

**MEDICAL BOARD OF CALIFORNIA**

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May 11, 2004

The Honorable Mark E. Souder  
U.S. House of Representatives  
Chairman  
Subcommittee on Criminal Justice, Drug Policy and Human Resources  
Committee on Government Reform  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Representative Souder:

On April 1, 2004, on behalf of the Medical Board of California, I presented testimony before the Subcommittee, on the topic, "Marijuana and Medicine: The Need for Science Based Approach." You have requested responses to a series of follow-up questions, which will be included in the written record. The questions appear to be based on two separate premises. The first is that the Medical Board of California establishes the practices and procedures to be followed by California physicians. The second premise is that the Medical Board is concerned only with the mechanical process followed by a physician, and not with the content or quality of that process. It is my hope that this response will illustrate the role of the Medical Board of California to the extent that it is clear that both of these premises are inaccurate.

The Medical Board of California exists to regulate the professional conduct and competence of California physicians. Our Legislature has decreed that protection of the public is the highest priority for the Board, and where public protection is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. In keeping with this mandate, it is the duty of the Medical Board to investigate all complaints received regarding the professional activities of a California physician. If our investigation shows that a physician has engaged in unprofessional conduct, as defined by the governing statutes, disciplinary action will be pursued.

Disciplinary action will be imposed in those instances where it has been established by clear and convincing evidence that a physician's conduct departed from the prevailing standard of practice. It must be emphasized that the Medical Board does not define the standard of practice. The standard of practice is derived from several sources: applicable statutory and case law, regulations and most importantly, by expert peer testimony. The Board does not establish "procedures" which physicians must follow, nor does it take a position with regard to specific medications. The role of the Medical Board is to determine the applicable community standard through its objective

physician experts, and to apply it to the facts of a given case. Inasmuch as California Health and Safety Code section 11362.5 establishes that marijuana can be used medically in California, the question before the Medical Board is limited to whether a physician who has recommended or approved marijuana has done so in a manner consistent with the standard of practice.

Accordingly, it is the community practice, not Board edict, which establishes the governing standard of practice with respect to physicians who recommend or approve marijuana to patients. The Board has consistently stated that physicians who do recommend marijuana must do so in accordance with accepted standards of medical responsibility. It is important to note the process a physician is expected to follow when recommending marijuana to a patient is the same as any physician would be expected to follow when prescribing any drug or treatment. This standard includes a history and good faith examination of the patient, development of a treatment plan with objectives, provision of informed consent, periodic review of the efficacy of treatment, any necessary consultation, and proper documentation to support the physician's decision to recommend the use of marijuana. This process is not merely a "procedure" to be followed by a physician, but is the overall assessment, evaluation and medical treatment provided by the physician.

The Board relies upon impartial, third party expert physicians to determine whether a physician has comported with the standard of practice when recommending marijuana. These experts are board certified physicians in good standing who are familiar with the standard of practice for prescribing medications. The Board attempts to utilize expert reviewers who engage in a practice that is similar to that of the physician who is under investigation. Because the ultimate question before the Medical Board is whether a physician adhered to the standard of practice for a physician in California, it is appropriate and necessary for the Board to utilize expert witnesses who practice in our state, and who are familiar with the applicable standard of practice. The experts review not only the mechanical "procedure" followed, but the quality and extent of the physician's treatment of the patient as well.

If the expert determines that marijuana was contraindicated in a particular case, the Board would expect the expert to so state, and to state the reasons for that conclusion. Similarly, the expert may conclude that the evaluation conducted by the subject physician was superficial or inadequate. Our experts must review the physician's medical records, and determine whether appropriate medical records have been created. In any case, the expert may conclude that marijuana was or was not an appropriate treatment for the condition presented. In other words, the expert reviewer will consider and assess the entire clinical presentation.

Similarly, it is not for the Board to determine which medical conditions may be appropriately treated with marijuana. The law provides that marijuana may be used by patients for any condition for which it provides relief. Thus, the question is a clinical

Letter, The Honorable Mark E. Souder  
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One, and we rely upon our expert witnesses to inform us whether a recommendation for cannabis was appropriate in a particular clinical setting.

On May 7, 2004, at a quarterly Medical Board of California meeting, the Board adopted a statement on medical marijuana, (copy attached). The purpose of this statement was to provide clarifying information to California physicians advising that their recommendation for medical marijuana will not have an adverse affect against their license if they follow good medical practice.

Thank you for this opportunity to respond.

Sincerely,



Joan M. Jerzak  
Chief of Enforcement

attachment

A Statement by the Medical Board of California, May 7, 2004

**California Physicians & Medical Marijuana**

On November 5, 1996, the people of California passed Proposition 215. Through this Initiative Measure, Section 11362.5 was added to the Health & Safety Code, and is also known as the Compassionate Use Act of 1996. The purposes of the Act include, in part:

“(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; and

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.”

Furthermore, Health & Safety Code section 11362.5(c) **provides strong protection for physicians who choose to participate in the implementation of the Act.** - “Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.”

The Medical Board of California developed this statement since medical marijuana is an emerging treatment modality. The Medical Board wants to assure physicians who choose to recommend medical marijuana to their patients, as part of their regular practice of medicine, that they WILL NOT be subject to investigation or disciplinary action by the MBC if they arrive at the decision to make this recommendation in accordance with accepted standards of medical responsibility. The mere receipt of a complaint that the physician is recommending medical marijuana will not generate an investigation absent additional information indicating that the physician is not adhering to accepted medical standards.

These accepted standards are the same as any reasonable and prudent physician would follow when recommending or approving any other medication, or prescription drug treatment and include the following:

1. History and good faith examination of the patient.
2. Development of a treatment plan with objectives.
3. Provision of informed consent including discussion of side effects.
4. Periodic review of the treatment’s efficacy.

5. Consultation, as necessary.
6. Proper record keeping that supports the decision to recommend the use of medical marijuana.

In other words, if physicians use the same care in recommending medical marijuana to patients as they would recommending or approving any other medication, or prescription drug treatment they have nothing to fear from the Medical Board.

Here are some important points to consider when recommending medical marijuana:

1. Although it could trigger federal action, making a recommendation in writing to the patient will not trigger action by the Medical Board of California.
2. A patient need not have failed on all standard medications, in order for a physician to recommend or approve the use of medical marijuana.
3. The physician should determine that medical marijuana use is not masking an acute or treatable progressive condition, or that such use will lead to a worsening of the patient's condition.
4. The Act names certain medical conditions for which medical marijuana may be useful, although physicians are not limited in their recommendations to those specific conditions. In all cases, the physician should base his/her determination on the results of clinical trials, if available, medical literature and reports, or on experience of that physician or other physicians, or on credible patient reports. In all cases, the physician must determine that the risk/benefit ratio of medical marijuana is as good, or better, than other medications that could be used for that individual patient.
5. A physician who is not the primary treating physician may still recommend medical marijuana for a patient's symptoms. However, it is incumbent upon that physician to consult with the patient's primary treating physician or obtain the appropriate patient records to confirm the patient's underlying diagnosis and prior treatment history.
6. The initial examination for the condition for which medical marijuana is being recommended must be in-person.
7. Recommendations should be limited to the time necessary to appropriately monitor the patient. Periodic reviews should occur and be documented at least annually or more frequently as warranted.

8. If a physician recommends or approves the use of medical marijuana for a minor, the parents or legal guardians must be fully informed of the risks and benefits of such use and must consent to that use.

Physicians may wish to refer to CMA's ON-CALL Document #1315 titled "The Compassionate Use Act of 1996", updated annually for additional information and guidance. (<http://www.cmanet.org/publicdoc.cfm/4>)

Although the Compassionate Use Act allows the use of medical marijuana by a patient upon the recommendation or approval of a physician, California physicians should bear in mind that marijuana is listed in Schedule I of the federal Controlled Substances Act, which means that it has no accepted medical use under federal law. However, in *Conant v. Walters* (9<sup>th</sup> Cir.2002) F.3d 629 the United States Court of Appeals recognized that physicians have a constitutionally-protected right to discuss medical marijuana as a treatment option with their patients and make oral or written recommendation for medical marijuana. However, the court cautioned that physicians could exceed the scope of this constitutional protection if they conspire with, or aid and abet, their patients in obtaining medical marijuana.

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June 1, 2004

The Honorable Mark E. Souder  
U.S. House of Representatives  
Chairman  
Subcommittee on Criminal Justice, Drug Policy and Human Resources  
Committee on Government Reform  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Representative Souder:

In response to your correspondence of May 19, 2004, the following response is provided, (with your questions preceding in italics).

1. *Your testimony suggests that the primary role of the Medical Board of California (the "Board") is to verify that a doctor has complied with certain procedural requirements - e.g., having a current license, conducting an examination and filling out the appropriate forms.*

**The Medical Board of California exists to regulate the professional conduct and competence of California physicians. Our Legislature has decreed that protection of the public is the highest priority for the Board, and where public protection is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. In keeping with this mandate, it is the duty of the Medical Board to investigate all complaints received regarding the professional activities of California physicians. If our investigation shows that a physician has engaged in unprofessional conduct, as defined by the governing statutes, disciplinary action will be pursued.**

- a. *Does this mean that a doctor could prescribe the scientifically wrong medication and still be in compliance with your regulations? For example, if a doctor carried out all the proper "procedures" but then prescribed Viagra to a patient with high blood pressure, would the Board take any action?*

**Disciplinary action will be imposed in those instances where it has been established by clear and convincing evidence that a physician's conduct departed from the prevailing standard of practice. It must be emphasized that the Medical Board does not define the standard of practice. The standard of practice is derived**

from several sources: applicable statutory and case law, regulations and most importantly, by expert peer testimony. The Board does not establish "procedures" which physicians must follow, nor does it take a position with regard to specific medications. The role of the Medical Board is to determine the applicable community standard through its objective physician experts, and to apply it to the facts of a given case.

The Board can take action if a physician falls below the standard of care, established by the medical community and opined upon by medical experts. No action can be taken based on what may be "scientifically wrong," unless it has been established that the medical procedure or treatment fell below the standard for a given patient in a given situation. If a medical treatment or procedure is contra-indicated for a particular patient, the medical expert would be expected to describe the community standard and how the contra-indicated procedure departed from that standard.

- b. *Are there any medications other than marijuana for which the board takes no position as to whether they are safe and effective? If a doctor tried to prescribe thalidomide for morning sickness, for example, despite what we now know about its side effects, would the Board take action?*

**As a regulatory agency the Board takes no position on any medical treatment or modality, and would rely on medical experts to state whether a specific treatment or modality, given to a particular patient, at a particular point in time, was within the standard.**

- c. *Does the board have any responsibility for regulating the content of medical treatment, rather than merely the procedures?*

**If medical treatment falls below the standard of care, as described by a Board-retained medical expert, the board would take action against the identified physician's license.**

2. *The voters in your state have attempted to legalize the use of marijuana for "medical" purposes, so it is understandable that the board - as a state government agency - feels obligated to implement that policy. Nevertheless, as doctors themselves and as regulators of the medical profession, it would seem that the members of the Board are supposed to protect the public based on scientific and medical evidence - not on politics. We have some questions about whether permitting doctors and patients to use a drug in this way can ever be considered appropriate in the practice of medicine.*

**The Compassionate Use Act of 1996, (commonly known as Proposition 215) was passed by California voters through the initiative process and became law in November 1996. This act added section 11362.5 to the California Health and Safety Code. The main thrust of the Act was to allow seriously ill Californians to obtain and use marijuana for medicinal purposes where such use is deemed appropriate and has been recommended by a physician.**

- a. *Are there any drugs other than marijuana that the Board believes can be safely smoked? If a doctor recommended that a patient smoke morphine, for example, would the Board take any action?*

**The Medical Board of California exists to regulate the professional conduct and competence of California physicians. Our Legislature has decreed that protection of the public is the highest priority for the Board, and where public protection is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. In keeping with this mandate, it is the duty of the Medical Board to investigate all complaints received regarding the professional activities of a California physician. If our investigation shows that a physician has engaged in unprofessional conduct, as defined by the governing statutes, disciplinary action will be pursued.**

**Regarding smoking as a delivery method: As a regulatory agency the Board takes no position on any medical treatment or modality, and would rely on medical experts to state whether a specific treatment or modality, given to a particular patient, at a particular point in time, was within the standard.**

- b. *Does the Board have any concerns about the lack of health or safety controls on the supply of marijuana to patients - since patients are essentially allowed to grow or procure their own "medicine"? Are there any other medications that you believe can be responsibly manufactured and self-administered by patients?*

**The Board has no jurisdiction over access to marijuana.**

**Alternative medicine, which includes a wide range of modalities and treatments, has been incorporated into the practices of many licensed physicians. The Board has no position over any particular remedy, but would rely on the medical expert opinion, in a particular case, for a particular ailment, at a particular point in time, to determine if a remedy was within or outside the standard of care.**

- c. *How much evidence, and what kind of evidence, does the Board believe is necessary before a drug should be used to treat a condition? Is anecdotal evidence sufficient? Should a doctor prescribe or "recommend" a drug that has not yet been properly tested?*

**While the FDA has the role of ensuring drugs are safe and effective, physicians are legally allowed off-label use. This off-label use makes the physician responsible for the medical care and treatment provided to each patient under their care. The Board does not evaluate drugs or if they should be used to treat any condition but would rely on the medical expert to determine if the standard of care was met.**

**Much alternative medicine, which is emerging, relies on anecdotal evidence as a starting point which may be augmented by scientific studies. The Board has taken action against alternative medicine practitioners when their claims or promises to patients fall outside the standard of practice.**

**Physicians are responsible for the care and treatment of their patients and providing them medicine within the community standard. A physician who provides any medical treatment may be subject to peer review any may be subject to action by the Board if their treatment falls below the standard.**

- d. *Since the federal government has already tested and approved Marinol, a marijuana derivative, why should doctors recommend any other form of marijuana?*

**Inasmuch as California Health and Safety Code section 11362.5 establishes that marijuana can be used medically in California, the question before the Medical Board is limited to whether a physician who has recommended or approved marijuana has done so in a manner consistent with the standard of practice.**

**The Board has no opinion about Marinol versus marijuana and would rely on a medical expert to describe the community standard in a particular situation.**

- e. *Should marijuana be used to treat psychiatric or psychological conditions like attention deficit disorder (ADD), depression or anxiety? Why or why not?*

**It is the community practice, not Board edict, which establishes the governing standard of practice with respect to physicians who recommend or approve marijuana to patients. The Board has consistently stated that physicians who do recommend marijuana must do so in accordance with accepted standards of medical responsibility. It is important to note the process a physician is expected to follow when recommending marijuana to a patient is the same as any physician would be expected to follow when prescribing any drug or treatment. This standard includes a history and good faith examination of the patient, development of a treatment plan with objectives, provision of informed consent, periodic review of the efficacy of treatment, any necessary consultation, and proper documentation to support the physician's decision to recommend the use of marijuana. This process is not merely a "procedure" to be followed by a physician, but is the overall assessment, evaluation and medical treatment provided by the physician. Similarly, it is not for the Board to determine which medical conditions may be appropriately treated with marijuana.**

**California Health and Safety Code section 11362.5(b)(1)(A) states that "seriously ill Californians have the right to obtain and use marijuana**

**for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of...or any other illness for which marijuana provides relief."**

- f. *Should marijuana be used to treat moderate or low-level pain? Why or why not?*

**California Health and Safety Code section 11362.5(b)(1)(A) states that "seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of...chronic pain...or any other illness for which marijuana provides relief."**

- g. *Should marijuana be used to treat epilepsy? Why or why not?*

**California Health and Safety Code section 11362.5(b)(1)(A) states that "seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of...or any other illness for which marijuana provides relief."**

- h. *Should marijuana be used to treat children or teenagers, including for psychiatric or psychological conditions? Why or why not?*

**California Health and Safety Code section 11362.5(b)(1)(A) states that "seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of...or any other illness for which marijuana provides relief."**

3. *If a complaint is filed against a physician, alleging the improper recommendation of marijuana use in medical treatment, how does the Board determine if that use of marijuana was appropriate?*

**It is the community practice, not Board edict, which establishes the governing standard of practice with respect to physicians who recommend or approve marijuana to patients. The Board has consistently stated that physicians who do recommend marijuana must do so in accordance with accepted standards of medical responsibility. It is important to note the process a physician is expected to follow when recommending marijuana to a patient is the same as any physician would be expected to follow when prescribing any drug or treatment. This standard includes a history and good faith examination of the patient, development of a treatment plan with**

objectives, provision of informed consent, periodic review of the efficacy of treatment, any necessary consultation, and proper documentation to support the physician's decision to recommend the use of marijuana. This process is not merely a "procedure" to be followed by a physician, but is the overall assessment, evaluation and medical treatment provided by the physician. Similarly, it is not for the Board to determine which medical conditions may be appropriately treated with marijuana.

a. *What standards are applied?*

**Licensed physicians in a particular specialty provide expert opinion to establish the standard of practice within the medical "community," within the state of California.**

b. *Who determines what those standards are? If they are determined by medical experts, who are those experts, and what is the basis for their selection?*

**The Board relies upon impartial, third party expert physicians to determine whether a physician has comported with the standard of practice in any given speciality or sub-specialty. These experts are board certified physicians whose licenses are in good standing who are familiar with the standard of practice for a particular ailment. The Board utilizes expert reviewers who engage in a practice that is similar to that of the physician who is under investigation. Because the ultimate question before the Medical Board is whether a physician adhered to the standard of practice for a physician in California, it is appropriate and necessary for the Board to utilize expert witnesses who practice in our state, and who are familiar with the applicable standard of practice. The experts review not only the mechanical "procedure" followed, but the quality and extent of the physician's treatment of the patient as well.**

c. *Is there such a thing as a "medical expert" on the use of marijuana?*

**Medical experts are divided into practice specialties, and not by a particular modality or treatment. A medical expert who provides testimony re: marijuana, could therefore, be one of many different specialty fields, e.g., ob/gyn, internal medicine, pain management.**

**If the expert determines that a physician fell below the standard, i.e., marijuana was contraindicated in a particular case, the Board would expect the expert to so state, and to state the reasons for that conclusion. Similarly, the expert may conclude that the evaluation conducted by the subject physician was superficial or inadequate. Our experts must review the physician's medical records, and determine whether appropriate medical records have been created. In any case, the expert may conclude that marijuana was or was not an appropriate treatment for the condition presented. In other words, the expert reviewer will consider and assess the entire clinical presentation.**

- d. *Why would the Board not consult with federal government experts, like those at FDA or NIDA?*

**Complaints to the Board typically do not pivot on whether a particular modality was good or bad, but rather there is focus on the question if the medical care provided met the standard of practice. The standard of practice, which is generally limited to the borders of our state, is established by a physician practicing medicine in the same specialty area as the physician under investigation. Occasionally, the Board has utilized federal government experts in cases where the issues did not involve the quality of medical care provided, but involved devices which were manufactured outside of the law or did not have FDA approval. Generally speaking, federal government experts are not able to provide expert opinions regarding the California standard of practice in quality of care cases.**

To further illustrate how the Board has responded to a complaint over improper recommendations of medical marijuana, please find attached a copy of an Accusation and Decision in a recent case, that resulted in physician discipline.

Sincerely,

A handwritten signature in cursive script, reading "Joan M. Jerzak".

Joan M. Jerzak  
Chief of Enforcement