Marijuana Policy Project
P.O. Box 77492
Washington, DC 20013
p: (202) 462-5747 • f: (202) 232-0442
info@mpp.org • www.mpp.org

"We change laws."

"Prescribing" Versus "Recommending" Medical Cannabis

Since 1996, 25 states have enacted comprehensive laws that protect and provide safe access to medical cannabis for qualified patients. Another 16 have enacted laws intended to allow certain patients to use low-THC cannabis preparations. However, dozens of other state medical cannabis laws since the 1980s are merely symbolic because they were crafted in a way that did not consider complications caused by federal law, which considers even medical cannabis illegal.

A "prescription" for the medical use of cannabis is illegal under federal law and carries significant penalties for doctors. Similarly, requiring physicians to specify dosage likely crosses the line into aiding and abetting, and thereby puts physicians at risk. By contrast, a "recommendation" or "certification" that a patient has a qualifying condition and could benefit from medical cannabis is permissible and forms the basis of every workable medical cannabis program in the United States.

Thus, when it comes to participation of physicians, improperly crafted state law requirements can have the unintended consequence of placing them at risk of serious penalties by federal law enforcement authorities. Even if the federal government does not target medical professionals, requiring them to cross a line into possibly illegal conduct can render a law merely symbolic. The vast majority of physicians are unwilling to put their livelihood and freedom at risk.

Why are cannabis prescriptions illegal?
Under the authority of the Controlled Substance Act ("CSA"), the Drug Enforcement Administration issues registration numbers to qualifying doctors who become authorized to dispense Schedule II, III, IV, and V controlled substances.[1] Doctors may not issue prescriptions for Schedule I substances. Cannabis in nearly every form, including low-THC varieties and extracts, is classified as a Schedule I drug and therefore may not be prescribed. A physician who engages in conduct against the public interest — such as by violating the CSA — may have his or her DEA registration revoked, leaving that physician unable to prescribe any controlled substances.

In addition, it is a criminal offense for a doctor to aid or abet the purchase, cultivation, or possession of cannabis,[2] or to engage in a conspiracy to cultivate, distribute, or possess cannabis.[3] A prescription is an order to a patient to consume a controlled substance, as well as an order to a pharmacist to prepare and distribute the substance. Issuing such an order can be interpreted as aiding or abetting a crime or as conspiring to violate a federal offense. Accordingly, any state that requires that doctors "prescribe" some form of cannabis could expose that person to not only the possible loss of a DEA registration but also to criminal liability.

Why are cannabis recommendations permitted?
By contrast, federal courts have found that "recommending" the use of cannabis for medical purposes is permitted — and indeed protected — even if it is reasonably foreseeable that a recommendation would be used to obtain medical cannabis.

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[1] 21 U.S. Code § 829.
[2] 18 U.S.C. § 2
[3] 21 U.S.C. § 846

A federal court decision examined the differences between a prescription for medical cannabis and a recommendation. The result was a finding that while a prescription for cannabis is unlawful, a recommendation could be distinguished and is allowed. The Ninth Circuit Court of Appeals was the last court to review the matter, and the U.S. Supreme Court refused to hear an appeal of the case.[4]

The Ninth Circuit noted that an integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients, and such speech strikes at the fundamental interests behind the First Amendment.

Unlike a prescription, a recommendation has no legal effect under federal law — it is merely a discussion about the pros and cons of consuming a substance, a statement that the benefits of use would likely outweigh the harms, and a suggestion that the patient consider it an option. The doctor is not ordering the patient to consume it, providing instructions on how to do so, or authorizing that substance to be distributed to the patient. Following a recommendation, the state steps in. It establishes protections for patients for whom a doctor has made such a recommendation, along with a regulatory framework for the production and distribution of cannabis.

What other conduct must physicians avoid?
The Ninth Circuit in *Conant v. Walters* found that doctors could recommend cannabis, but not with the specific intent that the recommendation be used to obtain marijuana. The California Medical Association has issued a list of dos and don'ts to physicians in light of the decision and advised against conduct indicating a specific intent — such as specifying dosage or the mode of administration. In addition to the risk of prosecution, a physician's DEA license to prescribe can be revoked for any conduct that is not in the public interest, which is a much lower standard.

Conclusion
To avoid putting physicians at possible risk — and to avoid risking their non-participation — state medical cannabis laws must not require doctors to specific dosage, routes of administration, or strains. They should simply affirm that a patient has a qualifying condition and that the physician believes the patient may benefit from cannabis. The more states try to mirror federal requirements for prescribing medicines, the more likely a physician is placed at risk of violating federal law.

Summary

A doctor may:

- Discuss treatment options, including treatment with cannabis or cannabis products.
- Discuss the pros and cons of treatment with medical cannabis.
- Recommend that a patient consider the use of medical cannabis to offset the symptoms.
- Sign a form to that effect.

A doctor may not:

- Order a patient to consume medical cannabis.
- Provide instructions on the amount to consume.
- Provide instructions on the form in which medical cannabis must be taken.
- Order that medical cannabis be prepared or distributed to the patient.

[4] *Conant v. Walters*, 309 F.3d 629, (9th Cir 2002), cert denied Oct. 14, 2003. See also *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997), and Conant v. McCaffrey, 2000 WL 1281174 (N.D. Cal. Sept. 7, 2000).