Summary of Medical Marijuana Work Group Session
May 26, 2010

As directed by the Children, Families, Health, and Human Services Interim Committee, legislative staff invited a group made up of medical marijuana caregivers, city and county officials, and law enforcement and school representatives to discuss potential changes to the Medical Marijuana Act. The Committee had asked that the group review the law and develop recommendations for improving regulation of patients, caregivers, and physicians.

The following issues were raised during the group's first meeting on May 26, 2010.

Definitions in the Medical Marijuana Act

- Debilitating Medical Condition: Some participants suggested adding PTSD and insomnia as additional qualifying conditions. Some participants discussed whether chronic pain should be better defined (perhaps by defining what does NOT constitute chronic pain) or whether a minimum time period for experiencing chronic pain should be part of the definition. Others noted that the definition is equally vague among many of the states with medical marijuana laws.
- Medical Use: Some participants noted that that this definition allows only a patient or caregiver to possess, cultivate, transport, deliver, and transfer medical marijuana, but that many large caregiver have employees. They wondered whether each employee must be a licensed caregiver or if some other category could be created for employees who work in larger caregiver operations. That category would be for a person who could handle the medical marijuana but not provide it or use it.
- Physician: Participants discussed the idea of whether a physician should be not only licensed but also in good standing with the Board of Medical Examiners, however that term may be defined. There was discussion of whether it was reasonable to set additional requirements, such as that the physician not be under a disciplinary action.
- Qualifying Patient: There was discussion of whether a qualifying patient must have more than the diagnosis of a debilitating medical condition, such as written certification from a physician, a pending application for a registry card and/or a valid registry card. Some people felt that a clear definition of this term and consistent use of the definition throughout the statute would clarify many of the issues of concern to law enforcement.

Various interested parties have suggested additional changes to the definitions section, but the suggestions were not fully discussed at the first meeting. Items that may be discussed at future meetings include definitions for:

- Usable Marijuana: One participant asked staff to make sure the idea of changing the definition from "dried leaves and flowers" to "cured leaves and flowers" was discussed at a future meeting.
- Plant: Law enforcement officials have suggested the term needs to be defined.
- Standard of care for physicians: State agency representatives have suggested that the law needs to establish a standard of review by physicians; one proposal focused on using the definition contained in the recent Board of Medical Examiners position paper on the standard of care for medical marijuana patients.

Issues Related to Current Regulatory Guidelines

- Caregivers for Minors: Currently, only parents may act as a caregiver for a minor child. The group agreed that it would make sense to allow the parent to contract with a caregiver to obtain medical marijuana as long as the parent remained solely responsible for obtaining the marijuana and controlling the dosage and frequency of the minor's medical use.
- Caretaker Relatives: The group discussed whether people who have officially been designated as caretaker relatives for other purposes should also be added to the Medical Marijuana Act and given authority, along with parents and legal guardians, to consent to and be responsible for a minor's use of medical marijuana. *Staff agreed to look into this issue and provide more information.*
- Caregiver Background Checks: Current law requires that a caregiver be licensed unless the person has been convicted of a felony drug offense. Some participants cautioned against making the requirements too strict, as that could result in reduced access to caregivers. However, many participants suggested that people with certain other criminal offenses or offender statuses should be prohibited from being a caregiver. Suggestions included people who:
    - Are registered sexual offenders or registered violent offenders;
    - Have been convicted of:
        - DUI offenses related to the use of drugs,
        - felony theft (because caregivers may handle relatively large amounts of money),
        - prostitution,
        - violent, aggravated, or domestic assault,
        - kidnapping,
        - murder,
        - crimes of moral turpitude, or
        - any felony offense.

  Participants generally felt the types of criminal offenses that might be added should be left to the Legislature. *Staff agreed to review a study conducted by the Department of Public Health and Human Services (DPHHS) on background checks for direct care workers to see the list of criminal offenses that the study concluded should result in denial or restrictions on licensure for people who work in the direct health care field.*
- Caregiver as Patient: Participants suggested that if the intent of the law is to allow a caregiver to also be a patient, the law should be made clearer on that point. The law is currently being interpreted by DPHHS and most other parties as allowing a person to be both a patient and a caregiver. Participants agreed the Children and Families Committee should consider this policy question.
- Minimum Age for Caregiver: The definition of caregiver allows anyone 18 years of age or older to be a caregiver. Some participants questioned why the age was set at 18 and whether it should be higher. Others noted that young people may be acting as caregivers for parents who have a debilitating condition.
- Caregiver to Caregiver Transfers: Participants discussed how caregivers could legally obtain the plants they need to provide medical marijuana in the first 120 days after a patient selects them as a caregiver and the plants they've started to grow are at a stage where they can provide medical marijuana for that patient. The law is silent on that point. Some caregivers have sold excess marijuana to other caregivers under a section of the law known as the "affirmative defense." (50-46-206, MCA) Participants generally felt there should be some provision in the law that allowed caregivers to obtain the marijuana from another registered entity. Creation of a "grower" category was discussed as one solution to this issue.
- Caregiver Compensation: Law enforcement representatives expressed concern that the provision allowing a caregiver to receive "reasonable compensation" has led to black-market prices. However, after some discussion, the group decided that the language may not need

to be changed because patients will not use a caregiver if the caregiver's prices are too high.

- Confidentiality of Information: Some participants said the confidentiality requirement in 50-46-103(8) may create problems for local governments that have obtained caregiver information for the purposes of a business license and may be subject to the open records provisions of the state constitution and law. Jeff Buska noted that DPHHS is required to keep the list confidential, but caregivers and patients are not granted the same confidentiality. They have a duty to show their card when requested. School representatives wondered if school districts could learn whether students or employees had a medical marijuana card. Caregivers expressed concern about disclosure of growing locations to people outside of law enforcement. DPHHS indicated that it will soon have an online system for law enforcement to use to check at any time on whether a person has a registry card, either as a patient or caregiver.
- Dispensaries vs. Caregiver-Patient Relationships. The group discussed how the dispensaries allowed in other states differ from the caregiver-patient relationship established in Montana law. Many caregivers in Montana grow for a number of people and may have storefront businesses. However, they are not allowed to sell marijuana to any registered patient. Instead, they can provide it only to patients who have identified them as the patients' caregiver. A patient may have only one caregiver. The group agreed it did not want to change the current caregiver-patient requirement.
- Dosages: Some participants wondered whether any limits should be established on the amount of marijuana a patient could receive in a specified time period. Currently, a person may possess one ounce and six plants. But there is no limit on how many times a day, week, or month that an ounce may be purchased.
- Application Process: Some caregivers expressed concerns about the current DPHHS delay in processing applications and asked whether an expedited process could be established for certain types of patients, such as hospice patients. Jeff Buska noted that DPHHS processes applications on a first-come, first-served basis. He also indicated that a process using a faxed application would not be able to provide the application fee required under law. However, he did say the department is developing a uniform patient application form that combines the two separate forms now in use.
- Revocation of Cards: Some participants suggested that the law needed to be clear on what steps DPHHS or law enforcement could take if a person's card has been revoked. Currently, a card is considered void under some circumstances and may be revoked by DPHHS under others. But the law doesn't provide any clear guidance on what happens in the event of revocation, such as whether a waiting period should occur before a person may apply again.

Issues Related to the Affirmative Defense Afforded Under the Law

The group began a discussion of 50-46-206, MCA, the affirmative defense section of the law, but did not make any final decisions or recommendations. The discussion focused on the following points:

- Subsection (1): This subsection doesn't specify that a person needs either a written certification or a card to use the affirmative defense and does not indicate whether the determination of a debilitating condition needs to be made before or after a person is arrested or cited. Law enforcement officials felt that those ambiguities should be clarified. There was discussion of using the term "qualifying patient" in this section if the definition is clarified. Caregivers noted that some people don't want to register for cards because they don't want their names on any list kept by the state, particularly a list that an employer or someone else may somehow access that shows they use medical marijuana. Law enforcement representatives suggested that people who want the protection of the law should be willing to apply for the card. The participants agreed that the details of this section should reflect policy decisions that need to be made by the Legislature.

- Subsection (1)(b): Some participants believe this subsection allows anyone to provide marijuana to a person who has been determined to have a debilitating medical condition as long as the marijuana is used only for medical purposes. They believe the section allows any person – not just a caregiver – to use the affirmative defense. Some participants suggested that this subsection should be stricken or that "caregiver" should be substituted for the word "person" in the subsection.
- Subsection (3): This subsection appears to contradict the allowable limits for possession (six plants and one ounce) established in 50-46-201(2), because it allows for "an amount that is reasonably necessary" to ensure an uninterrupted availability of marijuana. Some participants suggested amending this subsection to include a cap on the amount that is based on the amount allowed in 50-46-201.

New Regulatory Structure/Issues

- Regulatory Board: The group generally agreed that a regulatory board of some type was needed for caregivers, along with a process for requiring that caregivers keep records of their patients and transactions and that the records be open to inspection by some government entity. Options included splitting oversight of various medical marijuana activities among various state agencies (such as DPHHS for patients, Department of Labor and Industry for caregivers, and Department of Agriculture for growers) or consolidating regulation of most activities under one board in the Department of Labor and Industry. The board would have licensing and inspection authority. *Staff will provide information at the next meeting about the general provisions governing DOLI boards and how the boards typically operate.*
- Caregiver Requirements. There was some discussion of whether caregivers should need to meet minimum training and/or continuing education requirements. This was seen as an area that could be addressed by a regulatory board.
- Tiered Levels of Oversight: The group appeared to be in agreement that a tiered system of regulation was needed, depending on how many patients a caregiver serves. Participants discussed the idea of adding a category of "grower," who would be licensed to grow marijuana and sell it to caregivers. Some limit would be set on the amount of marijuana a grower could have. Growers would be treated as a business and required to pay fees, keep records, and meet safety and health standards. It also was envisioned that caregivers could be licensed as both a caregiver and a grower. Growers and caregivers with a higher number of patients would be subject to greater regulation (including inspections) than would caregivers with a small number of patients (perhaps 10 or fewer). The licensing fee structure also may be based on the number of patients.
- Requirement for Montana Production. Participants discussed whether the law should clearly state that medical marijuana needs to be grown or produced in Montana. They noted that federal law prohibitions the importation of marijuana or marijuana products and discussed whether an adequate oversight/tracking system would allow law enforcement to detect imported drugs. Some participants said there may be value in allowing marijuana from other states to be brought into Montana, to develop new strains that might better treat certain medical conditions. However, others noted that transporting marijuana across state lines would be a violation of federal law, even if it was intended for medical purposes.
- Regulation As an Agricultural Product: Participants discussed various issues relating to the growing of marijuana, including pest control, use of fertilizers, use of pesticides, and the effects of fertilizer or pesticide use on municipal or county water systems and on patients. There was some question of whether local public health departments or sanitarians should be able to inspect caregiver operations for public health and sanitation concerns, in addition to any state inspection or regulation. However, drawbacks were also noted to this idea, including the costs cities or counties could incur. There was discussion of whether local government inspections of caregiver operations should occur only if someone files a complaint or whether they could be undertaken at the local government's own initiative.

- Law Enforcement Seizures: Law enforcement representatives wanted clarification in the law on the amount of marijuana that could be seized from a patient or caregiver who had amounts exceeding the authorized limits. Should all of the drugs be seizable, as a violation of the law, or should only the amount over the allowable limit be seized? Different agencies have handled this question in different ways.

Physician Issues

In addition to discussing whether the definition of physician should be changed to include some reference to being in good standing, some participants discussed their concerns about the recent Board of Medical Examiners action disciplining a physician for violating a standard of care in conducting exams for patients seeking to obtain a medical marijuana card.

Questions also were raised about whether hospitals or other health care facilities should be prevented from placing restrictions on whether a physician may provide written certifications, as well as what other medical marijuana states provide in terms of protections for physicians.

Because only a few participants were still available for this discussion, issues related to the physician's role in the certification process will be discussed at the next meeting.

Participants

Industry
Rick Rosio, Montana Pain Management
Jason Christ and Ardyce Taylor, Montana Caregivers Network
Tom Daubert, Patients & Families United
Chris Lindsey, attorney
Jim Gingery, Montana Medical Growers Association
Rebecca Gross, A Kinder Caregiver, Inc.

Law Enforcement/Local Government
Lewis Smith, Powell County Attorney
Gina Dahl, Hill County Attorney
Kris Hansen, Deputy Hill County Attorney
Jim Smith, Montana Sheriffs and Peace Officers Association/Montana County Attorneys Association
Pat Brinkman, Great Falls Police Department
Chad Parker, Attorney General's Office
Greg Sullivan, Bozeman City Attorney

Schools
Kris Goss and Joe Brott, Montana School Boards Association