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Medical Marijuana and the Licensed Professional—Just Say No

Medical marijuana, however, presents significant legal risks to Pennsylvania's licensed professionals (lawyers, nurses, doctors and all other licensees) and multifaceted challenges for the 26 licensing boards and Supreme Court that supervise them.

By **Richard Q. Hark** | July 05, 2018



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Everyone knows medical marijuana is now available in Pennsylvania. The Medical Marijuana Act (MMA) is found at 35 P.S. Section 10231.101. Medical marijuana, however, presents significant legal risks to Pennsylvania's licensed professionals (lawyers, nurses, doctors and all other licensees) and multifaceted challenges for the 26 licensing boards and Supreme Court that supervise them.

The MMA's public safety catch-all provisions will be fertile ground for disciplinary action. For the licensed professional (lawyers too), a positive THC blood/urine test will incubate

legal entanglements. Disciplinary actions will flower from licensed professionals claiming medical conditions or disabilities that require a medical marijuana card. Physician practitioners performing improper MMA patient certifications allowing illegal marijuana consumption will spawn criminal and civil license prosecutions. This article will shed light on these negative consequences of medical marijuana for the licensed professional.

Some basic points are worth mentioning. It is still unlawful to smoke marijuana. It is unlawful for a MMA patient to share their marijuana with a non-MMA patient. Use of marijuana in a manner inconsistent with MMA violates the Controlled Substance, Drug, Device and Cosmetic Act. (the Drug Act). For most licensed medical professionals, a Drug Act violation will carry an automatic professional license suspension in addition to discipline under the MMA.

MMA section 510(4)'s public safety provision states "a MMA patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient." This provision squarely focuses on medical and public safety-oriented licensees.

Subsection 2103(b)(2) permits employment and disciplinary action against those professionals whose medical marijuana use impairs public safety. Section 2103(b)(3) precludes employers from allowing any worker to perform a job in violation of federal law. Marijuana use, medicinal or recreational, is still illegal as a Schedule 1 substance under 21 U.S.C. Section 802(16).

Section 1309 allows any civil or criminal penalty for undertaking a task "under the influence" of medical marijuana when doing so would constitute negligence, professional malpractice or professional misconduct. For example, performing surgery or representing a client in judicial proceeding while "under the influence."

These provisions intentionally omit a tetrahydrocannabinol (THC) nanogram blood level cut off that automatically renders the professional unsafe. Section 510(1) does identify a 10 nanograms limit of active THC per milliliter of blood in serum. Section 510(1) however does not apply to medical or legal licensees. For the professional, the MMA uses the term "under the influence."

The "under the influence" threshold varies per person and strain of THC and presents significant potential licensing board disciplinary exposure. Similar to Pennsylvania's drunk driving statute, 75

Pa.C.S.A. Section 3802, et seq., and case law, under the influence, is subject to competing expert opinions, burdens of proof, chain of custody, or evidentiary admissibility issues. Just think about how much drunk driving enforcement and litigation exist.

Licensees cannot work “under the influence” of THC when such work places public safety at risk. Working with THC in a licensee’s blood is allowed but cannot form the “sole” basis for disciplinary action. I cannot overstate my estimation that all licensing boards will find working “under the influence” of THC is working in a negligent or reckless manner that automatically risks public safety. If a licensing board or employer learns a licensee utilizes medical marijuana, drug tests will be ordered and medical records subpoenaed, both forming the basis for employment and licensing disciplinary action.

Medical-related disciplinary boards already allow disciplinary action against licensees who are unable to practice the profession with reasonable skill and safety to patients by reason of illness, addiction to drugs or alcohol. For nurses, 63 P.S. Section 224(a)(2) allows investigation to determine if a licensee is unable to practice safely due to a mental or physical incompetence, physiological or psychological dependence upon alcohol, hallucinogenic or narcotic drugs or drugs that tend to impaired judgment or coordination, with the physiological and psychological dependence is continuing.

These and other similarly worded licensing board impairment regulations complement MMA Sections 510(4), 1309 and 2103. Do not go to work high, impaired or under influence of medical marijuana. Such will be apparent, risk public safety, and sure to spawn disciplinary action regardless of what professional license you or your client holds.

Suffering from a debilitating medical condition requiring marijuana treatment is the second license trap for the MMA licensee/patient. Initially, the licensee/patient must be diagnosed as suffering from a serious medical condition for which medical marijuana is the primary medication.

Serious medical conditions are: amyotrophic lateral sclerosis, autism, cancer, including remission therapy, Crohn’s disease, damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies, dyskinetic and spastic movement disorders, epilepsy, glaucoma, HIV/AIDS,

Huntington's disease, inflammatory bowel disease, Intractable seizures, multiple sclerosis, neurodegenerative diseases, neuropathies, opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, Parkinson's disease, post-traumatic stress disorder, severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain, Sickle cell anemia, terminal illness.

In general, it will be extremely challenging to work while suffering from one of these conditions. For financial reasons, some will have to work. Typically co-workers' observations and reports of licensees sleeping or drooping on the job instigate employment-based drug testing and positive drug test results. Employers will terminate that licensee and mandatorily report that terminated employee to their respective board.

This, in turn, will require disclosure of prescription marijuana and a serious medical condition. Board counsel, through their experts will review medical records and potentially file disciplinary action alleging the MMA patient/licensee is unable to safely practice their profession due to either medical marijuana use or the medical condition. This is under the above state impairment regulations.

Board counsel can file a petition for mental and physical evaluation solely based upon a medical condition. Compliance with this board filing requires licensee/patients to provide all medical records—those that form the basis for the MMA card—to the board's expert. Here the medical condition, exposed through marijuana use, germinates into disciplinary action which propagates into license suspensions.

Medical marijuana physician practitioners are subject to a heightened enforcement scheme. Only physicians registered and approved by the Department of Health (DOH) as practitioners may certify a patient to receive medical marijuana. To qualify, a practitioner must have an active, unrestricted medical or osteopathic license in the Commonwealth of Pennsylvania issued pursuant to the Medical Practices Act or the Osteopathic Medical Practice Act. Only the DOH determines if practitioners are qualified to treat patients with one or more serious medical conditions.

To become a DOH practitioner the physician must take a four-hour training course. The training course shall include important responsibilities of Practitioners under the MMA, general

information regarding medical marijuana under federal and state law, the scientific research regarding the risks and benefits of medical marijuana, and recommendations for medical marijuana as it relates to the continuing care of pain management, risk management opiate addiction, palliative care, overdosing on medical marijuana, informed consent, and other areas to be determined by the DOH.

All practitioners must be familiar and compliant with the prescription drug monitoring (PA PDMP). A physician must possess knowledge of best practices regarding medical marijuana dosage based upon a patient's serious medical condition and the medical professional's medical training and specialty. These provisions, while very vague and ambiguous, are extremely extensive.

Once a physician is approved as a practitioner they must follow a specific process to issue patient certifications. This initial evaluation process is a fertile landscape for future disciplinary action against rogue or merely disorganized practitioners.

Practitioners cannot meet a patient simply claiming to suffer from cancer or a serious medical condition and issue a patient certification. The initial doctor-patient consultation must be in person, extensive, and include a full assessment of the patient's medical history and current medical condition. The consultation must be documented in the patient's health care record contemporaneous to the issuance of a MMA card. Telemedicine is not approved.

Practitioners must secure documentation of the serious medical condition prior to or contemporaneous with the patient certification. Up to date X-rays, MRIs, biopsy results, specialists' reports, prescription drug histories, and copies of a complete medical history file should be secured before issuing the patient certification.

The practitioner who does not initiate a best practices for these initial patient consultations will expose themselves to unhappy patients (who expect their certification at the first consultation) and disciplinary action for practicing below the standard of care and in violation of DOH medical marijuana regulations.

Patient certifications require complete patient identifiers, along with the diagnosis, assumption of continuing care for the patient, and the length of time (not exceeding one year) that the marijuana treatment would be palliative or therapeutic. The practitioner must also recommend either a specific dosage or consultation with the dispensary employee to recommend dosage.

Importantly, practitioners may not receive or provide medical marijuana product samples—suggesting their patients “try this” to “see how it works.”

The practitioner must review a patient’s PA PDMP controlled substance use history prior to issuing a MMA card. As of June 11, the PA PDMP is sharing data with 17 other states and Washington, D.C. A violation of the PA PDMP is a Drug Act violation, subjecting the practitioner to an automatic suspension. All PA PDMP inquiries are tracked, making it easy to determine if a practitioner did, or did not, comply with this provision prior to certifying a MMA patient.

The practitioner must credibly determine that imminent disability is present, warranting therapeutic medical marijuana as all other drugs have or are failing. If the licensed professional is disabled, they can not do their job. If they are high on medical pot, the boards think these licensees probably should not be permitted to practice their profession as they will either be unsafe to practice due to a medical condition or under the influence of THC while practicing their profession. Again, this is where Sections 1309 and 2103 balance public safety and patients’ medical needs and intersect the licensing board impairment evaluation regulations.

Practitioners are extremely limited to whom they can issue certifications. Practitioners cannot be a designated caregiver for a their own patient to whom the practitioner issues a certification. Practitioners may not issue a patient certification for themselves or a family or nonfamily household member. Practitioners may not advertise their services as a practitioner who can certify a patient to receive medical marijuana. Practitioners will require continuing, aggressive management of their qualifications to ensure continued compliance with DOH medical marijuana regulations. A practitioner under the act cannot hold a direct or economic interest in a medical marijuana organization.

Patient certifications are easily revoked. Practitioners shall notify the DOH in writing if they know or have reason to know that one of their certified patient has recovered from their “serious” medical condition, the patient has died, or the medical marijuana use would no longer be therapeutic or palliative. The regulations allow a practitioner to withdraw the issuance of a patient certification at any time, without any reason, upon written to notification to both the patient and DOH.

It will be interesting in practice how these provisions play out. Cancelling a certification could

generate patient complaints to DOH and subsequent DOH disciplinary action. Hence, full compliance with all patient contact and documentation requirements to properly answer a DOH—and possible licensing board—investigation is paramount and prophylactic. The DOH will be vigilant against any medical practitioner violating these regulations.

Once a patient receives DOH revocation notification, the same is entered in the electronic tracking system. Any subsequent distribution of medical marijuana to an uncertified patient shall be a violation of the PA PDMP program protocols and the Drug Act, possibly a felony, thereby creating automatic license suspension issues.

Department of Health regulations allow for a practitioner to be removed from the medical marijuana practitioner registry if a practitioner's medical license is inactive, expired, suspended, revoked, limited or otherwise restricted by the Pennsylvania appropriate medical board. Any physician subject to professional disciplinary action is subject to immediate or temporary suspension of their MMA participation. A physician subject to any professional disciplinary action (Pennsylvania or other states) may be removed from the practitioner list.

Importantly, these provisions only require the initiation of disciplinary action, not any formal conclusion to a disciplinary action. This is a huge provision allowing for emergent and possible automatic suspension from the program and medical license problems. Doctors need to stay ahead of the investigatory curve; document everything, practice with extreme ethical limitations, assume any patient in their medical practice is not really sick or is an undercover DOH officer recording every word.

From a legal standpoint, I cannot overstate the damming effect on a professional's license the suggestion of a medical disability warranting medical marijuana use or improper action of a prescribing practitioner. This is also true for the licensee who does not possess a medical marijuana patient card and tests positive for THC. This conduct will result in board prosecution because marijuana use without a MMA card is illegal regardless of whether criminally charged or when THC is removed from Pennsylvania's controlled substance schedules.

Impaired professionals caring for the public is the main concern of marijuana legalization, medical or otherwise, to which the states' legislatures' attention has been drawn. What was typically not too fertile of an enforcement area has become overridden with weeds of impaired

physicians, nurses, physician assistants, and all other licensed professionals getting caught high on or off the job. Licensing boards are bracing for licensed professionals legally or illegally utilizing marijuana and practicing under the influence.

Prosecutors are filing petitions for mental and physical examination and letting a drug addiction expert professionally evaluate the professional. Licensed professionals smoking legal or illegal marijuana are exposing themselves to an easy disciplinary trap. Unfortunately, their professional license could be up in smoke. This is why I say to the licensed professional, just say no!

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