

Physicians, Patients and Marijuana:

COMPLYING WITH THE LAW

By Larry McLaughlin, JD

Both state and federal law govern medical use of marijuana. Proposition 215, approved by California voters in 1996, provides a legal defense to the state's marijuana laws, which prohibit cultivation and possession of the drug. The proposition applies to patients who use marijuana "for the personal medical purposes of the patient upon the written or oral recommendation of a physician."

The purpose of Proposition 215 is to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." Use of the drug must first be recommended by a physician who has determined that the patient's health would benefit from the use of marijuana in the treatment of "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine,

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or any other illness for which marijuana provides relief."

Meanwhile, federal law still prohibits the distribution, dispensing or possession of marijuana. A federal court, however, has ruled that the First Amendment protects a physician's right (with in a bona fide physician-patient relationship) to discuss and recommend the medical use of marijuana to patients diagnosed with "HIV/AIDS, cancer, glaucoma, and/or seizures or muscle spasms associated with a chronic, debilitating condition."

The ruling specifies that physicians may only "discuss and recommend" marijuana. Some commentators believe that writing prescriptions or signing forms to help patients obtain marijuana would violate federal law and subject the physician to possible prosecution.

Also according to this ruling, the medical conditions for which physicians may safely recommend the use of marijuana are more limited under federal law than under Proposition 215. However, as noted below, the Sonoma County district attorney has accepted the less restrictive Proposition 215 definition. The fact that he has done so decreases the likelihood that any Sonoma County physician will be prosecuted under federal law.

Although any federal prosecution decision rests with federal prosecutors, I believe that the district attorney's opinion carries considerable weight. As a

Medical Marijuana Review Process

1. Patient asks his or her physician to begin review process.
2. Physician forwards patient's medical records to SCMA Professional Standards and Conduct Committee.
3. Committee determines if case meets criteria for use of medical marijuana.
4. Committee communicates its finding to the physician.
5. Physician shares the finding with the patient.
6. Patient decides whether to share the finding with the district attorney.
7. If patient does choose to share, district attorney communicates finding to police and sheriff.

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To help local physicians and patients comply with marijuana laws, the Sonoma County Medical Association and District Attorney Mike Mullins have agreed on a process whereby patients who claim to use marijuana legally can substantiate their claim via an independent medical review. Patients can then voluntarily convey this substantiation to law enforcement officials without having to breach the confidentiality of their medical records. (Prior to implementation of this process, the only recourse for these patients was to have police officers review their medical records.)

The central component of the process is a confidential review of each patient's claim by SCMA's Professional Standards and Conduct Committee, which

has a long history of conducting peer review. Only patients who have not been charged with possessing marijuana can request a review.

The review process consists of several distinct steps, involving in turn the patient, his or her physician, the committee, the district attorney and local law enforcement agencies.

The process begins when a patient asks his or her treating physician to forward a copy of the relevant portions of the patient's medical record to the Professional Standards and Conduct Committee for its review. Only the physician can provide medical records to the committee, which is never in direct contact with the patient. All the committee's proceedings are confidential, including the identity of patients requesting review.

The committee then reviews the patient's medical records within 60 days to determine whether the following criteria have been met:

- A bona fide physician-patient relationship exists between the patient and the physician.
- The physician has approved or recommended the use of marijuana for the patient, based on a consultation or examination.
- The approved or recommended use of marijuana is reasonably related to the purpose of alleviating one of the conditions set forth in Proposition 215 (see list above).

After making all three determinations, the committee must take one of the following actions:

- Issue a **positive finding**, meaning that all three criteria have been met.
- Issue a **positive finding with reservations**, meaning that while all three criteria have been met, the committee still has reservations about the case.
- Issue a **negative finding**, meaning that fewer than three criteria have been met.
- **Decline to issue a finding.**

Because its review is strictly medical, the committee cannot make any finding regarding the quantity of mar-

ijuana used or grown, what caregiver relationships the patient has, or the possibility of criminal prosecution.

No matter what action it takes, the committee must communicate its decision to the requesting physician. If the committee declines to issue a finding, it must provide an explanation to the physician, who may then elect to submit additional information to the committee. Except in these limited cases, physicians cannot "appeal" any decision made by the committee.

Once the physician receives a finding from the committee, he or she must then forward the finding to the patient. At that point, the patient has the option of sharing the results with the district attorney, who has agreed to abide by the committee's recommendations. Finally, the district attorney forwards the finding to the county sheriff or the appropriate police department.

The decision of whether to share the committee's findings with the district attorney is entirely up to the patient. If patients seek advice, physicians should restrict their comments to the medical aspects of marijuana use—not the legal aspects. So long as physicians limit the discussion to medical use of marijuana, they will not be liable, even if the patient is later arrested.

To evaluate the medical marijuana review process, the committee will issue a report to the SCMA board of directors after six months of experience with the process. The report will detail the number of cases reviewed, physician specialties, and conditions for which marijuana was recommended and approved.

For more information on complying with marijuana laws, SCMA members can call me at 542-1982. As legal counsel for the medical association, I provide free legal advice on medical matters to all SCMA physicians. Non-members are advised to call their own attorneys. [