

FHCA 2019 Annual Conference & Trade Show

CE Session #54 – Medical Marijuana: Not Just Another Medication

Wednesday, August 7 – 5:45 to 6:45 p.m.

Celebration 9-10 – Legal/Regulatory/Survey

Upon completion of this presentation, the learner will be able to:

- Recognize the legalities and illegalities of medical marijuana
- Develop appropriate policies and procedures in centers
- Discuss current cases and trends

Seminar Description:

Medical marijuana issues are increasing as the public becomes more aware of its uses and their limited rights to utilize it. The federal government still considers medical marijuana illegal. This session will recap the state and federal law, the limitations on certain providers to administer medical marijuana and drugs that are legal because they are not marijuana. There will be discussion of a pending federal case in which a marijuana grower in a state with legal marijuana use is being sued under the RICO Act. It will also discuss strategies being used by residents to force centers to administer medical marijuana.

Presenter Bio(s):

Karen Goldsmith currently serves as FHCA's Regulatory Counsel and previously served as the association's Legal Counsel since 1980. She is on the American Health Care Association's Legal Subcommittee and served as its Chair for three years. She is active in the American Health Lawyers Association and served as Chair of their Long Term Care subgroup for two years. She has been published in several books produced by AHCA. Karen practices primarily in long term care.



Medical Marijuana: Not Just Another Medication

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- The FDA has approved the use of certain components of marijuana and synthetic forms for use:
 - Marinol is one of those synthetics
 - Cesamet's chemical makeup includes a substance similar to THC

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What is marijuana?

- Marijuana is a member of the cannabis family. By common definition it is:
 - Psychoactive – contains high levels of tetra-hydro-cannabinol (THC)
 - Dried flower buds and leaves
 - From the female hemp or cannabis plant
 - Possession of small amounts is a misdemeanor
- Medical marijuana has low levels of THC

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What is CBD Oil

- Cannabidiol oil is the non-psychoactive compound in cannabis
- Is derived from the hemp plant – a cousin of marijuana and also in the cannabis family
- Typically has lower level of THC
- Illegal in Florida up until now – only 2 grow houses at universities
- Recommended for relief of seizures, pain relief, depression, anxiety
- Has been sold for a long time over the internet and in stores
- Was a felonious crime until legalized



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Back to marijuana...

- THC is the component of marijuana which creates the euphoric state
- Typical state laws permit low-THC medical marijuana which gives the benefit of those substances produced by the cannabis plant that are beneficial for treating certain medical conditions. Florida allows both for certain diseases and under certain conditions
- Law previous to this permitted only low-THC marijuana for terminally ill patients with less than 1 year to live. This was changed after the constitutional amendment was passed



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- Smoking was illegal until this legislative session when the Legislature passed a law permitting smoking
- Warning about smoking is some of the same as smoking cigarettes
 - Inhaling carcinogens
 - Second hand smoke
 - Impurities in the tobacco



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Federal vs State law

- We are still uncertain as to what will happen if a center participates in the distribution, storage or administration of medical marijuana
- It is still illegal under federal law



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- Not likely anyone will be prosecuted for using medical marijuana
- However, prosecution is not the only recourse
 - HUD can deny or call federal funding
 - Medicaid facilities risk loss of the federal share of the payment
 - Licenses can be impacted
 - Civil RICO actions can be brought



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- Definitions are important:
- **Legalization** of medical marijuana would make it safe to participate but this has not occurred at the federal level
- **Decriminalization** has partially occurred with the R-B which means that the federal prosecutors likely will not prosecute the person using marijuana in accordance with state law



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- However, decriminalization does not:
 - Make medical marijuana legal under federal law
 - Preclude someone who does not use it strictly in accordance with the state law from being prosecuted
 - Protect you from other potential liability such as funding issues mentioned on a previous slide



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- So why can't we just say not only are state LAW but our CONSTITUTION permits medical marijuana so as long as we are using it in accordance with that state law we should be safe?
 - Preemption is the issue:
- The Preemption doctrine is found in Article 6 of the United States Constitution which holds that federal law (or regulation) supersedes any state law even if it is in the state constitution



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- The simple answer seems to be to change the federal designation and let states make the choice within their own borders:
 - States could then regulate who can use it
 - Can regulate quality
 - Can monitor use
 - Can conduct more research on benefits and consequences
 - Could raise revenue for states
 - Would clarify issues for our members



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Some see the use of medical marijuana as an attack on the opioid crisis as it would make people less dependent on opioids

Some experts believe that people become dependent on marijuana but is that a true addiction – additives may make the difference



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- What is the status of the state law:
- Doctors must qualify and they do not prescribe:
 - Could be disciplined by Board for violating federal law
 - Could be prosecuted under federal law



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Federal law:

- RICO
 - This is the federal legislation designed to bring down organized crime
 - It has proven to be a powerful weapon against organized crime
 - Also has a civil element for those civilly damaged by RICO violations
 - Many plaintiffs have tried to turn ordinary business disputes into RICO claims
 - Treble damages plus attorneys fees
 - Courts have limited the use to serious violations



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• Civil actions:

- Must have racketeering
- Injured party must have damages
- There must be a causal relationship between the racketeering and the damages



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• Elements of RICO:

- An enterprise
- A pattern of racketeering activities
- Violation of federal criminal laws
- Over a substantial period of time



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• In marijuana cases:

- Usually brought by neighbors who dislike odor or marijuana in general
- Most cases have been dismissed
- Judges take a dim view of trying to turn business disputes into RICO cases
- Usually sue everyone they can which discourages people from working with marijuana growers



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Federal Cases of Interest:

Ainsworth v. Owenby (Oregon):

RICO Action filed by residential property owners against growers on nearby lands.

Dismissed in April 2019 for not being a valid RICO claim



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- Safe Streets Alliance v. Hickenhooper (Colorado)
 - Safe Streets Alliance is anti-marijuana group
 - Issue was whether there was damage to the value of the property of neighboring farmers
 - Sought to invalidate Colorado's marijuana program but this was thrown out early in the litigation
 - Plaintiff could not prove value diminished
 - Cannabis growers prevailed

However during the pendency of this case it was dismissed by the lower court and appealed to the 10th Circuit.



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- 10th Circuit:
 - Found that growing cannabis is an illegal act under federal law and therefore defendant was a criminal organization
 - State legality will not shield a defendant from RICO suits in federal court
 - Set a low bar for pleading enterprise
 - Said participant must play some part in directing the enterprise affairs
 - Eliminates actions against those indirectly involved
 - Remember that this is a civil case not a criminal case
 - Went back to lower court for factual determination where it was dismissed (see previous slide)



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- Thinking may be changing
 - The Opioid crisis is so significant that there is some movement to encourage medical marijuana for pain relief
 - States are regulating medical marijuana and some even recreational marijuana so there is less concern that the drug will be altered or contaminated
 - Not true of drugs sold by drug dealers illegally



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- Conditions for which it can be authorized:
 - Cancer
 - Epilepsy
 - Glaucoma
 - HIV
 - AIDS
 - PTSD
 - ALS
 - Crohn's Disease
 - MS



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“Other debilitating medical conditions of same kind or class or comparable to those enumerated”

Terminal condition diagnosed by other than the certifying physician



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- Must be for medical use which does not include:
 - Not purchased or acquired from a medical marijuana treatment center
 - In form of smoking, seeds or flowers, except for flower in a sealed, tamper-proof receptacle for vaping
 - Use inconsistent with physician's directions or his/her certification
 - Transfer to an unauthorized user
 - Use of marijuana prohibited:
 - Public transportation except for low THC cannabis
 - In place of employment unless authorized by employer
 - In public place except for low THC
 - State correctional institution



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- On the grounds of a school
- In a school bus, vehicle, an aircraft or motorboat, except for low THC
- See. 381.986(1)(j) for more details



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- Who can be a caregiver:
 - Defined at 381.986 as:
 - Florida resident
 - Agreed to assist patient in writing
 - Patients must be qualified to medical use of marijuana
 - Has a caregiver identification card
 - Cannot be a qualified physician or not employed by medical marijuana treatment center or testing laboratory
 - 21 years or older
 - Registered for no more than 1 qualified patient



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- Qualified patient may only designate one caregiver except:
 - Minor and the caregivers are parents or legal guardians
 - Patient is intellectually or developmentally disabled adult and then only parents or legal guardians
 - The qualified patient is admitted to a hospice program
 - The patient has requested the caregiver to assist
 - Caregiver is employed by the hospice
 - Caregiver performs other services for the patient
 - Nursing home and all caregivers cannot be caregivers for the residents



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- Caregiver cannot receive compensation but since employees of hospice can be caregivers one would presume they would be paid by hospice as not being paid to assist with marijuana but to provide hospice services
- Unless close relative caregiver must be background screened



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- So what are our concerns:
 - Violating federal law
 - Possible violating state law within the center – for example, residents sharing with one another
 - Funding issues
 - HUD issues
 - Citations by surveyors and potential decertification
 - Because licensure is strictly a state power probably not affected



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- Potential side effects on residents
- Interaction with other drugs
- Overuse or misuse
- Storage
- Residents stealing it from one another
- Proper administration



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HEMP/CBD OIL

- CBD Oil
 - Sold over the counter
 - Does not make people high – THC removed
 - Some agencies consider CBD Oil a hemp product (which is partially legal under federal law) and others consider it a marijuana product
 - Not regulated so do not know if contaminated or if THC completely removed
 - What are the problems – if THC not completely removed is considered marijuana so would have to be used under medical marijuana statutes
 - However, no way to know this



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- CBD oil has some scientific basis for relieving chronic pain
- Often used by individuals because no prescription necessary
- More research needed to explore its pain relieving potential



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- Hemp growing in Florida has been illegal until this past Legislative Session
- Great Grandmother arrested at Disney for possession of CBD Oil – held in jail 12 hours
- To be hemp based must have less than 0.3% THC
- Federal government moved hemp to a farm product (2018-Farm Bill)



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Questions

- Why has CBD Oil been sold freely in Florida if it is illegal?
- Why is possession of hemp products a felony where possession of marijuana (small amounts) is a misdemeanor?
- How quickly will the production of hemp products under the new legislation take off



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- Uses for CBD Oil
 - Seizures
 - Anxiety
 - Pain
 - Muscle issues
 - depression



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• Problems:

- Does not grow well in Florida because of the heat
- Marijuana has THC. Hemp has it genetically removed. Stress of heat can cause THC to rise in Hemp
- Could have effects of marijuana
- No regulation so consumers don't know contents of product they are buying
- Hemp can draw "bad" stuff from the soil such as heavy metals



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Where are we going:

- Agriculture Secretary Nikki Fried pushed for passage of the legislation to permit hemp production
- It is good for the economy as hemp is used in many things such as disposable food products, fabric
- This makes it good for the environment as well
- Rules are currently being developed to deal with the growing, processing, distributing and using hemp products which includes CBD Oil



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- What about homegrown marijuana brought in by friends and family?
- Planning care and services creates its own problems:
 - If you know you should include in the resident's but then are you aiding and abetting the violation of federal law by not reporting to federal authorities?
 - HIPAA?
 - What about the resident who drives a scooter or electric wheelchair?
 - Or a car?
 - What is the mental effect on the resident?
 - Weight issues?



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Use of marijuana in your facility

- Residents who need it or get relief from it are going to get it
- Your staff cannot administer it
- You cannot store it
- You cannot have it on your medication cart
- All of these things will put you out of compliance in federal law



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- There are still many unanswered questions around the idea of medical marijuana.
- Together we will learn how best to deal with it – protecting your residents’ privacy while still complying with federal law.
- This is certainly an evolving area of the law and one that will change with time.



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Some tips on developing policies:

- Staff should not procure, store or administer (even assist) medical marijuana
- Cannot be grown on premises
- Cannot be displayed in public areas
- Cannot be stored in their rooms where visible
- Resident should have a lockbox to keep it in which cannot be stolen
- Staff should not have key to the box.
- You can have no smoking policies (air quality is the issue)



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- Know who is using it and how
- Need to look at plans for care and services
- Provide education for your staff, residents and their families on the use of medical marijuana
- Consider negotiated risk agreement
- Weigh the risks of allowing it
- Risks of prosecution are wide range – from criminal fine to imprisonment to forfeiture

- I AM NOT RECOMMENDING ANY OF THESE BUT THEY SHOULD BE CONSIDERED AS YOU WORK ON POLICIES WITH YOUR ATTORNEY



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- As this presentation is being prepared, Florida is developing regulations to deal with some of the issues presented. This handout may be amended to include these regulations if they are issued, at least in draft form, prior to the presentation.



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