

MARIJUANA – KNOW THE RISKS



A LinkedIn Series by PRMS

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More on Medical Marijuana

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As discussed in my prior post, Why Marijuana is Still a “High” Risk for Physiciansⁱ, some people believe that enforcement guidance memos issued by the Department of Justice (DOJ) allow for medical marijuana use if such use is allowed under state law. The most often cited DOJ memo on this issue is the “Cole Memo”ⁱⁱ from 2011, specifying that federal resources should not be spent on marijuana enforcement in states “that have...implemented strong and effective regulatory enforcement systems”. There also is the “Ogden Memo”ⁱⁱⁱ from 2009, which instructs federal prosecutors “not [to] focus federal resources” on those that are clearly and unambiguously compliant with state medical marijuana laws.

Last month, Attorney General Jeff Sessions issued a memo^{iv} that declared previous DOJ “guidance specific to marijuana enforcement...unnecessary and is rescinded, effective immediately.” AG Sessions specifically abrogated the Ogden memo, the Cole Memo, and other marijuana-related memos.

However, the impact of AG Sessions’ memorandum is unclear for at least three reasons:

1. The Rohrabacher-Blumenauer amendment (formerly known as the Rohrabacher-Farr amendment until Farr retired from Congress), which prohibits the DOJ from using its funds to prosecute medical marijuana cases where the defendant is compliant with state marijuana laws, remains in effect until at least March 23, 2018.
Update: The March spending bill extended this amendment through September 30th.
2. AG Sessions’ Memo prompted a speedy and severe backlash on both sides of the political aisle.
3. Sessions’ Memo does not say when marijuana prosecutions will resume, or whether such prosecutions will resume at all. Rather, the Sessions Memo merely directs federal prosecutors to exercise prosecutorial discretion and to “weigh all relevant considerations” when deciding whether to bring a case. The impact of the Sessions Memo will turn on how the U.S. Attorneys in individual jurisdictions approach marijuana cases in the absence of the Ogden and Cole Memos.

Bottom line: Prescribers need to understand the risks. Under federal law, it is still illegal to prescribe marijuana, as it is a Schedule I controlled substance, even if “certification” (or other similar term) is legal under state law. There could be a criminal investigation or prosecution under federal law, which could result in loss of DEA license, exclusion from Medicare, loss of assets, and even prison. Medical malpractice insurance policies typically exclude coverage for illegal acts.

2019 Updates:

- William Barr has replaced Jeff Sessions as the US Attorney General.
- The Rohrabacher-Blumenauer amendment has been extended through 9/30/19.
- The APA has published two additional resources:
 - › Resource Documents on APA Opposition to the Use of Cannabis for PTSD^v (2019)
 - › Resource Document on Opposition to Cannabis as Medicine^{vi} (2018)

i <https://www.linkedin.com/pulse/why-marijuana-still-high-risk-physicians-donna-vanderpool-mba-jd/>

ii <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf>

iii <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>

iv <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>

v <https://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/resource-documents>

vi <https://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/resource-documents>



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Why Marijuana Is Still a “High” Risk for Physicians

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As more and more states are legalizing recreational and/or medical marijuana, physicians need to understand the risk associated with promoting the use of marijuana.

Here’s the problem...marijuana is a Schedule I controlled substance, which is definedⁱ by the federal government as having “no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.” Other substances in Schedule I include heroin, LSD, and Ecstasy. It is illegal to prescribe Schedule I controlled substances. Just last month, the Drug Enforcement Agency (DEA) considered but rejectedⁱⁱ two petitions to reschedule marijuana, “because it does not meet the criteria for currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse.” The actual letter of denial can be seen hereⁱⁱⁱ. The denial letter points out that the government supports and encourages research and outlines the ways it is promoting medical marijuana research.

Bottom line – Under federal law, it is illegal to prescribe marijuana as it is a Schedule I controlled substance.

But what about state law? Knowing of the federal prohibition on prescribing, state laws do not use that term, but rather terms such as a physician’s “referral” or “recommendation” or “certification” or “order.” Regardless of what the document written by the physician is technically called, the federal government may see it as illegal. There are serious consequences if a physician is found to have committed a criminal act or civil violation, including, but not limited to, loss of license to practice and loss of liability insurance coverage.

You may have heard that there are specific conditions, which if all are met by the state, will preclude the federal government from going after activities related to marijuana. The Department of Justice (DOJ) has put out several memos on marijuana enforcement. The memo from 2013^{iv}, referred to as the “Cole Memo”, was

from the Deputy Attorney General James Cole to all US Attorneys within the DOJ and the subject was “Guidance Regarding Marijuana Enforcement.” The memo listed the following eight priorities for federal enforcement:

- 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.

Some believed after reading this memo, that the federal government would leave states and citizens of those states alone if the state had enacted sufficient protections consistent with the federal government’s eight priorities. However, this is only “guidance” and it contains the language that nothing in the memo, including the absence of the listed factors, precludes investigation or prosecution.

You may also have heard that a recent court decision protects doctors from federal prosecution when they recommend medical marijuana consistent with state law. First, let’s be clear on the facts. This case involved ten combined criminal prosecutions, almost all dealing with growing marijuana, but none dealing with physicians recommending marijuana. The case revolved around Congress’ prohibition on spending funds to prosecute

those who complied with state marijuana law. This federal appeals court opined that the appropriations law (prohibition) would mean the federal government could not prosecute if state law was followed. The appellate court remanded the cases back down to the trial courts to determine if state law was followed. But keep in mind that this is just one appellate court's thoughts; other federal appellate courts could decide the same issue differently. Also, as noted by the court:

- Congress could appropriate funds for such prosecutions tomorrow; in fact, the appropriations measure expires September 30, 2016
- The spending prohibition does not provide immunity from prosecution for federal marijuana offenses
 - › The Controlled Substances Act prohibits the manufacture, distribution, and possession of marijuana.
 - › Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime
- The federal government can prosecute such offenses for up to five years after they occur
 - › Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding

The risk management advice is to understand the risks. There could be a criminal investigation or prosecution by the federal government. As stated in an interesting article^v by Bruce Reinhart, Esq. in the Florida Bar Journal, "Doctors or pharmacies helping a patient obtain marijuana risk losing their DEA license, being excluded from the Medicare program, losing their assets, and going to prison." And, medical malpractice insurance policies typically exclude coverage for illegal acts.

And we cannot forget the clinical risks. As noted by the American Academy of Child and Adolescent Psychiatry (AACAP) in its 2012 Medical Marijuana Policy Statement^{vi}:

"...adolescent marijuana users are more likely than adult users to develop marijuana dependence, and their heavy use is associated with increased incidence and worsened course of psychotic, mood, and anxiety disorders. Furthermore, marijuana's deleterious effects

on cognition and brain development during adolescence may have lasting implications."

AACAP spells out the reasons it opposes legalization of marijuana in its 2014 Marijuana Legalization Policy Statement^{vii}.

Similarly, the American Psychiatric Association (APA), in its Position Statement on Marijuana as Medicine^{viii} starts by noting "There is no current scientific evidence that marijuana is in any way beneficial for the treatment of any psychiatric disorder." The Position Statement concludes with this statement: "Physicians who recommend use of smoked marijuana for 'medical' purposes should be fully aware of the risks and liabilities inherent in doing so."

The APA has two other relevant resource documents^{ix} – Resource Document on Marijuana as Medicine and Resource Document on the Need to Monitor and Assess the Public Health and Safety Consequences of Legalizing Marijuana.

- i <http://www.deadiversion.usdoj.gov/schedules/index.html#define>
- ii <https://www.dea.gov/divisions/hq/2016/hq081116.shtml>
- iii <https://www.dea.gov/divisions/hq/2016/Letter081116.pdf>
- iv <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>
- v <https://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/d59e2cf27607c0cf85256ad1005ba53f/cf521b8a51d73dd685257f640075b6661OpenDocument>
- vi http://www.aacap.org/AACAP/Policy_Statements/2012/AACAP_Medical_Marijuana_Policy_Statement.aspx
- vii http://www.aacap.org/AACAP/Policy_Statements/2014/aacap_marijuana_legalization_policy.aspx
- viii <https://www.psychiatry.org/psychiatrists/search-directories-databases/policy-finder?g=98c9de83-8e45-4783-b319-72368c5085ba&Page=7>
- ix <https://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/resource-documents>



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States May Prohibit Marijuana Consults via Telemedicine

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Those states that permit the use of medical marijuana consistently require an established physician-patient relationship, as well as a physical examination. Some state are explicit that this required physical examination may not be performed remotely. For example:

- Under Illinois law, “the physical examination required by this Act may not be performed by remote means, including telemedicine.”
- Under Washington law, “in order to authorize for the medical use of marijuana...the health care professional must...complete an in-person physical examination of the patient;”
- Under Colorado law, “the appropriate personal physical examination...may not be performed by remote means, including telemedicine.”

The Florida Medical Board was all set to follow suit, and issued a Notice of Proposed Rule Making amending the telemedicine regulationsⁱ by adding the following: “Medical cannabis or low-THC cannabis...may not be ordered by means of telemedicine.” The Board held a hearing on this new provision at their meeting on February 3rd. However, after hearing testimonyⁱⁱ from interested parties, including physicians advocating against enactment of the rule, the Board decided to table the issue until the next meeting so that additional information could be gathered. So stay tuned...

ⁱ <https://www.flrules.org/gateway/ruleNo.asp?id=64B8-9.0141>

ⁱⁱ http://ww10.doh.state.fl.us/pub/medicine/Agenda_Info/Public_Information/Public_Minutes/2017/February/02032017_FB_Minutes.pdf

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