (i) has a high potential for abuse, (ii) does not have a currently accepted medical use for treatment, and (iii) poses an unacceptable safety risk even when used under medical supervision.² Simply put, as a Schedule I drug, the growth, distribution, possession and use of marijuana is illegal under federal law, regardless of conflicting state laws.³ Despite this fact, the U.S. Department of Justice ("DOJ") (at least for the time being) is prohibited from using any of the funding it receives from Congress to prosecute

¹ *Gonzalez v. Raich*, 545 U.S. 1, 13 (2005).

² 21 U.S.C. § 812(b)(1)(A)-(C), (c).

³ *Id.* § 812(b)(1)(A)-(C).

individuals and businesses that operate in the medical marijuana industry in compliance with state medical marijuana laws.⁴

CONSIDERATIONS FOR RECOMMENDING PHYSICIANS

Under the OMMA, individuals may possess and consume medical marijuana, provided that they hold a valid medical marijuana license issued by the Oklahoma Medical Marijuana Authority (a division of the OSDH). All applications for a medical marijuana license must be signed by a physician who holds a valid, unrestricted license to practice medicine in the State of Oklahoma, and who meets the definition of “board-certified” under the rules established by either the Oklahoma Board of Medical Licensure and Supervision (“OBMLS”) or the Oklahoma Board of Osteopathic Examiners (“OBOE”).⁵ In the case of applicants under eighteen (18) years of age, the application must be signed by two physicians within thirty (30) days of each other.⁶ If a patient is homebound or does not have the capability to self-administer or purchase medical marijuana due to developmental disability or physical or cognitive impairment, this fact should be noted on the physician’s recommendation form, as the patient’s guardian or caregiver may be eligible to apply for a caregiver’s license. Also, although it is not required, Oklahoma physicians who plan to recommend medical marijuana to patients are encouraged to register with the OSDH on a form that is accessible at omma.ok.gov in order to speed up the application approval process for their patients.

A. GENERAL CONSIDERATIONS UNDER FEDERAL LAW

The U.S. Food and Drug Administration (“FDA”) is the federal agency responsible for protecting and promoting public health through, in part, the control and supervision of prescription and over-the-counter pharmaceutical drugs. Because marijuana is still illegal under federal law, it has been difficult for clinical researchers to evaluate the therapeutic benefits of marijuana and to form conclusions regarding the efficacy of the drug. As a result, the FDA has only authorized the use of one drug derived from marijuana. Despite this fact, many states have approved the use of marijuana (i) to treat diseases and conditions such as post-traumatic stress disorder and epilepsy, or (ii) to relieve symptoms like pain and nausea.

Faced with a lack of clinical evidence and FDA approvals, the prospect of “prescribing” marijuana may cause some physicians to fear for their medical licenses and/or certifications to prescribe medications, or wonder if there could be any other negative repercussions for prescribing the drug. In Oklahoma, the medical marijuana landscape is shifting almost daily and no solid assurances can be given in response to some of these concerns (it’s hazy at best). As medical marijuana industries have taken root in other states, however, the legal risks to doctors who recommend medical marijuana to patients (within the guidelines set forth in their state) have proven to be minimal. This holds true for one primary reason: Physicians do not directly prescribe or dispense the drug. Instead, physicians merely issue written recommendations that allow patients to obtain state-issued licenses. Oklahoma’s medical marijuana program operates in this fashion.

Although the risk of losing a state license to practice medicine due to a medical marijuana recommendation may be minimal (as long as the recommendation is made in accordance with state law), marijuana is still a Schedule I substance under the CSA. In addition, it is a crime under federal law to knowingly or intentionally “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense” marijuana,⁷ as well as to knowingly or intentionally “possess a controlled substance.”⁸

⁴ Thompson Coburn LLP, *Rohrabacher-Blumenauer Amendment Included in Omnibus FY 2018 Spending Bill*, JD SUPRA (March 30, 2018).

⁵ OAC 310:681-1-4; 310:681-1-9.

⁶ 63 O.S. § 420A(L); OAC 310:681-2-2.

⁷ 21 U.S.C. § 841(a)(1).

⁸ *Id.* § 844(a).

Furthermore, federal law permits the prosecution of “principals” who commit offenses against the United States or who “*aid, abet, counsel, command, induce or procure*” the commission of such offenses.⁹ In other words, a person may be responsible for a crime he or she has not personally carried out if he or she helps another to complete its commission.¹⁰

Despite the foregoing, as mentioned above, the DOJ is currently prohibited from prosecuting individuals for marijuana related offenses when those individuals are acting in accordance with their state’s medical marijuana framework. Moreover, we are not aware of any cases in which physicians have been prosecuted under the CSA for recommending the drug in accordance with state law. It appears that nobody is going after physicians unless they are running the marijuana equivalent of a “pill mill.” This is particularly true with respect to state regulators, who (in other states) have stripped physicians of their medical licenses for excessive or imprudent recommendations (*e.g.*, to pregnant women or individuals with admitted histories of substance abuse issues).

B. SPECIFIC CONSIDERATIONS UNDER OKLAHOMA’S MEDICAL MARIJUANA ACT

The OMMA is unique when compared to the medical marijuana laws of other states. In contrast to the medical marijuana programs in all other states with medical marijuana laws, there are no specifically enumerated “qualifying conditions” that support a medical marijuana recommendation from an Oklahoma physician. Instead, when recommending medical marijuana, Oklahoma physicians are called on by the OMMA to use “accepted standards a reasonable prudent physician would follow when recommending or approving any medication.”¹¹ In the previous (and short-lived) version of OMMA’s implementing regulations, the OSDH outlined stringent requirements for recommendations and suggested best-practices for physicians recommending medical marijuana. Notably, however, the most recent version of implementing regulations (approved by Governor Fallin on August 6, 2018) omit almost all of the OSDH’s previous guidance (perhaps, due to an overstep in authority by the OSDH in the superseded regulations), which, for better or for worse, leaves more room for interpretation.

Notwithstanding the lack of detailed guidance from the OSDH, it is important for physicians contemplating the recommendation of medical marijuana to understand that their signature on a recommendation form amounts to an attestation to the following¹²:

- The physician has established a medical record for the patient/applicant and a bona fide physician-patient relationship with such individual;
- The physician has conducted an in-person examination of the patient/applicant within the previous thirty (30) calendar days;
- The physician has discussed the risks and benefits of the use of medical marijuana with the patient/applicant and or the patient/applicant’s custodial parent(s) or legal guardian(s);
- The physician has determined the presence of at least one medical condition for which the patient/applicant is likely to receive therapeutic or palliative benefit from the use of medical marijuana;

⁹ 18 U.S.C. § 2(a) (emphasis added).

¹⁰ *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014).

¹¹ 63 O.S. § 420A(M); OAC 310: 681-1-9.1.

¹² The physician recommendation form and additional guidance from the OSDH and the Oklahoma Medical Marijuana Authority can be found at <http://omma.ok.gov/guidance-for-recommending-physicians>.

- The physician is recommending a medical marijuana license to the patient/applicant in accordance with accepted standards a reasonable and prudent physician would follow for recommending or approving any medication;
- The physician has verified the patient/applicant's identity; and
- The physician has participated in all mandatory continuing medical education as required by his or her licensing entity.¹³

In addition, our review of medical marijuana programs implemented in other states has revealed other conventions Oklahoma physicians should incorporate in their recommendation practices, including (but not limited to) the following:

- Conducting a preliminary screening for substance abuse or mental health disorders and determining and documenting whether a medical marijuana recommendation presents an undue risk of abuse, addiction, or diversion;
- Maintaining accurate and complete medical records for the patient;
- Providing follow-up care and management of the patient's medical condition, including any follow-up examination necessary to determine the efficacy of medical marijuana for the patient's condition;
- Avoiding conflicts of interest and similar fraud and abuse violations applicable to the provision of all other medical services by, at a minimum, refraining from:
 - ✓ Accepting, soliciting, or offering any form of pecuniary remuneration from or to a caregiver, dispensary, processor, or commercial grower;
 - ✓ Offering a discount or any other thing of value to a patient who uses or agrees to use a particular caregiver or dispensary;
 - ✓ Examining a patient for the purposes of recommending medical marijuana at a location where medical marijuana is dispensed;
 - ✓ Holding a medical marijuana license in his or her personal capacity or as a caregiver if actively making recommendations to other patients; and
 - ✓ Holding any direct or economic interest in an enterprise that grows, transports, processes, or dispenses medical marijuana.¹⁴

Moreover, we also recommend that physicians consult with their medical liability insurance carriers before issuing recommendations, as there could be civil liability risks for recommending physicians. It is conceivable, for instance, that the right set of facts might allow a crafty plaintiffs' attorney to allege a

¹³ Neither the OBMLS nor the OBOE have issued guidance or mandated any particular CME requirements related to medical marijuana; however, the June 21-22, 2018 meeting minutes of the OBMLS indicate that a discussion of medical marijuana issues was on the agenda, so physicians should continue to watch for guidance and rules from their licensing bodies.

¹⁴ The current version of the implementing regulations does not contain the same fraud and abuse and conflict of interest prohibitions that were included in the superseded regulations. Importantly, however, physicians in other states have been burned (by state and federal agencies) for engaging in activities that appear to compromise their medical judgment, and, thus, we advise that recommending physicians in Oklahoma avoid these activities.

physician's negligence caused an overprescribed patient to injure a third party. After all, these cases are filed every day with respect to doctors who prescribe opioids.

CONCLUSION

Until the smoke clears regarding the efficacy of medical marijuana and its illicit status under federal law, physicians should exercise caution before choosing to recommend the drug to their patients. In particular, physicians who think they may recommend the drug should (i) speak with their medical liability insurance carrier to ensure they have coverage if an issue stemming from a medical marijuana recommendation arises and (ii) consult with legal counsel to ensure all (ever-changing) statutory and regulatory requirements are being satisfied through their recommendation practices.¹

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