Legal Implications of Recommending Medical Marijuana

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History of Federal Criminalization

• In 1800’s, states regulated cannabis under “poison” laws that required labeling or in some instances prescription
• In 1850, U.S. Pharmacopoeia began listing cannabis as a medicine (removed in 1942)
• “Pure Food & Drug Act” in 1906 - first federal regulation, required labeling of cannabis
• Federal Bureau of Narcotics formed in 1930
  – Harry Anslinger was first head of FBN
• “Marijuana Tax Act” (1937)
History of Federal Criminalization

- “Pure Food, Drug, & Cosmetics Act” – 1938, created FDA, labeled marijuana a “dangerous drug”
- Boggs Act (1951) – codified mandatory minimum sentences
- Marijuana Tax Act ruled unconstitutional in 1969
- Controlled Substances Act passed in 1970
- DEA created in 1973

Current Federal Law

- Marijuana is classified as a Schedule I drug
  - No currently accepted medical use
  - Cannot prescribe
  - High potential for abuse
  - Other schedule I drugs include LSD and heroin
- Manufacture, sale, distribution and use of medical marijuana violate CSA
Current State Law

- 23 states and D.C. have legalized medical marijuana/cannabis in some form
- California legalized medical marijuana in 1996
- Most recent are Maryland, New York, and Minnesota
- At least 18 more will consider legalization in 2015
- Alaska, Oregon, Washington, D.C., Colorado and Washington have legalized recreational marijuana

The Ogden Memo (October 2009)

- Prosecutors “should not focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws”

- Prosecuting “individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen,” or “caregivers” is not an efficient use of resources.

- Listed several commercial enterprise “characteristics” that may trigger prosecution, including sales to minors, evidence of money laundering or other illegal activities.
The Cole Memo (June 2011)

• “Persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.”

• “Those who engage in transactions involving the proceeds of [large-scale cultivation and distribution] may also be in violation of federal money laundering statutes and other federal financial laws.”

Cole II (August 2013)

• “Prosecutors should not consider the size or commercial nature of a marijuana operation alone”

• Prosecutors should not distinguish between caregivers and cultivators

• New statement of federal prosecution priorities:
  – Distribution to minors
  – Criminal enterprises, gangs, and cartels
  – Diversion of marijuana to other states
  – Trafficking of other illegal drugs or other illegal activity
  – Violence and the use of firearms
  – Drugged driving and other adverse public health consequences
  – Preventing the growing of marijuana on public lands
  – Preventing marijuana possession or use on federal property
Prosecutions

- Dispensary prosecutions
  - Chris Williams (Montana)
  - Matthew Davies (California)
- Caregiver prosecutions
  - Jeremy Duval (Michigan)
- Patient prosecutions
  - “Kettle Falls Five” (Washington)
- Physician prosecutions
  - Dr. Bennie Brown (California)

Physician-Specific Issues

- DEA prescribing licenses at risk
- *Conant v. Walters* (9th Cir. 2002)
  - Upheld permanent injunction
    - Enjoined government from revoking a physician’s DEA license to prescribe controlled substances based solely on the physician’s professional recommendation of the use of medical marijuana
    - Enjoined government from investigating physician for same reason
  - First Amendment right to discuss medical marijuana with patients
  - However: A doctor would “aid and abet” or “conspire” by acting with the specific intent to provide a patient with the means to acquire marijuana.
- Problematic business arrangements
  - partnering/associating closely with dispensaries
Federal Trends

- Efforts to re-schedule cannabis
  - DEA has asked FDA to examine re-scheduling
  - Congress and White House in re-scheduling discussions
- December 2014 Congressional Spending Bill
  - Essentially de-funded medical marijuana prosecutions
- “CAREERS Act”
  - Reschedules marijuana as Schedule II
  - Permits research
- 2016 Election rhetoric suggests positive developments

State Trends

- Increase in states with legal medical marijuana
  - 10 states in last 5 years
  - 8 of the 10 were legislative enactments (moving from referenda to legislative action)
- Increased access in states that already have legal medical marijuana
  - Full legalization in Colorado, Washington, Alaska, Oregon, D.C.
  - Expansion of qualifying conditions in states with medical marijuana
  - But…Florida referendum failed, debate over qualifying conditions continues, etc.
Questions?

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