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OPINION 22-0138

The Honorable Joseph A. Marino III
State Representative—District 85
200 Derbigny Street
Central Government Building
Suite 4300
Gretna, LA 70053

22-A DRUGS – Narcotics, etc.

La. R.S. 37:1271
La. R.S. 40:1046

The provisions of La. R.S. 1271(B)(3) do not apply to a physician's recommendation of therapeutic marijuana.

Dear Representative Marino:

Our office has received your request for an opinion regarding the applicability of La. R.S. 37:1271(B)(3) to the recommendation of therapeutic marijuana by physicians licensed to practice medicine in Louisiana. Specifically, you inquire whether Louisiana's telemedicine statutes require physicians to conduct an in-person patient history or physical examination prior to recommending therapeutic marijuana via telemedicine. For the reasons set forth below, it is the opinion of this office that La. R.S. 37:1271(B)(3) does not require physicians to conduct an in-person visit prior to recommending therapeutic marijuana to a patient via telemedicine.

Louisiana Revised Statute 40:1046 permits "authorized clinicians" to recommend the therapeutic use of marijuana to any patient clinically diagnosed as suffering from a debilitating medical condition. "Authorized clinicians" include any physician licensed by and in good standing with the Louisiana Board of Medical Examiners ("LSBME") to practice medicine in this state.¹ The Legislature has specifically authorized physicians to recommend therapeutic marijuana through the use of telemedicine, defined as "the practice of health care delivery, diagnosis, consultation, treatment, and transfer of medical data by a physician using technology that enables the physician and a patient at two locations separated by distance to interact."²

The practice of telemedicine in Louisiana is governed by La. R.S. 37:1271. Subsection (B)(2)(b) of this statute provides:

(b) The physician practicing telemedicine shall not be required to conduct an in-person patient history or physical examination of the

¹ La. R.S. 40:1046(B)(1). While nurse practitioners and medical psychologists are also authorized to recommend marijuana, this opinion only addresses recommendations for therapeutic marijuana made by physicians.

² La. R.S. 40:1046(K); La. R.S. 37:1226.

patient before engaging in a telemedicine encounter if the physician satisfies all of the following conditions:

- (i) Holds an unrestricted license to practice medicine in Louisiana.
- (ii) Has access to the patient's medical records upon consent of the patient.
- (iii) Creates a medical record on each patient and makes such record available to the board upon request.
- (iv) If necessary, provides a referral to a physician in this state or arranges for follow-up care in this state as may be indicated.

Louisiana Revised Statute 37:1271(B)(3) provides an exception to the generally applicable provisions of La. R.S. 37:1271(B)(2)(b) and requires physicians to conduct an in-person visit with a patient before prescribing any controlled dangerous substances through telemedicine:

- (3) Except as authorized by R.S. 37:1271.1 or otherwise by rule promulgated by the board, no physician practicing telemedicine pursuant to this Subsection shall *prescribe any controlled dangerous substance* prior to conducting an appropriate in-person patient history or physical examination of the patient as determined by the board

(emphasis added).

Pursuant to the authority granted in La. R.S. 37:1271(B)(3), LSBME has promulgated rules mandating that physicians shall not utilize telemedicine to authorize or order the prescription, dispensation, or administration of any controlled dangerous substance unless the physician has had at least one in-person visit with the patient in the preceding year.³

The Louisiana Legislature first authorized the use of telemedicine by physicians in Act 850 of the 2008 Louisiana Legislative Regular Session. While Act 850 amended the provisions of La. R.S. 37:1271 to authorize the use telemedicine, the amendments also required a licensed health care professional to be physically present with the patient during all telemedicine encounters.⁴ The provisions of La. R.S. 37:1271 were again revised by Act 442 of the 2014 Louisiana Legislative Regular Session, which eliminated the required presence of a licensed healthcare provider and enacted provisions largely mirroring those appearing in Subsection (B) of the current version of the statute. Section 2 of Act 442 also enacted the Louisiana Telehealth Access Act, authorizing certain non-

³ LAC 46:XLV.7513.

⁴ The provisions of Act 850 of the 2008 Louisiana Legislative Regular required physicians to "ensure that a licensed health care professional who can adequately and accurately assist ... is in the examination room with the patient at the time the patient is receiving telemedicine services."

physician healthcare providers to deliver healthcare services remotely using technological means similar to a physician's use of telemedicine.

Louisiana's regulation of the therapeutic use of marijuana for medical purposes has a somewhat more complicated history. The legislature made its first foray into the regulation of medical marijuana in Act 874 of the 1991 Louisiana Legislative Regular Session, which authorized physicians who were "registered to prescribe Schedule I substances with the Drug Enforcement Administration" to prescribe marijuana to patients for therapeutic use.⁵ As discussed below, however, federal law does not allow physicians to legally prescribe Schedule I substances, resulting in the statutory provisions enacted in 1991 having no effect. This remained true until 2015, when the legislature began a comprehensive rewrite of La. R.S. 40:1046 and other statutes with the goal of creating a statutory framework that would actually make therapeutic marijuana available to Louisiana patients. Between 2015 and 2022, these efforts produced some seventeen legislative acts modifying the provisions of La. R.S. 40:1046.

Particularly relevant to the issues raised by your inquiry are changes made to La. R.S. 40:1046 in Act 96 of the 2016 Louisiana Legislative Regular Session. Section 1 of the act removed all references to "prescribing" marijuana and authorized physicians to "recommend" therapeutic marijuana instead. Section 1 of the act also directed LSBME and the Louisiana Board of Pharmacy to amend their existing rules to accord with the changes to La. R.S. 40:1046's provisions by eliminating references to the "prescribing" of marijuana and providing only for the "recommendation" of therapeutic marijuana by physicians. Section 2 of Act 96 contained provisions nearly identical to those provided in Section 1 of the act, but retained use of the term "prescribe" instead of substituting "recommend." While Section 1 of Act 96 became effective upon the governor signing the act into law, the provisions of Section 2 would only become effective in the event of marijuana's reclassification from a Schedule I substance to a Schedule II substance under the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.*⁶ Also relevant is Act 491 of the 2022 Louisiana Legislative Regular Session, which authorized physicians to recommend therapeutic marijuana to patients through telemedicine as provided in La. R.S. 40:1046(k).

As described above, the histories of La. R.S. 37:1271 and La. R.S. 40:1046 reflect the legislature's accommodation of the therapeutic use of marijuana by patients suffering from debilitating medical conditions when *recommended* by a licensed physician. The determination of whether the provisions of La. R.S. 47:1271(B)(3) apply to a physician's recommendation of therapeutic marijuana therefore turns on whether such *recommendations* of therapeutic marijuana are properly considered *prescriptions* of a controlled dangerous substance.

Louisiana has enacted its own Uniform Controlled Dangerous Substances Law, codified at La. R.S. 40:961 *et seq.*, which contains the following definitions:

⁵ The provisions of Act 874 of the 1991 Louisiana Legislative Regular Session were originally codified at La. R.S. 40:1021 but were subsequently redesignated as La. R.S. 40:1046.

⁶ *Id.* at §§ 3 and 4.

“Prescribe” means to issue a written request or order for a controlled dangerous substance by a person licensed under this Part for a legitimate medical purpose. The act of prescribing must be in good faith and in the usual course of the licensee’s professional practice.⁷

“Prescription” means a written request for a drug or therapeutic aid issued by a licensed physician, dentist, veterinarian, osteopath, or podiatrist for a legitimate medical purpose, for the purpose of correcting a physical, mental, or bodily ailment, and acting in good faith in the usual course of his professional practice.⁸

The current language of La. R.S. 40:1046 contains no reference to physicians “prescribing” or issuing written “prescriptions” for therapeutic marijuana, instead authorizing physicians to “recommend” the therapeutic use of marijuana to patients. La. R.S. 40:1046(A)(3) defines the recommendation of therapeutic marijuana as:

an opinion of any authorized clinician, provided within a bona fide clinician-patient relationship, that, in the sincere judgment of the clinician, therapeutic cannabis may be helpful to the patient’s condition or symptoms and is communicated by any means allowed by the Louisiana Board of Pharmacy.⁹

The definitions above demonstrate the distinction made by the legislature between the “prescription” of controlled substances and the “recommendation” of therapeutic marijuana. Specifically, while physicians are authorized to “prescribe” controlled dangerous substances “for the purpose of correcting a physical, mental, or bodily ailment” by issuing a “written request or order,” they are only authorized to “recommend” therapeutic marijuana to patients with debilitating medical conditions by providing an “opinion” that “therapeutic cannabis may be helpful to the patient’s condition or symptoms.” While there may be little practical difference between a physician “prescribing” a controlled dangerous substance and “recommending” therapeutic marijuana, there are significant legal distinctions between these two acts that provide a fundamental basis for the lawful use of medical marijuana.

The genesis of the legal distinction between the prescription of a controlled substance and the recommendation of therapeutic marijuana arises from marijuana’s classification as a Schedule I controlled substance in federal law.¹⁰ Schedule I substances are deemed to have no medical use and therefore cannot be legally prescribed by physicians.¹¹ Due to the federal prohibition against prescribing Schedule I substances, when California

⁷ La. R.S. 40:961(36).

⁸ La. R.S. 40:961(37).

⁹ La. R.S. 40:1046(A)(3).

¹⁰ 21 U.S.C. § 812(c)(c)(10), *see also* La. R.S. 40:964(C)(38).

¹¹ *United States v. Evans*, 892 F.3d 692, 699 (5th Cir. 2018), *as revised* (July 6, 2018); citing 21 U.S.C. § 812; 21 C.F.R. § 1308.11.

became the first state to authorize the use of marijuana for medical purposes upon passage of the Compassionate Use Act of 1996, the language of the resulting statute authorized “the use of marijuana for medical purposes where that medical use is deemed appropriate and has been *recommended* by a physician...”¹²

In response to California’s legalization of medical marijuana, the federal government promulgated a policy providing that physicians who recommended use of a Schedule I substance to a patient would have their federal authorization to prescribe controlled substances revoked.¹³ A group of patients and physicians filed suit over the policy and ultimately obtained a permanent injunction barring the federal government from revoking any physician’s authority to prescribe controlled substances or initiating any investigation based solely on the physician’s recommendation of marijuana to a patient.¹⁴ The federal government appealed issuance of the injunction to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the district court’s ruling. In doing so, the appellate court rejected the government’s argument that a physician’s “recommendation” of marijuana is analogous to the “prescription” of a controlled dangerous substance and found that the federal government’s policy compromised physicians’ ability to speak frankly and openly with their patients.”¹⁵ The federal government petitioned the Supreme Court of the United States for a writ of certiorari, but the court declined any further review.¹⁶

Due to the successful defense of California’s medical marijuana program in the *Conant* case, every state that has since authorized the use of marijuana for medical purposes has done so by authorizing physicians to *recommend* marijuana to patients, not to *prescribe* it.¹⁷ The Louisiana Legislature’s adoption of this distinction is clearly reflected in the revisions to La. R.S. 40:1046 described above, which eliminated references to physicians “prescribing” marijuana to now provide that physicians may only “recommend” the therapeutic use of marijuana to their patients. It is presumed that the legislature intended to change the law when making these revisions to the language of La. R.S. 40:1046.¹⁸

The clear import of the legislature’s elimination of all references to the prescription of therapeutic marijuana in the current version of La. R.S. 40:1046 is that a physician who recommends marijuana pursuant to the statute is not prescribing a controlled dangerous substance. The text of La. R.S. 37:1271 makes it equally clear that, when the conditions identified in La. R.S. 37:1271(B)(2)(b) are satisfied, physicians may utilize telemedicine without conducting any in-person patient history or physical examination, as long as no controlled dangerous substance is prescribed during the encounter. Thus, when considered together, the provisions of La. R.S. 40:1046 and La. R.S. 37:1271 clearly and unambiguously establish that the Legislature exempted the recommendation of

¹² Cal. Health & Safety Code § 11362.5 (emphasis added).

¹³ *Conant v. Walters*, 309 F.3d 629, 632-33 (9th Cir. 2002), cert. denied, 540 U.S. 946 (2003).

¹⁴ *Id.* at 634.

¹⁵ *Id.* at 636.

¹⁶ 540 U.S. 946 (2003).

¹⁷ Mikos, Robert A., *The Evolving Federal Response to State Marijuana Reforms*, 26 Widener L. Rev. 1 (2020).

¹⁸ La. R.S. 24:177(C).

therapeutic marijuana from the in-person visit requirement imposed by La. R.S. 37:1271(B)(3)) and no in-person patient history or physical examination is required prior to the physician making such recommendation.

Notably, this conclusion does not conflict with existing rules promulgated by LSBME. As referenced above, these rules provide that physicians shall not use telemedicine to “authorize or order” the prescription, dispensation, or administration of a controlled substance using telemedicine unless the physician conducted an in-person visit with the patient less than one year prior to the telemedicine encounter.¹⁹ As discussed above, however, La. R.S. 40:1046(A)(3) provides that a physician’s recommendation of therapeutic marijuana is neither an authorization nor an order, but is rather an “opinion” that “therapeutic cannabis may be helpful to the patient’s conditions or symptoms.” By contrast, a physician’s prescription of a controlled substance to a patient entails issuance of a “written request or order” for the controlled substance to be administered or dispensed to a patient.²⁰ As a physician’s recommendation of therapeutic marijuana does not constitute either an “authorization” or an “order”, the provisions of LAC 46:XLV.7513 are also inapplicable to a physician’s recommendation of therapeutic marijuana in accordance with La. R.S. 40:1046.

Stated succinctly, neither Louisiana’s statutory law nor the regulations promulgated by LSBME currently require physicians to conduct an in-person visit prior to recommending therapeutic marijuana to a patient through telemedicine. To the contrary, absent legislative amendment, the clear and unambiguous language of Louisiana’s telemedicine statutes prevents the imposition of any in-person visit requirement for telemedicine encounters, except when the physician prescribes a controlled dangerous substance.

As a final matter, nothing in this opinion should be construed to indicate that LSBME lacks the authority to regulate physician recommendations of therapeutic marijuana to patients. To the contrary, LSBME is statutorily authorized to regulate the practice of medicine in Louisiana through the adoption of rules, regulations, and standards, and by taking appropriate administrative actions.²¹ A physician’s recommendation of therapeutic marijuana to a patient undoubtedly constitutes the “practice of medicine” as defined in La. R.S. 37:1262 (3):

“Practice of medicine”, whether allopathic or osteopathic, means the holding out of one's self to the public as being engaged in the business of, or the actual engagement in, the diagnosing, treating, curing, or relieving of any bodily or mental disease, condition, infirmity, deformity, defect, ailment, or injury in any human being, other than himself, whether by the use of any drug, instrument or force, whether physical or psychic, or of what other nature, or any other agency or means; or the examining, either gratuitously or for compensation, of any person or material from any person for such purpose whether such drug, instrument, force, or other agency or means is

¹⁹ LAC 46:XLV.7513.

²⁰ La. R.S. 40:961(36) and (37); *see also* La. R.S. 40:961(2) and (14) (defining “administer” and “dispense”).

²¹ La. R.S. 37:1270(A)(1) and (B)(6).

applied to or used by the patient or by another person; or the attending of a woman in childbirth without the aid of a licensed physician or midwife.

While LSBME possesses broad authority to regulate the practice of medicine in Louisiana, the legislature has also placed statutory restrictions on the exercise of this authority, such as those imposed by La. R.S. 37:1271(B)(2)(b). While these statutory restrictions substantially limit LSBME's ability to require physicians to conduct an in-person patient history or physical examination before engaging in a telemedicine encounter, the board may still utilize means within its authority to regulate the recommendation of therapeutic marijuana by physicians.

The Attorney General recognizes that the existing laws enacted by the legislature prevent LSBME from imposing any in-person visit requirement prior to a physician recommending therapeutic marijuana. These statutory restrictions on LSBME's authority create a potential avenue for abuse of Louisiana's therapeutic marijuana program by facilitating the recommendation of marijuana to individuals who do not suffer from a debilitating medical condition. In light of concerns expressed by LSBME, the legislature should consider amending the provisions of La. R.S. 37:1271 and La. R.S. 40:1046 to remove these restrictions.

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

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BY:


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