



EVi ...educating about the dangers of drugs

**THE POTENTIAL MEDICAL LIABILITY
FOR PHYSICIANS RECOMMENDING
MARIJUANA AS A MEDICINE**

Executive Summary

Educating Voices, Inc.

July 2003

THE POTENTIAL MEDICAL LIABILITY FOR PHYSICIANS RECOMMENDING MARIJUANA AS A MEDICINE

Executive Summary

Physicians who are approached by patients for medical marijuana should be apprised of the accompanying potential medical liability. Companies writing medical malpractice insurance are carefully scrutinizing ways to limit their malpractice exposure because of escalating plaintiffs' settlements or judgments. One attempt to limit exposure is to exclude any claim arising from the use of a non-FDA approved medication.

Marijuana is a Schedule I drug in the Controlled Substances Act. By definition a Schedule I drug is considered to have a high potential for abuse, it lacks any currently accepted medical use in treatment, and it is unsafe even under medical supervision. However, a number of states have passed ballot initiatives permitting physicians to recommend crude marijuana as medicine.

There is substantial case law supporting the potential medical liability for a physician who recommends marijuana to patients. Courts have ruled that physicians have a duty to (1) render quality care, (2) be adept in the use of medical options, (3) provide a standard of care commensurate with accepted medical practice, (4) inform a patient of the risks and side-effects associated with a particular treatment, (5) not cause a patient injury or future harm, and (6) protect an unidentifiable, unknown third party who may be endangered by a patient under a medication.

Physicians who recommend marijuana would find it extremely difficult to demonstrate that they had "rendered quality care" or met the "standard of

care" that other reasonably prudent, similarly trained and experienced physicians would consider. This is because the necessary scientific research regarding marijuana and its effectiveness, risks, benefits, dosages, interactions with other drugs, and impact on pre-existing conditions is not available, and because there are no quality controls in the manufacturing process.

Courts across the country have looked to drug companies' warnings and to the *Physician's Desk Reference* manual for direction in negligence cases. The medicinal use of marijuana does not appear in the *Physicians' Desk Reference*, and there are no drug manufacturer warnings to accompany marijuana. In the absence of an adequate warning accompanying the product, it could be ruled unreasonably dangerous.

Historically, physicians rely upon the Federal Food and Drug Administration's (FDA) process for approving drugs to protect them from liability should a drug be unsafe. An Institute of Medicine study did suggest some potential therapeutic value in the individual chemical compounds that make up cannabis (marijuana), but clearly, the burden of proof has not been met, and the FDA has yet to approve marijuana. Recommending a non-FDA approved drug requires a major "leap of faith" for most jurors in a liability suit.

A different kind of damage claim is raised by physician errors that increase the likelihood of "future harm" to the plaintiff.

Some jurisdictions have allowed recovery for the increased risk of future harm or injury and also for the plaintiff's anxiety that such a risk may materialize in the future. Clinical trials have shown that marijuana affects phases of the reproductive process, has more carcinogens than tobacco, is an addictive substance and is often a gateway drug to the use of cocaine, heroin and other psychoactive substances. The latent period between the start of smoking marijuana and the development of cancer, respiratory, heart or circulatory conditions is fraught with "future harm" implications. These potential implications closely follow the claims made by so many against the tobacco industry.

Risks associated with a particular treatment are perhaps the most important information that a physician can give to a patient for consideration. Generally, a physician functions as a learned intermediary between a drug manufacturer and the patient. This learned intermediary position is not possible when a physician recommends marijuana, because there is no drug manufacturer, no FDA approval, no standard chemical composition (potency and quality), no standard dosage, no safe delivery system, and no knowledge of marijuana's interaction with other drugs or its impact on pre-existing conditions. Most marijuana used for medicine is grown in backyard gardens, hydroponic closets and large warehouses without any quality controls.

Several courts have held that a physician's relationship with the patient was sufficient to impose a duty to protect unidentifiable, unknown third parties who are endangered by a patient. Similarly, courts have held that doctors who fail to warn their patients about the possible side effects of prescribed medicines can be held responsible if a patient suffers an adverse reaction and injures someone in a traffic accident. Smoking marijuana diminishes physical and mental abilities. A study conducted by the U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA) concluded that smoking relatively low-moderate THC doses impairs driving. Frequently, marijuana is used in combination with

alcohol. The NHTSA study found that the combination of alcohol (BAC 0.04) and a low-moderate THC produced "very severe effects on driving performance."

On July 30, 2001, the Canadian government passed the *Marihuana Medical Access Regulations* that allows smoking marijuana for medical purposes. However, the Canadian Medical Association (CMA), the Canadian Medical Protective Association (CMPA), the Canadian Society for Addiction Medicine (CSAM), and the Physicians for a Smoke-Free Canada (PSC) all issued strong warnings against recommending crude marijuana as a medicine.

Dr. Henry Haddad, President of the Canadian Medical Association, wrote to the Minister of Health Canada regarding the Regulations, "As you know, physicians are not in a position to adequately counsel patients regarding the use of marijuana, nor do we have the necessary information regarding what constitutes the proper dosage, its interaction with other drugs, or its impact on other pre-existing medical conditions."

This white paper discusses in detail these and other legal points. Extensive case law is cited to illustrate the substantial potential medical liability for physicians who recommend marijuana for patients and the resulting exposure for companies writing medical malpractice insurance.

Many leading insurance companies are adding exclusion clauses to their medical malpractice policies to disallow coverage for any claim arising from the recommendation of a non-FDA approved drug. These include Medical Liability Mutual Insurance Company, the nation's leading writer of medical malpractice insurance, TIG Insurance and other leading writers of such coverage. If there were no insurance coverage, a physician would be exposed to paying defense costs and could be held personally liable for any judgment entered against him or her.



EVI...educating about
the dangers of drugs

BOARD OF DIRECTORS

OFFICERS

President

Judy Kreamer

Vice President

Gary M. Fields, Ph.D.

Secretary

Anne D. Meyer

Treasurer

Donald W. Lohrentz

BOARD

Sandra S. Bennett

Peter B. Bensinger

Michael J. Dalich

Judy L. Dinerstein

James R. Kreamer, F.S.A.

Joyce Lohrentz

Carla Lowe

John M. O'Halloran, Esq.

Thomas L. Spicer

Robert M. Stutman

BOARD OF ADVISORS

William M. Bennett, M.D.

Judith S. Bensinger, M.D.

Robert B. Charles, Esq.

JoAnne V. Indre

Carl Lambrecht

Connie Moulton

David Padfield

Forest Tennant, M.D., Dr. P.H.

In Memoriam

Otto Moulton

Educating Voices, Inc.

Educating Voices, Inc. (EVI) is a national organization founded to proactively support education and communication on the dangers of drugs. EVI is a volunteer organization whose Board Members have a total of over 300 years of experience and expertise in drug prevention.

EVI...Rising To Meet The Need for Education

EVI...Doing The Work

EVI...Serving The Educational Process

EVI...Making A Difference In Individual Lives

EVI...Growing To Meet The Need For Education

A copy of the White Paper may be obtained by calling or faxing Educating Voices. The White Paper can also be downloaded from the Educating Voices website.

P.O. 6084

Naperville, IL 60567

Phone: 630.420.9493

Fax: 630.420.9904

evi@educatingvoices.org

www.educatingvoices.org