

Ohio Physician's Guide to Cannabis Compliance 2.0: Budding Issues for Ohio's Medical Marijuana Physicians

Cash only? Informed consent forms? Waivers of liability? The original [Ohio Physician's Guide to Cannabis Compliance \(Part 1\)](#) was created to give Ohio M.D.s and D.O.s a starter pack for understanding [Ohio's Medical Marijuana Law](#), including the distinction between a [prescription and a recommendation](#), and the all-important [Rohrabacher Amendment](#), which requires strict compliance with state law to attempt to avoid prosecution under federal law. However, as more [physicians](#) obtain an Ohio [Certificate to Recommend](#) medical marijuana, deeper issues must be understood to limit liability associated with Ohio's medical marijuana law and ensure legal compliance before designing a medical marijuana practice. First, physicians should understand that making a recommendation for medical marijuana has been interpreted by a [federal court](#) as being protected by the First Amendment. Thus, medical marijuana recommendations do not violate federal law.

Payment and Insurance Issues

Some of the lesser understood medical marijuana issues involve payment and insurance. Now, I know what you are thinking: insurance is not going to pay for marijuana products (medical or otherwise) because they are federally illegal. However, I am not referring to payments for the medical marijuana products themselves; I am referring to the payments for the evaluation services that may lead to a recommendation for medical marijuana. These evaluation services would theoretically be billed under the CPT Code for [a new or established patient office/outpatient visit](#). Indeed, New York State's Department of Financial Services recognized the need to address this issue and circulated a [letter](#) to all state-authorized health insurers, providing that:

“[i]f office visits are covered under the insurance policy or contract, and the insured receives services during an office visit that are covered under the insurance policy or contract, the issuer may not deny coverage for the office visit solely on the basis that the visit also resulted in the insured receiving a medical marijuana [recommendation].”

Consequently, Ohio physicians must be wondering how to handle billing for evaluation services that may result in a recommendation for medical marijuana. Must a physician charge a patient cash for the evaluation? What if the patient has health insurance? Better yet, what if the patient is a Medicare or Medicaid patient? For physicians who dive headfirst into the medical marijuana-recommendation business, these issues need to be dealt with carefully.

While it is unclear how private insurers will deal with any sort of reimbursement for evaluation services involving a medical marijuana recommendation, physicians must be aware that (i) patients covered by a *governmental* health insurance program (Medicare, for example) may only be charged cash when certain requirements are met; and (ii) pursuant to the [Social Security Act](#)

[Section 1848\(g\)\(4\)](#), a physician who is enrolled in Medicare is *required* to submit claims on behalf of a Medicare patient for all services the physician provides for which Medicare payment may be made under Part B of the Medicare program ([Medicare Benefit Policy Manual \(Chapter 15, Section 40\)](#)).

Remember, however, Medicare only covers medical services that are reasonable and necessary, and a physician is not allowed to charge beneficiaries in excess of the limits on charges that apply to the item or service being furnished (*Id.*).

These rules beg many questions. Does an Ohio physician's medical marijuana evaluation to determine whether a Medicare patient has a [qualifying medical condition](#) constitute a reasonable and necessary service? While the answer to this question is likely no, due to marijuana's federal illegality, the payment issue does not stop there. If the evaluation is not a reasonable and necessary service, before charging a patient cash, the physician then needs to evaluate whether to present the patient with an Advance Beneficiary Notice of Noncoverage ("ABN"). Failure to comply with the ABN requirements under Medicare may result in Medicare program exclusion, a civil monetary penalty of up to \$2,000 for each violation, and/or a 10 percent reduction of the physician's payment once the physician is eventually brought back into compliance. See [MLN Matters](#), page 4. Further, recommending physicians must check the corresponding provisions under the Medicaid rules and any provider agreements they may have with private insurers to determine whether these evaluation visits will be covered to avoid payment issues. Some Medicaid rules have an ABN-style requirement similar to Medicare for which physicians will want to document compliance.

Overall, it is important for Ohio physicians to be weary of the easy conclusion that "you can just charge a patient cash, because marijuana is federally illegal." Careful consideration must be given to the rules by which physicians must abide before personally charging a patient cash for any medical services, especially when they are covered by governmental health insurance.

Developing an Informed Consent Form

Ohio's medical marijuana law requires that a recommending physician obtain a patient's consent prior to completing a recommendation for treatment with medical marijuana. Additionally, 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. [O.A.C. 4731-32-03\(C\)\(5\)](#). In the past, the State Medical Board of Ohio developed an informed consent to treat [form](#) for physicians to utilize when [prescribing opioids to minors](#). There was some thought that the State might prepare a similar form for medical marijuana treatment, yet that no longer appears to be the case. Consequently, it will be up to physicians to develop a robust informed consent to treat form when recommending the use of medical marijuana to mitigate the risks presented by such a treatment.

Pursuant to the standard of care within Ohio's medical marijuana law, a recommending physician must document that he or she explained the risks and benefits of treatment with medical marijuana as it pertains to the patient's qualifying medical condition and medical history. [O.A.C.](#)

[4731-32-03\(C\)\(4\)](#). Although a physician is immune from civil liability for advising a patient about the benefits and risks of medical marijuana to treat a qualifying medical condition, an explanation of the risks and benefits should be included on the informed consent to treat form to be acknowledged as understood by the patient. [O.R.C. 4731.30\(H\)](#).

In addition, it is recommended that physicians provide some guidance to their patients regarding the legal nuances of medical marijuana. The last thing a physician would ever want is for a patient to try and place blame on the physician for failing to advise the patient that, for example, possession of marijuana on federal land is still a federal offense. Patients should be instructed on the conflict between federal and Ohio law, and the physician should push the obligation to continue monitoring any applicable legal developments on to the patient.

Employment matters are also something that a recommending physician should consider including on the informed consent to treat form. Ohio's medical marijuana law does not require an employer to permit or accommodate an employee's use or possession of medical marijuana in the workplace; nor does it prohibit an employer from taking an adverse employment action against employees because of their utilization of medical marijuana. Finally, if an employee's use of medical marijuana was in violation of an employer's drug-free workplace policy, his or her resulting termination is considered "just cause" for purposes of unemployment benefits. Patients need to be told that they may risk their employment when it comes to obtaining and utilizing medical marijuana, and a physician will want to provide that explanation upfront. This will help avoid the awkward conversation that is inevitable once the first Ohio patient loses his or her job due to his or her use of medical marijuana.

Waiver of Liability

In line with an informed consent to treat form, recommending physicians will want to consider a waiver of liability when treating a patient with medical marijuana. Since marijuana is still illegal federally, studies on its efficacy and safety have been severely limited. However, some scientific data does show that it may have some unwanted and unintended clinical effects, such as [anxiety and paranoia](#), that can land a patient in the emergency room. Further, a patient may subject himself/herself or others to harm if the patient operates any heavy equipment or a motor vehicle while on medical marijuana. Through a waiver of liability, physicians can limit any liability associated with the unfortunate results of a medical marijuana recommendation.

The Ohio Supreme Court has determined that a waiver of liability is only effective if its intent is stated in clear and unequivocal terms. See [Bowman v. Davis, 48 Ohio St.2d 41, \(1976\)](#). A release of liability signed between a patient and a physician is not a "usual run-of-the-mill contract," according to [Guido v. Murray, 1985 WL 10387, ¶ 1 \(Ohio Ct. App. 1985\)](#). The physician is the one who is skilled in an area about which the patient knows little or nothing, yet the patient still places his health, appearance and maybe even his life in the hands of the physician. *Id.* This makes the patient-physician relationship a fiduciary one, which requires a duty of good faith and fair dealing from the physician, "not only as to the professional obligations of the physician, but also as to other transactions between the parties." *Id.* Ohio courts have long held that from this fiduciary relationship comes the imperative obligation of full disclosure. *Id.* at ¶ 2. Therefore, if a

physician wishes to secure a general release of liability from a patient, the fiduciary relationship creates an obligation for the physician to “fully disclose to the patient the effect of such release and to ascertain as fully as possible that the patient understands the consequences thereof.” *Id.* at ¶ 4.

Consequently, a recommending physician may develop a release of liability form for patients, but in order for it to be effective, the form must state in clear and unequivocal terms that the patient is releasing the physician from all liability for recommending that the patient use medical marijuana. The physician may also attempt to expand the protection by including language regarding foreseeable harm to third persons. In general, warning a patient about such third-party risk is sufficient to protect the physician from third-party liability, even if the patient ignores the physician’s advice, as Douglas B. Marlowe notes in “Malpractice Liability and Medical Marijuana,” published in *The Health Lawyer* (2016). These forms should be developed carefully to attempt to secure as wide – yet specific – a range of protections as possible for a recommending physician. While it may be difficult to forecast all of the adverse reactions or consequences of a patient’s utilization of medical marijuana, an attempt should be made in the recommending physician’s waiver of liability form.

Conclusion

Once you have your Certificate to Recommend, and you are ready to begin to see patients to determine whether they have a qualifying medical condition, pump the brakes. Do not be goaded into seeing patients without full preparation. You will receive calls – instantly – from prospective patients and vendors that will make you think you need to start seeing patients immediately. However, use the patience you developed in your countless years of studying and practicing medicine to assess whether you have all your bases covered before developing your medical marijuana practice. When you have questions, please reach out to me, [Brian Higgins](mailto:bhiggins@fbtlaw.com) (513-651-839 or bhiggins@fbtlaw.com) of Frost Brown Todd, to talk through the issues and ensure you are on the right path regarding Ohio’s new medical marijuana law.

Brian Higgins is a healthcare and corporate law attorney with the law firm Frost Brown Todd LLC. He has counseled health systems, skilled nursing facilities, and healthcare providers on Ohio’s medical marijuana law. He has also written numerous articles (available at www.healthlawmattersblog.com) and has given presentations to healthcare and legal professionals on the law. Additionally, Brian regularly handles healthcare-related transactions, advises clients on the Stark Law and Anti-Kickback Statute, assists with HIPAA and state privacy law issues, and has represented providers in Medicare appeals and self-disclosures to the OIG for suspected overpayments. His biography is available here: <https://www.frostbrowntodd.com/professionals-brian-f-higgins.html> and he may be contacted at bhiggins@fbtlaw.com or 513-651-6839.