



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

June 18, 2015

OPINION NO. 2015-03

**BOARD OF MEDICAL EXAMINERS;
MEDICAL MARIJUANA; LICENSES:** A licensee may be found to have violated the Controlled Substances Act (CSA) if a court concludes that the licensee, in completing a physician statement so that a person may apply for a registry identification card, had specific intent to aid and abet that person in acquiring marijuana. A licensee of the Board violates the CSA by becoming a shareholder, owner, investor, officer, employee or managing member of a medical marijuana dispensary or establishment.

Edward O. Cousineau
Executive Director
Nevada State Board of Medical Examiners
1105 Terminal Way, Suite 301
Reno, Nevada 89502

Dear Mr. Cousineau:

You have requested an opinion from this office regarding issues related to certain activities undertaken by physicians pertaining to medical marijuana, medical marijuana establishments and medical marijuana dispensaries and whether those activities violate the Controlled Substances Act, 21 U.S.C. §§ 801 et seq.

BACKGROUND

In 1998 and 2000 the people of this State voted to amend the Nevada Constitution to authorize the use of marijuana by certain persons. The Nevada Legislature in 2001 adopted the statutory framework to authorize the medical use of marijuana. NRS 453A.010 to 453A.810, inclusive. The Legislature in 2013 revised those statutes to provide the framework to allow for the formation of medical marijuana establishments; for the cultivation of medical marijuana; and the sale of medical marijuana.

QUESTION ONE

Does a licensee of the Board of Medical Examiners (Board) violate the Controlled Substances Act (CSA) (21 U.S.C. §§ 801 et seq.) by providing a person with written documentation, as required by NRS 453A.210, so that the person may apply for a registry identification card for marijuana?¹

SHORT ANSWER

A licensee could be found to violate the CSA if a court concluded that the licensee, in completing a physician statement so that a person may apply for a registry identification card, had specific intent to aid and abet that person in acquiring marijuana.

ANALYSIS

Pursuant to NRS 453A.210, to obtain medical marijuana in this State, a person must receive a registry identification card. In addition to completing an application and providing other information, to obtain a medical marijuana registry identification card, a person must submit valid written documentation from the person's attending physician stating that: (1) the person has been diagnosed with a chronic or debilitating medical condition; (2) the medical use of marijuana may mitigate the symptoms or effects of that condition; and (3) the attending physician has explained the possible risks and benefits of the medical use of marijuana. NRS 453A.210(2). This is commonly known as the physician statement.

The CSA requires every person who manufactures, distributes or dispenses any controlled substance to annually register with Drug Enforcement Administration's Registration Unit. 21 U.S.C. § 822(a)(1) and (2); 21 C.F.R. § 1301.14(a). Once registered, the registrant is authorized to manufacture, distribute or dispense controlled substances to the extent authorized by the registration and in conformance with the

¹ Senate Bill 447 of the 78th Legislative Session amended NRS 453A.210 to authorize the Division of Public and Behavioral Health of the Department of Health and Human Services to issue letters of approval to persons under 10 years of age. The written documentation by a physician is also required to obtain a letter of approval. The analysis set forth in this letter applies equally to a physician who provides the written documentation to a patient so that patient may obtain a letter of approval from the Division.

CSA. 21 U.S.C. § 822(b). The CSA classifies a controlled substance according to its inclusion in one of five different schedules, which are dependent upon certain criteria. 21 U.S.C. § 812. Schedule I controlled substances are drugs or other substances which: (1) have a high potential for abuse; (2) have no currently accepted medical use in treatment; or (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. § 812(b)(1)(A-C). Marijuana is listed as a Schedule I substance. 21 U.S.C. § 812(c)(d)(1).

Section 829 of the CSA sets forth the requirements for the dispensing of certain controlled substances. Specifically, 21 U.S.C. § 829 provides that Schedule II, III and IV controlled substances must be dispensed pursuant to a written or oral prescription. 21 U.S.C. § 829(a) and (b). Section 829 does not speak to the requirements regarding the dispensing of a Schedule I controlled substance. As such, under the maxim, "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another, a Schedule I controlled substance, such as marijuana, cannot be dispensed by a prescription. See *Department of Taxation v. DaimlerChrysler Services North America, LLC*, 121 Nev. 541, 119 P.3d 135 (2005). A Schedule I controlled substance, however, must be distributed pursuant to a written order. 21 U.S.C. § 828(a). The CSA defines the term "distribute" as the "means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." 21 U.S.C. § 802(11). The CSA defines the term dispense as the "means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term 'dispenser' means a practitioner who so delivers a controlled substance to an ultimate user or research subject." 21 U.S.C. § 802(10). A registrant who distributes or dispenses a controlled substance without a written or oral prescription as required by section 829 or who distributes or dispenses a controlled substance which is not authorized by the registration, is in violation of the CSA. 21 U.S.C. § 842(a)(1) and (2). Additionally, a registrant who does not distribute a controlled substance classified as a schedule I or II pursuant to a written order of the person to whom the substance is distributed is in violation of the CSA. 21 U.S.C. § 843 (a)(1), 21 U.S.C. § 828. The CSA does not merely prohibit direct violations of its limitations on distribution or dispensing; it also criminalizes activities that aid or abet such violations. Specifically, the CSA provides that that a person "who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

As noted, the CSA does not explicitly authorize the prescribing of marijuana, including for medical use. See 21 U.S.C. § 829 (setting forth the requirements for prescribing controlled substances). A physician who completes a physician statement pursuant to NRS 431A.210 is not prescribing marijuana, but is providing certain statements acknowledging the medical condition a person has and that medical marijuana may mitigate such condition. A patient then takes such a statement and

submits that statement to obtain a registry identification card to use in acquiring medical marijuana. Pursuant to NRS 453A.500, the Board is prohibited from disciplining a physician who completes the physician statement. Such a physician, however, if found to have specific intent to assist a person to obtain marijuana, runs the risk of being found to be aiding and abetting or conspiring in the acquisition of medical marijuana in violation of the CSA.

The Ninth Circuit Court of Appeals in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), recognized that a physician's First Amendment right was central to the doctor-patient relationship and that merely recommending that a patient may benefit from the use of medical marijuana based on the physician's sincere medical judgment could not be criminalized. Thus, such a communication alone would not be a stand-alone reason to initiate proceedings against that physician. *Conant*, 309 F.3d at 636–37. The Court determined that when a doctor merely made a recommendation to a patient regarding the use of medical marijuana, even if the physician anticipated the patient would then use that recommendation to obtain medical marijuana, that alone “does not translate into aiding and abetting, or conspiracy.” *Id.* at 635–36.

But the Court distinguished the mere recommendation to a patient from the circumstances where the physician has provided the patient with *the means* to acquire medical marijuana. *Id.* at 636 (emphasis added). Where the physician has done more than merely make a recommendation to the patient, but has also provided the patient with the means to obtain marijuana, the Court reasoned that the physician could be guilty of “aiding and abetting the violation of federal law.” *Id.* at 635.

The Court identified four factors to assist in determining whether a physician has gone beyond mere recommendation to aiding and abetting the commission of a crime:

- (1) that the accused had the specific intent to facilitate the commission of a crime by another,
- (2) that the accused had the requisite intent of the underlying substantive offense,
- (3) that the accused assisted or participated in the commission of the underlying substantive offense, and
- (4) that someone committed the underlying substantive offense.

Id. at 635. Put differently, to have criminal liability as a conspirator, requires that a physician enter into an “agreement to accomplish an illegal objective” when the physician “knows of the illegal objective and intends to help accomplish it.” *Id.*

Thus, a physician providing a physician's statement to a patient could be found to aid and abet a patient in illegally acquiring marijuana under the CSA if the physician acts with specific intent to provide the patient with the means to acquire the marijuana. *Id.* at 636. Under the test set out in *Conant*, a physician could unlawfully conspire with a patient when the physician: (1) knows that the patient intends to obtain marijuana;

(2) agrees to help the patient acquire marijuana; and (3) specifically intends to help the patient obtain marijuana by providing the physician statement. *Id.*; see also 21 U.S.C. § 846.

QUESTION TWO

Does a licensee of the Board violate the CSA by becoming a shareholder, owner, investor, employee, officer, or managing member of a medical marijuana dispensary or marijuana establishment?

SHORT ANSWER

Yes.

ANALYSIS

While the cultivation, sale and use of medical marijuana is permissible under Nevada law (NRS 453A.320-362; NAC 453A.300-472), it nonetheless remains prohibited under the CSA. The CSA provides that it is unlawful to:

- (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
- (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856(1) and (2).

The CSA also prohibits the use or investment of "income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce." 21 U.S.C. § 854(a).

Thus, if a licensee becomes a shareholder, owner, investor, employee, officer or managing member of a medical marijuana establishment, that licensee would be in violation of the plain language of the CSA.²

² The United States Department of Justice has issued two memoranda concerning the willingness of the Department to enforce the CSA against persons concerning the use of medical marijuana. This Opinion does not analyze the impact of those memoranda nor Section 538 of Public Law No. 113-235

Edward O. Cousineau, Esq.
June 18, 2015
Page 6

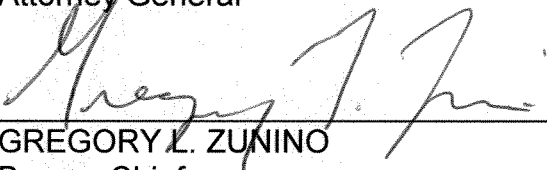
CONCLUSION

Even though the Board is prohibited by Nevada law from taking disciplinary action against a physician who provides a physician statement pursuant to NRS 453A.210 to a patient seeking medical marijuana, that physician could be found to have violated the Controlled Substances Act, 21 U.S.C. §§ 801 et. seq., if a court concluded that the physician completed the physician statement with specific intent to assist the patient obtaining medical marijuana. A physician who becomes a shareholder, owner, investor, employee, officer, or managing member of a medical marijuana establishment also would also be in violation of the plain language of the Controlled Substances Act.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:


GREGORY L. ZUNINO
Bureau Chief
Bureau of Business and State Services
for COLLEEN L. PLATT
Deputy Attorney General

CLP:slg/daw

concerning the use of funds appropriated under the law by the Department of Justice in the enforcement of the CSA and use of medical marijuana. This Office is not in a position to predict about the Department of Justice's enforcement intentions under the CSA with regard to the cultivation, sale, and use of medical marijuana.