Doctors and Ohio's Medical Marijuana Law: A Physician's Guide to Cannabis Compliance

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If you already know this stuff, check out Ohio Physician's Guide to Cannabis Compliance 2.0 (part 2).

The first important distinction for physicians to understand when it comes to medical marijuana treatments is that physicians recommend medical marijuana, they do not prescribe it. In short, this is due to the federal restrictions on prescribing controlled substances (like marijuana) and a physician's right to free speech when it comes to suggesting all possible forms of treatment for patients.

Any physician intending to recommend medical marijuana cannot have an "ownership or investment interest in or compensation agreement with" any medical marijuana entity licensed or seeking licensure under the Ohio Medical Marijuana Control Program. This is designed to ensure that physicians do not allow their business interests to interfere with their medical judgment when making a marijuana recommendation to patients.

Ultimately, physicians will have to decide whether they want to be involved at the clinical level recommending marijuana to patients or at the corporate level of a medical marijuana venture – they cannot do both. While this article mainly focuses on *Ohio* medical marijuana law compliance, there are many federal law and contractual issues (including provider agreements with Medicare, Medicaid, and other payers and medical staff bylaws) that physicians will need to consider before deciding to participate in the medical marijuana industry one way or the other. Any physician who decides to recommend medical marijuana as a treatment option must receive a "certificate to recommend" from the State Medical Board of Ohio (the "Board").

What criteria must a physician satisfy to be eligible to receive a certificate to recommend?

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To be eligible for a certificate to recommend medical marijuana treatments, a physician-applicant must:

- Hold an active, unrestricted license to practice medicine and surgery, or osteopathic medicine and surgery.
- Have been granted access to, and not be under any prohibition for access to, the drug database established and maintained by the Ohio Board of Pharmacy ("Board of Pharmacy").
- Hold an active registration with the Drug Enforcement Administration (DEA).
- Not have been denied a controlled substances license by the DEA or other appropriate issuing body based on his or her inappropriate activities with respect to controlled substances or dangerous drugs.
- Not have held a controlled substances or dangerous drugs license issued by the DEA or a state licensing administration in any jurisdiction that has ever been restricted based on his or her inappropriate activities with respect to controlled substances or dangerous drugs.
- Not have been subject to disciplinary action by any licensing entity based on the his or her inappropriate activities with respect to controlled substances or dangerous drugs.
- Have completed at least two hours of continuing medical education in courses certified by the Ohio State Medical Association or the Ohio Osteopathic Association that assist physicians in both of the following:

- Diagnosing "qualifying medical conditions" (including ailments like: Alzheimer's disease, Epilepsy, Fibromyalgia, and Parkinson's disease).
- Treating qualifying medical conditions with medical marijuana, including the characteristics of medical marijuana and possible drug interactions.

If the physician satisfies the above criteria, the application is considered "complete." As long as the Board is not conducting an investigation appearing to show that the physician-applicant has

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violated a duty subjecting him or her to disciplinary action, the application will be processed.

What happens when the Board receives a complete application and processes it for a certificate to recommend?

Once the Board receives a complete application, it will thoroughly investigate the application materials. Since a physician-applicant must file the application under oath, it is paramount that all information submitted is truthful. The Board has the right to contact individuals, agencies or organizations for information about applicants and may even request that the physician-applicant appear before the Board to answer questions or provide additional information.

If the Board proposes to deny a certificate to recommend, it must grant the physician-applicant a hearing on the denial. Applicants should be aware that they may not withdraw an application for a certificate to recommend without the approval of the Board.

What happens when the Board receives an incomplete application for a certificate to recommend?

The answer to this question depends on why the application is not complete. If the application is incomplete because required information, facts or other materials have not been received by the Board, it may notify the applicant that it intends to consider the application abandoned. Such a notice must specifically identify the information, facts, or other materials required to complete the application and provide a specified deadline date when the information must be received. The notice must also inform the applicant that if the application remains incomplete at the close of business on the deadline date, the application may be deemed abandoned. If all the information, facts, or other materials are received by the board by the deadline and the application is determined to be complete, the Board will process the application, but may request updated information as it deems necessary.

If the application is not complete because the Board is investigating evidence appearing to show that the applicant has violated a duty subjecting him or her to disciplinary action, the Board will:

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- Notify the applicant that, although otherwise complete, the application will not be processed pending completion of the investigation.
- Upon completion of the investigation and the determination that the applicant is not in violation of statute or rule, process the application, including requesting updated information as it deems necessary.

If a physician is granted a certificate to recommend, when must it be renewed?

The certificate to recommend must be renewed when the physician's license to practice as a physician or osteopathic physician is renewed or restored, conditioned upon the physician's certification of having met all the eligibility requirements listed above and having completed at least two hours of Board-approved continuing medical education annually, as listed above. The Board will notify the Board of Pharmacy if a physician's certificate to recommend is lapsed, surrendered, suspended, revoked or otherwise not renewed.

What is the standard of care when recommending treatment with medical marijuana?

A physician treating a patient with medical marijuana must establish and maintain a bona fide physician-patient relationship with the patient, for the provision of medical services that is established in an in-person visit and for which there is an expectation that the physician will provide care to the patient on an ongoing basis. This requires the physician to create and maintain a medical record that includes documenting the following:

- Patient's name and date or dates of office visits or treatments.
- A description of the patient's current medical condition.
- Documented assessment of the patient's medical history, including relevant prescription history and any history of substance use disorder.

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- Documented review of any available relevant diagnostic test results.
- Documented review of prior treatment and the patient's response to the treatment.
- Documented review of the patient's current medication to identify possible drug interactions, including benzodiazepines and opioids.
- Documented review that standard medical treatment has been attempted or considered. If standard medical treatment is not attempted, the physician must document the reasons why it is not appropriate for this patient.
- Based on evidence or behavioral indications of addiction or drug abuse, the physician may obtain a drug screen on the patient. It is within the physician's discretion to decide the nature of the screen and which type of drug to be screened.
- The physician's performance of a physical examination relevant to the patient's current medical condition.
- The physician's diagnosis of the patient's medical condition.
- If the patient has previously been diagnosed with a qualifying medical condition by another Ohio-licensed physician, the recommending physician may confirm the diagnosis so long as he or she obtains a copy of the medical records or a detailed written summary indicating the diagnosis, and is satisfied that the records confirm diagnosis of a qualifying condition. A copy must be kept of any previous record or report the physician relied on for purposes of meeting this requirement.

Once the diagnosis of a qualifying medical condition has been made, what is the physician required to document in the medical record?

In the medical record, the physician must document compliance with all of the following actions:

- Development of a treatment plan, including consideration of whether treatment with medical marijuana is complementary to standard medical treatment.

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- The review of the report concerning the patient obtained from the Board of Pharmacy's drug database covering at least the 12 months immediately preceding the date of the report.
- Discussion with the patient regarding any indicators of possible abuse or diversion of controlled substances that are reflected on the drug database report obtained from the Board of Pharmacy.
- The explanation of the risks and benefits of treatment with medical marijuana as it pertains to the patient's qualifying medical condition and medical history.
- The patient's consent prior to completing a recommendation for treatment with medical marijuana. If the patient is a minor, the physician must obtain the consent of the patient's parent or legal representative prior to completing a recommendation for treatment with medical marijuana.
- Whether the patient needs a caregiver to assist in the use or administration of medical marijuana. If the patient needs a caregiver, the physician must document the name of the caregiver designated by the patient or the patient's legal representative.

When recommending treatment with medical marijuana, the physician or the physician's delegate has to determine from the Board of Pharmacy's patient registry whether the patient has an active registration for medical marijuana. If the patient is not registered or if the registration will expire within 30 days, the physician or physician's delegate must submit the patient's application for registration or renewal according to the Board of Pharmacy's rules.

What information must a physician's medical marijuana recommendation include?

The recommendation for treatment with medical marijuana has to include a statement from the physician certifying that:

- A bona fide physician-patient relationship exists between the physician and patient.

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- The patient has been diagnosed with at least one qualifying medical condition.
- Description of the qualifying medical condition(s) and indication whether it is a terminal illness for which the patient has a life expectancy of six months or less.
- The physician or physician's delegate has requested a report of information related to the patient from the drug database, covering at least the 12 months immediately preceding the date of the report.
- The physician has informed the patient of the risks and benefits of medical marijuana as it pertains to the patient's qualifying medical condition and medical history.

What must a physician do after providing a patient with a medical marijuana recommendation?

Any physician who recommends treatment must be available to provide follow-up care and treatment to the patient, including physical examinations relevant to the patient's condition, to determine the efficacy of medical marijuana in treating the patient's qualifying medical condition. If the qualifying condition was indicated as a terminal illness in the prior six months, the physician shall confirm whether the patient's condition continues to be a terminal illness.

When must a physician terminate or decline to issue a new recommendation for medical marijuana?

There are several instances in which a physician must terminate or decline to issue a new recommendation to a patient:

- The patient no longer has the diagnosis of or symptoms of the qualifying medical condition.
- The physician no longer has a valid certificate to recommend medical marijuana.
- Based on the physician's clinical judgement, the patient or caregiver is abusing or diverting medical marijuana.
- The patient is deceased.

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What other obligations does a physician have after issuing a recommendation for medical marijuana?

A physician must retain the medical records required for the recommendation for at least three years following the last office visit by the patient. These records do not need to be kept separately, but may be kept with the patient's other medical records.

A recommending physician must also submit an annual report to the Board, describing observations regarding the effectiveness of medical marijuana in treating patients without any patient identifying information.

Conclusion

There is a variety of issues that physicians need to consider before either becoming involved with an Ohio medical marijuana entity or deciding to apply for a certificate to recommend. There are federal law and contractual concerns to be dealt with in addition to the state law requirements. Our Health Care Innovation Team is well positioned to advise physicians and other industry-participants on these issues.

Continue on to Ohio Physician's Guide to Cannabis Compliance 2.0 (part 2). You can also visit our Health Law Matters blog for more insight into legal issues impacting the health care industry.

**Marijuana is illegal under federal law even though Ohio's Medical Marijuana Law authorizes the cultivation, sale, and use of marijuana for medical purposes and such acts may lead to criminal prosecution or other penalties.*

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