



Ohio Physician Alert: Remember, You Are Recommending Medical Marijuana, Not Prescribing It.

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One common misconception physicians may have about these rules is that they will enable physicians to *prescribe* marijuana. However, [Ohio's medical marijuana law](#) will only allow physicians to *recommend* marijuana. Like most other states that have enacted similar medical marijuana legislation since 2002^[1], Ohio's law was carefully crafted to only allow recommendations in accordance with the Ninth Circuit's ruling in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

You see, if Ohio, [or any other state for that matter](#), enacted a medical marijuana law that authorized physicians to prescribe marijuana — that would be an outright violation of federal law, specifically, the Controlled Substances Act (CSA). Whether a state's enactment of any medical marijuana law is an outright violation of federal law is an article for another day, but know that courts have ruled both ways when determining whether the CSA preempts state marijuana laws^[2].

The CSA prohibits physicians from prescribing Schedule I controlled substances, like marijuana, because the federal government has determined that these substances have: (i) a "high potential for abuse," (ii) "no currently accepted medical use in treatment in the United States," and (iii) a "lack of accepted safety" for "use under medical supervision." ^{[3][4]} Ohio's law circumvents this federal prohibition by only allowing physician recommendations, taking a page out of the *Conant* court's interpretation of similar language used in California's Compassionate Use Act.

Conant v. Walters: Prescribing v. Recommending

California passed the Compassionate Use Act in 1996, which permitted patients to use medical marijuana that was "recommended" by a physician.^[5] In response, The White House Office of National Drug Control Policy threatened that any physician who prescribed or recommended medical marijuana would have

their Drug Enforcement Administration (DEA) registration revoked – the registration that allows physicians to prescribe controlled substances in Schedules II–V, like Percocet and Vicodin.^[6] This caused patients and physicians to sue the federal government – they argued that the federal government’s threat to punish physicians for communicating with their patients about medical marijuana as a treatment option violated the physicians’ First Amendment right to free speech.^[7]

The Ninth Circuit upheld the District Court’s ruling in favor of the patients and physicians, permanently enjoining the federal government from prosecuting or revoking a physician’s DEA registration for recommending medical marijuana.^{[8][9]} Both courts determined that:

- The First Amendment protects physicians from being punished for voicing their professional opinions based on their medical judgment, whether the government agrees with those or not^[10];
- Marijuana treatment recommendations for certain debilitating illnesses are recognized as legitimate in medically appropriate circumstances and if recommendations cannot be communicated, the physician–patient relationship can be seriously impaired^[11];
- A physician’s recommendation – unlike a prescription – may not necessarily lead to a patient obtaining marijuana, to the contrary, patients receiving a recommendation may choose to honor federal law and not obtain marijuana or may even use the recommendation to urge the government to change the law^[12];
- Even if a physician foresaw that a recommendation may be used to acquire marijuana by illegal means, this alone would not make the doctor’s recommendation a crime^[13];
- The dispensing of information by a physician is very different from the dispensing of controlled substances, and holding a physician responsible for whatever conduct the physician *could* anticipate a patient *might* engage in after leaving the physician’s office is simply beyond the scope of federal law.

[\[14\]](#)

While the Ninth Circuit affirmed the ruling in favor of medical marijuana recommendations, it pointed out that the ruling did not limit the government from investigating physicians who aid and abet the actual distribution of medical marijuana.[\[15\]](#) Interestingly, the Supreme Court of the United States denied the government's writ of certiorari without comment, leaving the Ninth Circuit's opinion as law in that Circuit's states and territories (Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands).[\[16\]](#)

The *Conant* case is the reason why Ohio's medical marijuana law allows physicians to recommend, and not prescribe medical marijuana. The *Conant* ruling is not binding on Ohio state courts or the Sixth Circuit, which has jurisdiction over Ohio. It is merely persuasive authority and if a case with facts similar to *Conant* was ever brought in a federal court in the Sixth Circuit, it is entirely possible the outcome could be different.

Bottom line: when it comes to medical marijuana, physicians can recommend it, but not prescribe it. The difference between prescribing and recommending can have significant civil and criminal consequences for Ohio physicians participating in the State's new medical marijuana program.

Frost Brown Todd's health law service team is well-versed in creating compliance programs that follow scrupulous guidelines and documentation practices in the best interest of the physician and patient. Please contact a member of our [Health Care Innovation Team](#) for more information on appropriate best business practices when it comes to Ohio's medical marijuana law.

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[\[1\]](#) Other states that require physician recommendations of medical marijuana: California, Massachusetts, Michigan, Maine, Colorado, and Illinois.

[2] See *White Mountain Health Center v. Maricopa County*, 241 Ariz. 230, 386 P. 3d 416, 2016 WL 7368623 (Ariz Ct. App. Dec. 20, 2016); and *People v. Crouse*, 388 P. 3d 39, 2017 WL 365800 (Colo. 2017).

[3] *Conant v. McCaffrey*, No. C 97-00139 WHA, 2000 WL 1281174, at *1 (N.D. Cal. Sept. 7, 2000), aff'd sub nom. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

[4] *Id.* (citing 21 U.S.C. § 812(b)(1)).

[5] Cal. Health & Safety Code § 11362(b)(1)(A)(1996) (emphasis added).

[6] *Conant v. McCaffrey*, 2000 WL 1281174, at *2 (quoting Joint Stmt. Undisputed Facts § 6).

[7] *Id.* at *6.

[8] See *Conant v. McCaffrey*, 172 F.R.D. 681, 681 (N.D. Cal. 1997).

[9] *Conant*, 309 F.3d at 634.

[10] *Conant*, 2000 WL 1281174, at *14.

[11] *Id.* at *14.

[12] *Id.*

[13] *Id.* at *15.

[14] *Conant*, 309 F.3d at 636.

[15] *Id.* at 632 (citing 21 U.S.C. 841(a) (2000)).

[16] See *id.*, cert. denied, 124 S. Ct. 387 (U.S. Oct. 14, 2003) (No. 03-40).

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