

Montana's Medical Marijuana Act: Emerging Issues

Prepared by Sue O'Connell
for the Children, Families, Health, and Human Services Interim Committee
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Background

In November 2004, Montana voters approved the use of medical marijuana through passage of Initiative 148. The measure was approved by 62% of the voters.

In the first year after passage, the Department of Public Health and Human Services (DPHHS) issued medical marijuana registry cards to 176 individuals. The number of patients remained relatively low in the next two years and did not reach 1,000 until June 2008. A year later, there were 2,923 registered patients. Just six months after that, in December 2009, the number had increased to 7,339. And in the first three months of this year, DPHHS has issued nearly 5,000 more cards.

As of March 31, there were 12,081 patients with active registry cards. In addition, 2,797 people were registered to provide marijuana on behalf of one or more patients.

With the explosive growth in these numbers, government entities at all levels have faced a host of questions that are not always easily answered by existing law. So the Children, Families, Health, and Human Services Interim Committee decided in spring 2010 to take a look at the new and emerging issues related to the Montana Medical Marijuana Act.

This briefing paper summarizes the law, the use of the program, and some of the key issues facing policymakers.

First, a Note About Terminology

People often talk about medical marijuana being "prescribed" and "dispensed." However, those terms are not contained in the law itself.

Marijuana remains a Schedule I controlled substance under federal and state law, meaning doctors cannot write prescriptions for it and pharmacies cannot stock or dispense it. In Montana, doctors instead provide "written certification" that:

- a person has a "debilitating medical condition" that is listed in the Montana Medical Marijuana Act; and
- the potential benefits of the medical use of marijuana are likely to outweigh the health risks of using the marijuana.

Likewise, marijuana is not "dispensed." However, individuals who are designated as "caregivers" may grow marijuana and provide it to patients who have specifically chosen the person to act as their caregiver. The role of the caregiver varies. Some provide medical marijuana to only one patient, while others have created businesses and supply medical marijuana to a relatively large number of patients.

Montana also does not have "dispensaries" as some medical marijuana states do. Dispensaries may sell marijuana to any registered medical marijuana user. There is no direct patient-provider relationship in those states, as there is in Montana.

Page 12 contains a glossary of terms used in the medical marijuana program.

What Exactly Does the Law Allow?

The Montana Medical Marijuana Act contains the following key provisions:

- A qualifying patient who has received a physician's written certification of a debilitating medical condition may apply for a medical marijuana registry identification card.
- A qualifying patient may designate an individual to serve as a caregiver; that caregiver may legally grow and provide medical marijuana for that patient.
- A qualifying patient may possess up to six plants and one ounce of usable marijuana. A caregiver may possess the same amounts for each patient who has named the person as a caregiver.
- DPHHS must process medical marijuana registry applications and issue and renew registry cards for qualifying patients.
 - ▶ DPHHS must approve or deny applications within 15 days of receipt and must issue registry cards within five days of approval of an application.
 - ▶ DPHHS may deny an application if a person does not provide the information required by the law, if the agency determines that the information was falsified, or if the person is not qualified to receive a registry card.
- Caregivers do not apply separately for a registry card; they receive a card when patients designate them on the patient's application form.
 - ▶ A person with a felony drug conviction is prohibited from being a caregiver.
 - ▶ Caregivers may not use marijuana.
- A patient may not:
 - ▶ operate a vehicle, aircraft, or motorboat while under the influence of marijuana.
 - ▶ smoke marijuana in a school bus or on public transportation, on school grounds, in a correctional facility, or at a public park, beach, recreation center, or youth center.
- Employers are not required to accommodate the medical use of marijuana.
- Governmental medical assistance programs and private health insurers aren't required to reimburse a patient for the costs of its use.
- A patient or caregiver with a may not be arrested, prosecuted, or penalized for growing, buying, or having amounts of marijuana within the legal limits.
 - ▶ Patients and caregivers are presumed to be engaged in the medical use of marijuana if they possess a registry card and don't have more marijuana than allowed.
 - ▶ Patients and caregivers may use as a defense to any criminal charge involving marijuana the fact that they are engaged in the medical use of marijuana.
- Possession of or application for a registry card does not constitute probable cause for any government agency to search the person or the person's property.

Who Qualifies for Medical Marijuana, and How?

A person may apply for the program by submitting the following materials to DPHHS:

- a one-page form providing personal information and identifying a caregiver, if the patient chooses to have another person provide the medical marijuana;
- a one-page statement signed by a physician licensed in Montana that certifies the patient's debilitating medical condition; and
- a fee of \$25 for a new application or \$10 for a renewal application.

A registry card is valid for one year. A patient may renew the card by submitting a new form and a \$10 fee.

Both adults and minors are eligible for the medical marijuana program. However, a minor's custodial parent or legal guardian must sign a minor's application for a registry card, agree to act as the minor's caregiver, and agree to control the minor's acquisition and use of the marijuana.

DPHHS statistics through March 2010 showed that 295 physicians had certified the debilitating medical conditions of the 12,081 people enrolled in the registry. Fourteen of those physicians had certified more than 100 patients, while 23 had written certifications for more than 20 but fewer than 100 patients.

Another 106 physicians had provided written certification for just one patient, while 83 doctors had written certifications for two to four patients.

Who Has a Medical Marijuana Card, and Why?

DPHHS statistics show that medical marijuana patients live in every county of the state except two — Garfield and Petroleum. The number of patients as a percentage of population is highest in Mineral County, where nearly 3% of the county's population holds a registry card.

A table on Pages 10 and 11 lists the number of patients in each Montana county as of March 31, 2010.

DPHHS lists the average age of a medical marijuana patient as 41. But 21- to 30-year-olds make up the largest percentage of cardholders, at nearly 25%. They are followed by 51- to 60-year-olds, who represent nearly 23% of the cardholders.

DPHHS also collects information on the debilitating medical conditions that doctors have certified for registered patients. More than half of the patients have a debilitating condition that involves severe or chronic pain, with 6,988 of the patients listing that medical condition on their applications. People with severe or chronic pain and muscle spasms make up the second-largest category of cardholders, with 2,634 people listing that condition.

The tables on the following page provide more information about the ages and medical conditions of medical marijuana patients.

Medical Marijuana Patients by Age

Age Group	# of Patients	% of Cardholders
Under 18	22	0.18%
18-30	397	3.29%
21-30	2,981	24.68%
31-40	2,503	20.72%
41-50	2,476	20.49%
51-60	2,762	22.86%
61-70	917	6.76%
71-80	105	0.87%
81-90	16	0.13%
Over 90	2	0.02%
Total	12,081	100%

Medical Marijuana Patients by Medical Condition

Debilitating Medical Condition	# of Patients
Cachexia or Wasting Syndrome	400
Cancer, Glaucoma, or HIV (AIDS)	355
Multiple Sclerosis	23
Seizures	116
Severe Nausea	218
Severe or Chronic Pain	6,988
Severe or Chronic Pain/Muscle Spasms	2,634
Severe or Chronic Pain/Nausea	616
Severe or Chronic Pain/Seizures	106
Severe or Chronic Pain/Nausea/Muscle Spasms	372
Severe or Persistent Muscle Spasms	211
Severe Seizures and/or Nausea and/or Muscle Spasms	42

Who's Providing It, and to How Many People?

Medical marijuana patients may either grow the marijuana on their own or select someone to act as a caregiver who will grow and provide the marijuana to them.

Caregivers do not register with DPHHS or pay a fee of any kind to serve as a caregiver. Instead patients designate a caregiver on their own applications for a registry card. The price a patient pays for the marijuana is negotiated between the patient and the caregiver.

DPHHS statistics through March 2010 showed that patients had designated 2,797 caregivers. However, 776 of the 12,081 patients with active cards had not identified a caregiver. That means those patients are growing their own marijuana for medical use. Another 1,554 caregivers were providing marijuana to just one patient, and 746 were providing it to two to four patients.

At the other end of the spectrum, 109 caregivers had 20 or more patients, while 47 had 15 to 19 patients. A caregiver with 15 patients would be authorized to possess 90 plants and 15 ounces of marijuana.

A table showing the number of caregivers in each county is on Pages 10 and 11.

What Questions Are People Asking, and Why?

Some issues related to medical marijuana — particularly those involving law enforcement — have been simmering below the surface since the law passed. But with the recent growth in the number of patients and caregivers, a wide range of entities have found themselves facing questions about the law. And as they look for answers, some people feel the law provides too little guidance in many areas.

Many of these interested parties, including businesses that grow and provide medical marijuana, have been involved in discussions to see where they may agree on potential changes to the law.

Following is a summary of some of the more high-profile questions and issues that have surfaced in recent months. The points below by no means cover all of the questions that have arisen.

State Government Issues

- *What resources should DPHHS put toward the medical marijuana program?* With hundreds of applications arriving daily at the DPHHS offices, the agency has fallen behind in processing applications and has had to hire temporary staff to help with the process. It also must store applications securely, because they contain confidential information.
- *How should complaints by applicants or program participants be handled?* DPHHS has no authority to investigate or regulate activities related to the application process. However, the agency does receive complaints from people unhappy with third parties handling their applications.

- *Are the requirements in place for physician certification sufficient?* Some physicians appear to be conducting appointments via Web cams or telemedicine. Some do not require medical records. Some are not the doctor a person sees on a regular basis. People have questioned in particular what constitutes a "bona fide physician-patient relationship." The law uses this term but does not define it.
- *Is there a standard of care that physicians who provide written certification should follow?* The Board of Medical Examiners is looking at this issue.
- *Are there any circumstances in which pharmacies can handle medical marijuana?* Pharmacies, particularly those located in hospitals, have asked the Board of Pharmacy for guidance on this question.
- *Do other state agencies have a role in the medical marijuana program?* The Department of Agriculture has determined it may license a caregiver as a nursery if the caregiver is selling whole plants or parts of plants. Licensing fees would apply and would be based on the sales generated by the business.

Community Issues

- *What city zoning and licensing laws should apply to caregivers? Do other local regulatory activities come into play?* As caregivers have begun setting up storefront businesses, local governments have dealt with a host of issues related to zoning and business licenses, as well as questions related to inspections for compliance with requirements such as building and fire codes. Some cities have established moratoriums on the issuance of business licenses as they examine these issues.
- *What requirements should or could be placed on the location of caregiver operations?* Community residents have expressed concern about the location of caregiver operations near schools, day care centers, and churches.
- *How should schools handle students or employees who are registered medical marijuana users?* School districts believe the Federal Drug-Free Schools and Communities Act allows them to prohibit the use of medical marijuana on school grounds. Questions may remain, however, about students or employees who use medical marijuana off campus but may be under the influence of the drug when they are in school. The University of Montana has banned medical marijuana from its campuses based on the provisions of the Drug-Free Schools and Communities Act; Montana State University is expected to follow suit.
- *Should medical marijuana patients be allowed to use marijuana when they're admitted to a hospital?* The Clean Indoor Air Act prohibits smoking in any public place and covers any "smokable product." That would prevent patients from smoking marijuana in the hospital, but patients have sometimes asked to ingest marijuana in another form. Hospitals are uncertain how to ascertain the dosage of marijuana the patient may be receiving and how the marijuana may interact with other treatment being provided by the hospital. The hospitals are also uncertain whether they can legally store marijuana on hospital premises.

- *What requirements may employers place on employees who have a medical marijuana card?* The law specifically says an employer is not required to "accommodate" the use of medical marijuana in the workplace, but questions remain about what limitations may be set. A wrongful discharge suit is currently pending in Great Falls.
- *Are there any additional locations where use of medical marijuana should be prohibited?* A medical marijuana user currently may use marijuana in public as long as the use does not occur in the specific locations listed in the law.

Law Enforcement Issues

- *Should additional people be prevented from being caregivers?* Law enforcement is concerned that only people with felony drug convictions may be prevented from serving as a caregiver. Officers raise questions about whether people who have committed sexual offenses or violent offenses should be allowed to be in the position of selling marijuana, possibly marketing to young people
- *Should background checks of potential caregivers be expanded beyond Montana?* Currently, background checks do not include offenses in all other states so someone with a felony drug conviction in another state may still receive a caregiver card in Montana.
- *Should caregivers be required to report the location of their growing operations so they can be inspected?* Law enforcement officials note that the businesses are not subject to inspection to make sure they are in compliance with the Medical Marijuana Act or other state laws or regulations related to public health or taxation.
- *How can issues related to driving while under the influence of medical marijuana be addressed?* The Montana Medical Marijuana Act prohibits a person from driving while under the influence of marijuana but enforcement can be a problem.
- *Is it possible to arrest and charge a person for possessing marijuana if they've applied for a registry card but not yet received it?* Officers have sometimes stopped a person who is in possession of marijuana only to be told that the person has applied for a medical marijuana card or will be named as a caregiver after an application is processed.
- *Do the limits on the amount of allowable marijuana need to be clarified?* The law allows possession of one ounce of usable marijuana, but makes no distinction about the form of the marijuana or the strength of the product. Questions abound about how the limits should be applied to such varying products as baked goods, hashish, and liquid tinctures.
- *Should the strength of the marijuana be a factor?* The strength of not only dried marijuana but also other products may vary greatly.

Industry Issues

- *Are people hired to help a caregiver with the growing or delivery of marijuana covered by the Montana Medical Marijuana Act?* Caregivers with many patients may need to hire employees to help them grow and provide the marijuana, but the law is unclear on whether those employees are protected by the provisions of the law.
- *May caregivers exchange marijuana among themselves to ensure an uninterrupted supply to their patients?* This question comes into play if a caregiver loses some plants and is unable to meet a patient's needs.
- *Should restrictions be placed on the location, signage, or advertising of storefront businesses?* Some caregivers have been willing to work with local government officials on these questions because they want to accommodate community concerns.
- *Should the list of debilitating medical conditions be expanded to include additional conditions?* Advocates believe there are other medical conditions that could be alleviated by the medical use of marijuana.
- *Should the state regulate the industry?* Stakeholders have said some licensing and oversight requirements — including record-keeping and reporting requirements — may ensure transparency and create a higher comfort level about the industry among state and law enforcement officials.

What Have the Courts Said?

Courts often rule on questions brought before them and establish case law that serves as guidance on legal issues, until or unless a statute is changed.

However, few court actions involving the Montana Medical Marijuana Act have been filed. The Montana Supreme Court has ruled in two cases. A 2008 case involved conditions imposed on a person as part of a sentence in a drug case. A 2009 case involved a wrongful discharge case that included medical marijuana as an issue. While the Supreme Court decided in favor of the employer in the 2009 case, it did so in a decisions that may not be cited as case law.¹

The 2008 case involved an appeal by Timothy S. Nelson, who had been charged with seven counts related to manufacture of methamphetamine and possession of marijuana and drug paraphernalia. At the time of his arrest in April 2006, he told authorities he had applied for a medical marijuana card. DPHHS issued a registry card in December 2006. In February 2007, Nelson entered into a plea agreement in which he pleaded no contest to the criminal possession or manufacture of dangerous drugs. He received a three-year deferred sentence.

The court imposed two conditions on his sentence that related to his medical use of marijuana. One condition allowed him to use medical marijuana only in a pill form that

¹ Johnson v. Columbia Falls Aluminum Co., LLC, 2009 MT 108N, 2009 Mont. LEXIS 120 (2009).

contains a legal synthetic version of the active ingredients of marijuana and that is prescribed by a physician. The other required him to comply with all laws, including federal laws. Federal law prohibits the possession of marijuana.

Nelson appealed the imposition of those two conditions on the grounds that they illegally restricted his use of medical marijuana. The Supreme Court ruled in his favor, saying the plain language of the Montana Medical Marijuana Act prevented the court from limiting the ability of a person to use medical marijuana while under state supervision. The Supreme Court did say that a court could impose some restrictions on where the medical use may occur and may prohibit a person from abusing medical marijuana. But it determined that the blanket prohibition on using medical marijuana in any form other than a pill form was not allowed under current law.

In Summary

Only limited case law exists to guide people on questions related to the Montana Medical Marijuana Act. In addition, many people who have reviewed various aspects of the law agree that many provisions are unclear. The growth in the number of patients and caregivers has clearly given rise to numerous questions that remain unresolved. For those reasons, the Children, Families, Health, and Human Services Committee may want to step in to see where and how the Legislature may clarify issues of concerns to the many parties interested in the law.

In making any decision, the Committee may want to consider the following questions:

- Are there specific issues the Committee believes warrant continued review this interim?
- If so, the Committee may want to determine:
 - which issues are the highest priority for the committee;
 - how members would like to proceed with the review process;
 - how stakeholders should to be involved in the review; and
 - whether the Committee anticipate its review will result in a committee bill draft?
- If the Committee does not want to continue reviewing this issue, do members want other entities working on related matters to bring their proposals to the committee at a future meeting?

Patients and Caregivers by County

County	Caregivers	Patients	Population	Patients as % of Population
Beaverhead	15	76	8,903	0.85%
Big Horn	5	20	12,841	0.16%
Blaine	1	22	6,491	0.34%
Broadwater	16	86	4,704	1.83%
Carbon	19	69	9,657	0.71%
Carter		1	1,234	0.08%
Cascade	196	1,244	82,026	1.52%
Chouteau	6	29	5,225	0.56%
Custer	9	47	11,149	0.42%
Daniels		6	1,643	0.37%
Dawson	13	53	8,490	0.62%
Deer Lodge	5	79	8,843	0.89%
Fallon		17	2,716	0.63%
Fergus	25	76	11,195	0.68%
Flathead	381	1,593	88,473	1.80%
Gallatin	645	1,849	89,824	2.06%
Garfield			1,184	0.00%
Glacier	2	32	13,297	0.24%
Golden Valley	2	3	1,081	0.28%
Granite	4	34	2,821	1.21%
Hill	19	168	16,454	1.02%
Jefferson	12	88	11,255	0.78%
Judith Basin	3	8	2,014	0.40%
Lake	71	349	28,690	1.22%
Lewis and Clark	135	786	60,925	1.29%
Liberty	5	10	1,725	0.58%
Lincoln	104	364	18,971	1.92%
Madison	28	121	7,509	1.61%
McCone	1	3	1,676	0.18%
Meagher	3	21	1,868	1.12%
Mineral	21	114	3,862	2.95%

County	Caregivers	Patients	Population	Patients as % of Population
Missoula	351	1,749	107,320	1.63%
Musselshell	14	66	4,498	1.47%
Park	117	447	16,189	2.76%
Petroleum			436	0.00%
Phillips	3	19	3,904	0.49%
Pondera	17	45	5,852	0.77%
Powder River		1	1,694	0.06%
Powell	6	44	7,041	0.62%
Prairie		4	1,064	0.38%
Ravalli	171	632	40,664	1.55%
Richland	2	18	9,270	0.19%
Roosevelt	1	11	10,089	0.11%
Rosebud	1	17	9,190	0.18%
Sanders	55	163	11,034	1.48%
Sheridan		4	3,283	0.12%
Silver Bow	56	302	32,803	0.92%
Stillwater	9	39	8,687	0.45%
Sweet Grass	1	31	3,790	0.82%
Teton	9	60	5,992	1.00%
Toole	4	27	5,141	0.53%
Treasure		2	637	0.31%
Valley	10	34	6,892	0.49%
Wheatland	1	13	2,010	0.65%
Wibaux	1	4	866	0.46%
Yellowstone	222	981	142,348	0.69%
Totals	2,797	12,081	967,440	1.25%

Source: Department of Public Health and Human Services, April 12, 2010

Glossary: Montana Medical Marijuana Act Terms

Bona fide physician-patient relationship: In order to obtain a written certification allowing the use of medical marijuana, a doctor is supposed to examine the patient's medical history and current medical condition "in the course of a bona fide physician-patient relationship." The term is not defined in statute.

Caregiver: A person 18 years of age or older who grows or provides medical marijuana for one or more patients. A person who has been convicted of a felony drug offense may not be a caregiver.

Debilitating Medical Condition: One of several conditions for which the use of medical marijuana is allowed. The conditions include cancer, glaucoma, positive status for human immunodeficiency virus (HIV) acquired immune deficiency syndrome (AIDS), or the treatment of one of those diseases. The definition also covers any chronic or debilitating disease or medical condition or its treatment that produces:

- cachexia or wasting syndrome;
- severe or chronic pain;
- severe nausea;
- seizures, including those caused by epilepsy;
- severe or persistent muscle spasms; or
- any other medical condition adopted by rule by DPHHS. (DPHHS has not added to the list of debilitating medical conditions)

Medical Use: This term covers any of the following activities:

- acquisition, possession, cultivation, manufacture, delivery, transfer, or transportation of marijuana or drug paraphernalia by a patient or a caregiver if it relates to the use of marijuana to alleviate the symptoms or effects of a qualifying patient's debilitating medical condition;
- the use of marijuana or paraphernalia by a patient to alleviate the effects of the patient's condition; or
- the use of paraphernalia by a caregiver to grow, manufacture, deliver, transfer or transport marijuana for use by a patient.

Qualifying Patient: A person who has been diagnosed by a physician as having a debilitating medical condition.

Usable Marijuana: The dried leaves and flowers of marijuana and any mixture or preparation of marijuana. A patient or a caregiver may each have up to six plants and one ounce of "usable marijuana. The caregiver may have those amounts of plants and usable marijuana for each patient for whom the person is a registered caregiver.