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Legal Brief

SOUTH DAKOTA
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Medical Cannabis

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of July 1, 2022; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

Summary

In 2020, the voters of South Dakota adopted Initiated Measure 26 (IM26), which legalized medical cannabis under South Dakota law. With the passage of IM26, South Dakota law authorizes patients who suffer from “debilitating medical conditions” and who have received a registry card from the South Dakota Department of Health to possess and use cannabis to treat their debilitating condition.

Physicians should be aware, however, that prescribing, dispensing, and possessing cannabis remains illegal under federal law regardless of the intended use. While the Obama administration adopted a formal policy of limited enforcement of federal law regarding cannabis, that policy was rescinded during the Trump Administration, and the Biden administration’s policy on enforcement is not clear. Practitioners should proceed cautiously with the knowledge that federal enforcement actions are still a possibility.

Discussion

General

Starting in 1996, many states and the District of Columbia passed laws allowing cannabis to be used to treat a variety of medical conditions. South Dakota followed suit with the adoption of IM26 in 2020, now codified at SDCL 34-20G.

Despite these state laws, the use, possession, and distribution of cannabis continue to be criminal offenses under federal law. It is also illegal under federal law for a practitioner to prescribe cannabis to a patient. The Obama administration adopted a formal, written policy limiting the enforcement of federal law regarding cannabis. The Trump administration rescinded the Obama policy. The Biden administration has yet to adopt a policy like that of the Obama administration or otherwise definitively articulate a position concerning the enforcement of existing federal law relating to cannabis.

State laws legalizing the use of cannabis for medical purposes, including South Dakota, attempt to avoid the federal prohibition by calling on practitioners to assess and certify that patients have a qualifying condition and that they will benefit from the use of medical cannabis rather than issuing a prescription. Until federal law is changed, or the Biden administration provides definitive guidance concerning the legality, under federal law, of providing a certification for medical cannabis or a “recommendation” for patient cultivation, physicians should be aware there is a risk of federal prosecution for providing such a certification or recommendation.

As to state law liability or culpability, SDCL 34-20G-5 explicitly provides immunity from criminal prosecution or disciplinary proceedings by the Board of Medical and Osteopathic Examiners (the “Board”) arising out of providing a certification or recommendation relating to medical cannabis. The Board continues to have the authority, however, to

initiate disciplinary proceedings if a practitioner issues a written certification to a patient with whom the practitioner does not have a bona fide practitioner-patient relationship or the practitioner fails to properly evaluate a patient's medical condition.

Generally speaking, SDCL 34-20G and the related administrative rules call for an evaluation and recommendation by a practitioner stating that the patient has a debilitating medical condition. The patient's application and the practitioner's recommendation are submitted to the Department of Health, which may, if appropriate, issue a Registry Identification Card. A cardholder may then purchase medical cannabis from an approved dispensary and possess limited quantities of cannabis for medical use. In some limited circumstances, a cardholder may also cultivate cannabis for their own medical use.

Registry Cards and Certification

Under SDCL 34-20G, the threshold question is whether the patient has a "debilitating medical condition." "Debilitating medical condition" means "[a] chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe, debilitating pain; severe nausea; seizures; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis" The statute also sets out a procedure whereby interested parties may petition the Department of Health to add to the list of qualifying conditions.

A patient who believes they suffer from a debilitating medical condition and who seeks authority to use medical cannabis must obtain a Registry Identification Card from the South Dakota Department of Health. The patient's application must be accompanied by a written certification from a "practitioner" that includes the following:

1. The practitioner's name and address;
2. The practitioner's South Dakota medical license and National Practitioner Identification numbers;
3. Certification that the practitioner has assessed the patient's medical history and current medical condition, including an in-person physical examination;
4. The date on which the physical examination was conducted;
5. Certification that the patient has a debilitating medical condition, as described above, specifying the International Classification of Diseases, Tenth Revision code;
6. Certification that the practitioner and patient, or the patient's parents or legal guardian, have discussed treatment options for the patient's debilitating medical condition;
7. Certification that the practitioner is available for further consultation and follow up care with the patient or the patient's parents or legal guardian to monitor the use of cannabis;
8. The date of expiration, not to exceed one year;
9. The number of designated caregivers, if more than one, that the patient's age or medical condition necessitates; and
10. Certification that the bona-fide practitioner-patient relationship exists, and the relationship is not for the sole purpose of providing a written certification for medical cannabis, unless referred by another practitioner.

With respect to patients who are South Dakota residents, the term "practitioner" means a physician, physician assistant, or advanced practice registered nurse licensed in South Dakota with the authority to prescribe drugs. With respect to non-residents, it means a person licensed to prescribe drugs to humans in the state of the patient's residence.

Practitioners are cautioned that a bona-fide practitioner-patient relationship must exist, and the practitioner must conduct an in-person examination of the patient.

The practitioner's certification is not provided to the patient; rather, it is to be filed directly with the Department of Health, thus avoiding the publication of the practitioner's medical license and National Practitioner Identification numbers more broadly than necessary. The portal to create a practitioner account and access a page for the submission of practitioner certifications is available at this URL: <https://sd.airlift.app/practitioner/enrollment>.

The administrative rules implementing SDCL 34-20G specifically provide that a practitioner may elect not to provide a certification if the practitioner does not believe there is any therapeutic or palliative benefit to the patient from the use of medical cannabis.

Upon receipt of the patient's application and the practitioner certification, it is the decision of the Department of Health whether to issue a registry card.

Caregivers

The statutes and administrative rules allow for the designation of a "caregiver" or "caregivers" for patients under the age of eighteen and for patients eighteen and older whose age or medical condition necessitate the appointment of a caregiver. A designated caregiver may assist with the patient's use of medical cannabis, including purchase and transportation, and in some instances may assist with the home cultivation of cannabis.

A caregiver must agree to assist the patient, must be at least twenty-one years of age, and may not have a conviction for a violent crime that was classified as a felony in the state of conviction. Except for caregivers in a health care facility, who may act as caregivers for any number of residents or admittees of the facility, no person may act as a caregiver for more than five patients.

If the patient is younger than eighteen, the patient (presumably in consultation with their parents or legal guardian) may designate a caregiver. If the patient's parents or legal guardians believe more than one caregiver is necessary, they may consult with the practitioner concerning the number of caregivers needed; the practitioner's recommendation concerning the number of caregivers needed must be included in the written certification to the Department of Health.

If the patient is eighteen or older but in need of a caregiver due to their age or medical condition, the person responsible for making medical decisions for the patient is automatically designated as caregiver. If the patient's practitioner believes the patient's age or medical condition call for the appointment of more than one caregiver, the practitioner shall so state in the practitioner's certification, in which case the person responsible for making medical decisions for the patient may designate an additional caregiver or caregivers.

Patient Cultivation

While most patients will purchase their medical cannabis from an authorized dispensary, SDCL 34-20G also allows for patient cultivation of cannabis in some circumstances. Although required in IM 26 as passed, a practitioner's prescription is no longer required when applying for patient cultivation. If patient cultivation is permitted, the patient may cultivate two flowering cannabis plants and two cannabis plants that are not flowering. Patients who are permitted to cultivate cannabis plants must do so in a secure facility approved by the Department. If permitted by the Department of Health, caregivers may in some circumstances cultivate cannabis for the patients under their care. It isn't clear what factors the Department of Health will use in considering an application to cultivate cannabis.

Prohibited Practitioner Conduct

A practitioner should not issue a written certification of a debilitating medical condition without establishing a bona fide practitioner-patient relationship, conducting an in-person examination, and properly evaluating the patient's medical condition.

Furthermore, practitioners are specifically prohibited from knowingly referring a patient to a specific medical cannabis establishment or to a designated caregiver; from advertising in a medical cannabis establishment; and from issuing written certifications while holding a financial interest in a medical cannabis establishment. A violation of these prohibitions is a Class 2 misdemeanor, punishable by up to thirty days in jail, a \$500.00 fine, or both.

Access to the Registry of Cardholders

SDCL 34-20G-88 specifically prohibits the disclosure of the identity of cardholders for anything other than specific purposes set out in the statute. One authorized purpose is for a physician to determine if a person in the physician's care engages in the medical use of cannabis so the practitioner may assess possible drug interactions or assess other medically necessary concerns.

Civil Liability

SDCL 34-20G-5 provides as follows:

No practitioner is subject to arrest, prosecution, or *penalty of any kind*, or denied any right or privilege, including civil penalty or disciplinary action by the South Dakota Board of Medical and Osteopathic Examiners or by any other occupational or professional licensing board or bureau, *solely for providing written certifications or for otherwise stating that, in the practitioner's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of cannabis to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition.* Nothing in this chapter prevents a practitioner from being sanctioned for: (1) Issuing a written certification to a patient with whom the practitioner does not have a bona fide practitioner-patient relationship; or (2) Failing to properly evaluate a patient's medical condition.

Because IM26 was only recently adopted, the phrase "penalty of any kind" has not been construed by our courts. It is reasonable to assume, however, that a court would conclude the term means criminal penalties or civil fines, rather than damages in a civil case.

Regardless of the meaning of the phrase, case law from other states with more mature medical marijuana laws tends to support the conclusion that practitioners face the same risk of liability for providing a written certification as with a prescription for any well-established, FDA-approved medication. Put another way, the practitioner runs the risk of a claim of malpractice alleging failure to exercise the appropriate standard of care in evaluating the patient and prescribing, or in this case recommending, treatment.

The difference with respect to medical cannabis, of course, is the lack of authoritative medical literature and approval by a governmental entity such as the FDA. The lack of clear standards may place practitioners at greater risk of liability for allegedly negligent acts in recommending medical cannabis use. Practitioners are therefore cautioned to take extra care when evaluating a recommendation for medical cannabis.

The Future

At the time of publication, the future of both medical and recreational marijuana is uncertain, both in South Dakota and nationwide. At the national level, the Biden administration may issue guidance similar to that in effect during the Obama presidency. Congress may vote to "legalize" marijuana for all purposes.

At the state level, the voters or the Legislature may legalize recreational marijuana as a matter of state law by way of a statutory change. The legalization of recreational marijuana would likely render medical marijuana moot except as to persons under the age of twenty-one.

The Association will endeavor to update this Legal Brief as warranted by future changes in the law. Practitioners are encouraged to otherwise stay informed as to the status of medical marijuana, both nationally and as a matter of state law.

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Conclusion

While cannabis possession remains illegal under federal law regardless of the purpose, South Dakota law allows persons who suffer from a “debilitating medical condition” and who have been issued a valid registration card to purchase and possess cannabis for medical purposes. Federal and state law relating to cannabis – both medical and recreational – is in a state of flux. Practitioners are encouraged to stay abreast of developments as they occur.

Sources: 21 USC 801, et. seq

SDCL 34-20G, available at https://sdlegislature.gov/Statutes/Codified_Laws/2078844

ARSD 44:90:02:06, available at <https://sdlegislature.gov/Rules/Administrative/40151>

Cross-References

Complaint Investigations and Hearings of the S.D. Board of Medical & Osteopathic Examiners.



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