

The State Medical Marijuana Identification Card Program: A Debate

Right to Privacy Is Worth Defending

By Jeffrey Hergenrather, MD

Proposition 215 neither limits the conditions for which a physician can approve cannabis nor does it require a California registry of cannabis users or their physicians. Keeping medical information from governmental view protects the patient's and the physician's rights to privacy. Many patients are asking whether they should submit to the new state ID card program, and most say they will never participate in a state-run program that reveals their identity.

The state ID card program was created by SB 420 along with allowable quantities for possession and cultivation¹. On its surface it seems like a good way to protect patients from improper arrest, detainment, and seizure of their plants and medicine. It is based on a review of elements of the medical record submitted by the patient and the physician to the county health department. Once the information is verified by the physician, the state creates a card containing a photograph, unique ID number, county of issuance, expiration date, and a toll-free phone number that law enforcement can call at any time to verify the authenticity of the card.

The card does not include—but the county health department may retain—such information as the patient's name, address, telephone number, and the name of the approving physician, address and telephone number.

SB 420 makes no reference to a state registry of cannabis-approved patients. How can the state collect this verification information without creating a state registry? Governor Schwarzenegger made it clear at the inauguration of the state ID card program that California would not protect the information about patients and their physicians from the federal government. In effect this affirmed that there is in fact a state database accessible to state, federal, and private inquiries. Access to all of this verification information infringes on privacy rights of the patients and approving physicians.

The presence of an unprotected database tends to discourage physicians and patients from getting involved in cannabis approvals. Many physicians who approve cannabis use by their patients do so confidentially. Thousands of California physicians have issued approvals documented only in the patient's medical record.

An Ominous Trend

Recently in Sonoma County some community health clinics have stopped offering cannabis approvals. The physicians don't want to complicate their lives with court testimony, public misinformation and possible scrutiny by the state medical board. Patients don't want the risks of being identified as cannabis users for many reasons, not the least of which are burglaries and unwarranted state and federal prosecution. Revealing the information could adversely affect their livelihoods, social standing, and peace of mind. Patients using cannabis who are physicians, nurses, lawyers, judges, county and federal employees, law enforcement officers, counselors, teachers, healthcare workers, professional drivers, equipment operators and many others simply cannot afford to reveal their cannabis use in our society at this time.

The voluntary ID card program requires the patient to get the card in their county of residence only. Especially in smaller counties, just going to the health department to apply for a state ID card could mean loss of privacy.

Is there really a need for a verifiable identification program beyond a direct

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inquiry of the approving physician? In response to inquiries from law enforcement, the physician should be prepared to affirm that a person is indeed their patient and that an approval to use cannabis has been made.

Although not required by law, many physicians produce a written document for the patient that includes identifying information and facts of the approval, such as a renewal date. Over the first 10 years of the law these so-called "approval documents" have been accepted by many in law enforcement and the California judicial system as valid and verifiable identification documents. The state attorney general should affirm their validity as alternatives to the voluntary state ID card.

Since the state program began issuing cards a little more than a year ago, there have been troubling reports of police and sheriff's deputies rejecting physician's documents as invalid, insisting that only a state ID card is a bar to arrest. Whether this stems from ignorance or deception, it must stop.

Some cannabis dispensaries, too, are demanding that clients have the state ID card. They seem to be putting sales before principles.

The ID card is not synchronized with the renewal dates of the approving physician. Cards are issued only for a full year term. Even if the physician writes a trial approval for, say, two months—which my colleagues and I do when there are questions about suitability—the patient will be issued a state ID card for a full year. At that point the Department of Public Health is approving the use of cannabis despite the treatment plan of the physician.

The state ID card is prohibitively expensive for those patients on limited incomes. Some counties are charging up to \$100 annually.

Before anyone requests a state ID card they should read the details, especially when it comes to the annual renewals enumerated in section 11362.76 of the law. To list a few: the card shall be deemed expired if the patient fails to 1) notify the county health department within seven days of any change in the person's attending physician or primary caregiver, 2) provide updated written documentation of the person's serious medical condition, 3) submit the name and duties of the person's designated primary caregiver for the forthcoming year.

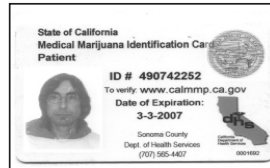
Another troubling trend involves county bureaucrats deciding not to accept the approvals of certain physicians. One physician who was placed on probation by the Medical Board for alleged practice and documentation deficiencies has appealed the decision while he continues his monitored medical practice. The county's punitive action sets the stage for any county going beyond the Medical Board in persecuting a physician for cannabis consultations by invalidating his approvals and access to the ID card.

Understandably, law enforcement wants to have a verifiable method of identifying legitimate cannabis users. Whether the patient has a state ID card, a

Legitimacy Conferred Outweighs Risks

By Philip A. Denney, MD

The passage of Senate Bill 420, which became law on January 1, 2004, provided California medical marijuana patients the option to participate in a voluntary ID Card program. The program came about as part of a backroom political deal between the police and politicians, which also included, among other things, guidelines for possession and cultivation of medical cannabis. The police wanted very limited possession guidelines and the politicians wanted an ID Card to prevent arrests.



The sponsors of SB420 knew full well that a statute enacted by the initiative process cannot be changed in any way without another vote of the people and were careful to use terms like "voluntary" and "guidelines." Thus it is clear that Proposition 215 is the law and that it contains not a single word about ID cards. You don't have to have an ID card to legally use cannabis as medicine.

What is a patient to do? He or she must choose between the potential loss of privacy regarding their cannabis use and the purported protection from arrest offered by the police. A number of problems become readily apparent. First and foremost, participation requires a level of trust for the police who have been utterly

private physician's approval document or a verbal approval from one's physician, all are entitled to the protections of the law². Despite the well-meaning efforts by county health department personnel around the state, I don't believe it is possible to have a state-operated verification program that will ever attract the participation of a majority of approved cannabis patients. There are, however, ways to improve participation.

Since SB 420 allows counties to designate outside entities to perform document verification tasks, there is an opportunity for an institutional "firewall" in regards to protecting the patient's anonymity and privacy. A physician's letter of approval and even verbal approvals are verifiable with the appropriate procedures. An independent organization committed to privacy and anonymity—the Oakland Cannabis Buyers Cooperative, for example, or a county medical society or a professional organization such as the Society of Cannabis Clinicians could perform the verification procedures. A non-governmental organization could more cost-effectively provide the 24-hour toll-free telephone number or web-based system giving officers in the field immediate access to information necessary to verify the validity of a citizen's "medical use" claim. Patients will be more inclined to submit to a verification process if it is between an independent organization and their physician. After all, use of cannabis in California is based solely on the physician's approval and a verification process need not require a state database and bureaucracy.

One thing is for sure: the passage of Proposition 215 and SB 420 have forced a conversation in counties throughout California about recognizing and accommodating medical cannabis users. Were it not for the ubiquitous use of cannabis and

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untrustworthy about this issue. Secondly, information about participants in the program could end up on the desk of a DEA agent in Washington. And thirdly, as a matter of fairness, no one carries an ID card for any other medication. Why should patients medicating with cannabis be singled out?

Despite the above, I believe there are a number of advantages inherent in the program. The protection from arrest is potentially huge and, if real, frees patients from the legal morass of the affirmative defense. The privacy issues may turn out to be moot because the state program allows counties to destroy any identifying information once the card is issued.

The most compelling reason to support the ID card program however may be that forcing counties to issue medical cannabis ID cards requires them to recognize the legitimate use of cannabis as medicine. Patients in the "Red State" counties of California would have a measure of security. Neanderthal politicians (with apologies to Neanderthals) such as the San Diego County Board of Supervisors would be required to enforce all the laws, even the ones they don't agree with. What a concept!

In summary, despite some misgivings, I support a policy of insisting that county governments implement the voluntary medical marijuana ID card program as soon as possible. The legitimacy conferred on cannabis as medicine and on cannabis using patients, in my opinion, far outweighs the risk.

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the conflict with federal law, this process of validating and verifying medical users would quickly vaporize. The time is overdue to remove cannabis from Schedule 1 of the Controlled Substances Act.

Notes

1. Health & Safety Code 11362.77 (a) and (b): define the weight as eight ounces of dried mature processed flowers of female cannabis plants per qualified patient. In addition, it allows the qualified patient or primary caregiver to maintain no more than six mature or 12 immature plants. These quantities may be exceeded in the doctor's recommendation in order to meet the patient's medical needs.

2. "With respect to individuals, the identification system established pursuant to this act must be wholly voluntary, and a patient entitled to the protections of Section 11362.5 of the Health and Safety Code need not possess an identification card in order to claim the protection afforded by that section." From H & S C, Section 11362.5, Section 1. (d) (2)

PROHIBITION BY BUREAUCRATIC FIAT:

The Contra Costa County health department has turned down ID card applicants whose cannabis use was approved by Dr. Tod Mikuriya, citing his probationary status. This is a dangerous precedent, given how vague the "standard of practice"



TOD MIKURIYA, MD