Marijuana and CBD/THC-A Oil: Therapy or Felony?

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§ 18.2-251.1. Possession or distribution of marijuana for medical purposes permitted

A. No person shall be prosecuted under § 18.2-250 or § 18.2-250.1 for the possession of marijuana or tetrahydrocannabinol when that possession occurs pursuant to a valid prescription issued by a medical doctor in the course of his professional practice for treatment of cancer or glaucoma.

B. No medical doctor shall be prosecuted under § 18.2-248 or § 18.2-248.1 for dispensing or distributing marijuana or tetrahydrocannabinol for medical purposes when such action occurs in the course of his professional practice for treatment of cancer or glaucoma.
Supremacy Clause
Article VI, Section 2

United States Constitution
Acts of Congress
State Constitutions
State Statutes
Federal law classifies cannabidiol as a controlled Schedule I substance by definition as a “derivative” or “component” of marijuana 21 USC 802 (16)

Schedule I substances have “a high potential for abuse,” “no currently accepted medical use in treatment,” “a lack of accepted safety for use of the drug or other substance under medical supervision 21 USC 812(b)(1)

Cannot be prescribed: it is a federal crime to possess, distribute, or dispense
Elements of aiding and abetting

- Elements necessary to convict under aiding and abetting
  - Accused had the requisite **intent** of the underlying offense
  - Accused **assisted or participated** in the commission of underlying offense
  - That someone **committed the underlying offense**

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, **is punishable as a principal.**

Following the state legalization of medicinal marijuana in California, the Department of Justice issued the following response:

Practitioner's action of recommending or prescribing Schedule I controlled substances . . . Risk revocation of their DEA prescription authority, criminal prosecution, and exclusion from participation in Medicare and Medicaid programs.
“… [a] doctor's recommendation does not itself constitute illegal conduct…”

A physician issuing a prescription intends for the patient to fill it and obtain the substance, while physicians recommending marijuana do not necessarily have that intent.

Inconsistent with the First Amendment

- Importance of physician-patient communications
- Government had not provided a clear definition of what constitutes a prohibited "recommendation" of marijuana
Rohrabacher-Blumenauer Amendment included in omnibus FY 2019 spending bill

- Division B, section 537: Prohibits the use of DOJ funds for CSA enforcement in states with a medical cannabis program.

- Renewed February 15, 2019.

- Does not offer immunity from prosecution.
2015-2017 Legislation

2015: Provided for an affirmative defense for possession of cannabidiol or THC-A oil pursuant to written certification to alleviate intractable epilepsy
   - No provision for how to acquire oils

2016 and 2017
   - Authorized five pharmaceutical processors, one in each Health Service Area to produce, and dispense oils
C. In any prosecution under this section involving marijuana in the form of cannabidiol oil or THC-A oil . . . it shall be an affirmative defense that the individual possessed such oil pursuant to a valid written certification issued by a practitioner in the course of his professional practice . . . for treatment or to alleviate the symptoms of (i) the individual's intractable epilepsy diagnosed condition or disease or (ii) if such individual is the parent or legal guardian of a minor or of an incapacitated adult as defined in § 18.2-369, such minor's or incapacitated adult's intractable epilepsy diagnosed condition or disease.

§ 18.2-250.1(C)
"Practitioner" means a practitioner of medicine or osteopathy licensed by the Board of Medicine who is a neurologist or who specializes in the treatment of epilepsy. A physician assistant licensed by the Board of Medicine, or a nurse practitioner jointly licensed by the Board of Medicine and the Board of Nursing.
D. No practitioner shall be prosecuted .... for dispensing or distributing cannabidiol oil or THC-A oil for the treatment or to alleviate the symptoms of a patient's diagnosed condition or disease pursuant to a written certification issued pursuant to subsection.

B. Nothing in this section shall preclude the Board of Medicine from sanctioning a practitioner for failing to properly evaluate or treat a patient's medical condition or otherwise violating the applicable standard of care for evaluating or treating medical conditions.

§ 54.1-3408.3
Practitioners issuing certifications must

- Conduct an assessment/evaluation including an examination of patient
- Opinion: benefits outweigh risks
- Explain proper administration
- Available for follow-up care
- Access PMP
- Patient care and evaluation cannot be conducted by telemedicine for first year
- Each practitioner can certify for maximum of 600 patients
Implementation

- Before a physician can issue, they must register with the Board of Pharmacy.
- Patient must register with the Board of Pharmacy.
- Once registration is issued, a link to the written certification will be sent via email.
Implementation

Who will produce the oils?
5 processors: Pharmacann, Dalitso, Dharma, Green Leaf, Columbia Care

Where to purchase?
Five Health Service Areas
Availability? Spring/Summer 2020
DEA Moves CBD Drugs to Schedule V; Follows FDA’s Lead

“The DEA announced last week that it is placing certain drug products that have been approved by the FDA and which contain cannabidiol (CBD) in schedule V of the Controlled Substances Act. The action places FDA-approved drugs that contain CBD derived from cannabis and no more than 0.1 percent tetrahydrocannabinols in Schedule V.”

“This does not render all CBD in the Schedule V category. DEA expressly limited the classification to FDA-approved drugs, which currently consists of just one product – Epidiolex. Cannabis remains a Schedule I substance and cannabis-based CBD generally remains scheduled as a derivative of cannabis.”
Summary

- Under federal law marijuana possession is illegal
- 9th Circuit Court opinion “recommendation not illegal”
- Rider prohibiting DOJ from using a penny to prosecute
- Virginia Code § 54.1-3408.3; § 18.2-250.1(C)
- Board of Pharmacy 18VAC 110-60-30
Questions?