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VIA ELECTRONIC MAIL

January 25, 2010

Colorado State Senators
Colorado State Representatives
State Capitol
Denver, Colorado

Re: Preliminary Comments on Senate Bill 10-109
“Regulation of the Physician-Patient Relationship for Medical
Marijuana Patients”

Dear Senators and Representatives:

Thank you for considering these comments on SB 10-109, “Concerning Regulation of the Physician-Patient Relationship for Medical Marijuana Patients,” attached hereto.

I am a lawyer who has specialized in Medical Marijuana issues for approximately nine years. Some of my relevant experience includes: I successfully sued the State of Colorado and Department of Health over its illegal five patient per caregiver limit, won an injunction against the City of Centennial over its illegal prohibition of the constitutional right to medical marijuana, tried seven felony criminal jury trials involving medical marijuana, have represented or currently represent over 100 criminal defendants where medical marijuana was an issue in the case, have represented or currently represent over 40 caregivers assisting patients with their medical marijuana, have four appeals cases currently in front of the Colorado Supreme Court or Colorado Court of Appeals involving medical marijuana, and have persuaded courts to order the return of medical marijuana to patients that was illegally seized by law enforcement, including receiving marijuana grow equipment formerly held by the United States Drug Enforcement Administration (DEA). I serve as Chairman of the Colorado Wellness Association, the industry trade association designed to self-regulate the medical marijuana industry without government “help,” and I also serve on the

Board of Sensible Colorado. I formerly served as Republican Majority Counsel to the U.S. of Representatives Judiciary Committee and Constitution Subcommittee, so I am familiar with the legislative process.

In helping to build the medical marijuana community over the years and experiencing the personal joy of seeing this formerly underground illegal criminal enterprise blossom into a legal, safe, job-creating, tax-paying, space-renting, vibrant and beautiful economic force in a relatively short time, I am familiar with the unique challenges facing patients, caregivers, and physicians who specialize in this area. My clients' lives literally depend on their access to medicine, and SB 10-109 thus causes concern, and we hope you or the sponsors will consider modifying it or withdrawing it. If not, and it becomes law, it will cause unnecessary human suffering and may expose the State of Colorado to costly litigation.

In general, the top three problems facing Colorado's Medical Marijuana patients are (1) high cost; (2) choices and consistent supply; and (3) quality control and labeling. Fundamental laws of supply and demand -- which the legislature cannot repeal -- hold that only way to lower cost, on both a short- and long-term basis, is to increase supply. SB 10-109 would significantly increase costs to patients, thereby placing the most vulnerable of them in danger.

As a threshold legal matter, the medical use of marijuana is a constitutional right, which cannot be limited by the legislature without amending the state constitution. Your legislative oath of office to support the Colorado Constitution (Colorado Constitution, Article V § 2) means the voters have entrusted you to uphold all aspects of the Colorado Constitution, even those with which you may personally disagree. We understand that the medical use of marijuana is controversial, but majority rules, and the majority of Coloradoans placed this in our constitution.

Specific subsection-by-subsection analysis follows. I am happy to meet and confer with any elected official or staff member who wishes to discuss my position in greater detail.

Section 1(1)(a)(I), page 2:

Requires physician and patient to have "a treatment or counseling relationship," which implies that patient must have seen the particular physician on more than one occasion. If this is not the intent of the bill, it should be so clarified. If it is the intent of the bill, then it should be modified as it conflicts with the Colorado Constitution, Article XVIII § 14(1)(e), which defines and establishes the qualifications of the physician as "a doctor of medicine who maintains, in good standing, a license to practice medicine issued by the State of Colorado." The requirement of multiple physician visits is discriminatory against, and harmful to, patients who have limited incomes, or those do not have medical insurance, or

those veterans who served our country in time of war and who see doctors affiliated with the Veterans Administration which as a federal governmental entity, has shown some hostility against permitting its physicians to advise medical marijuana.

Section 1(1)(a)(II), page 2:

Requires physician to consult with the patient before the patient applies for registry identification card. I have no objections to, or concerns with, this subsection.

Section 1(1)(a)(III), page 2-3:

Requires physician to provide follow-up care and treatment, including physical examinations, to determine efficacy of medical marijuana. There are similar concerns as with Section 1(a)(I) above; it is discriminatory and harmful to patients with limited incomes or without health insurance, to pay for these additional government-mandated doctor visits. It is also inconsistent with the Colorado Constitution, Article XVIII § 14.

Section 1(1)(b), page 3:

I have no objections to, or concerns with, this subsection.

Section 1(1)(c)(I), page 3:

I have no objections to, or concerns with, this subsection.

Section 1(1)(c)(II), page 3:

Requires physician to hold a valid, unrestricted license to practice medicine. Some physicians are permitted to practice medicine on restricted licenses for a variety of reasons dependent on case-by-case factors. Some of these restrictions may result from a physician's own illness or injury, incurred through no fault of the physician. Physicians on restricted licenses are typically permitted to practice medicine. Some are permitted to practice in their respective specialties, which may be highly complex. If a physician on a restricted license can perform heart surgery, for example, then surely she is qualified to advise patients re medical marijuana. If a physician satisfies the definition in the Colorado Constitution, Article XVIII § 14(1)(e), then the legislature cannot further restrict this constitutional definition, which a physician with a restricted license satisfies.

Section 1(1)(c)(III), page 3:

Requires physician to hold a U.S. Drug Enforcement Administration (DEA) controlled substances registration and have a lifetime perfect record of never

having same suspended or revoked. First, a DEA controlled substance registration is optional, not required to practice medicine in Colorado, and many M.D.s and D.O.s in Colorado forego or give up such registration because they are familiar with the damaging effects of addictive synthetic narcotics and are not interested in prescribing controlled substances to their patients. This section would also exclude a physician who had a one-day suspension of her DEA license 25 years ago. Second, to permit the DEA any say in whether a Colorado physician is able to recommend medical marijuana under our State's Constitution invites unconstitutional federal oversight of our state. The DEA continually demonstrates its disrespect for the will of Colorado's voters as regards medical marijuana by working to undermine our medical marijuana law almost from its inception, including the DEA setting the illegal Five Patient limit, according to sworn court testimony of a Colorado Department of Health official in the 2007 LaGoy v. Ritter case in Denver District Court, which I litigated and which struck down the DEA's Five Patient limit. The State of Colorado must not provide this potent weapon to a hostile federal police force.

Section 1(d), page 3:

I have no objections to, or concerns with, this subsection.

Section 1(e), page 3:

I have no objections to, or concerns with, this subsection.

Section 1(e)(2), page 3:

I have no objections to, or concerns with, this subsection.

Section 1(2), page 3:

I have no objections to, or concerns with, this subsection.

Section 1(2)(a), page 4:

Requires registry card to bear the name of the physician certifying the debilitating medical condition, and permits the confidential [sic] registry containing the physician's name to be communicated outside of the confidential [sic] registry as a device to refer physicians to the Colorado Board of Medical Examiners. This "witch hunt" provision is unconstitutional. Colorado Constitution, Article XVIII § 14(c)(2) provides that "No physician shall be denied any rights or privileges for the acts authorized by this subsection." It also provides that all information about physicians remains confidential. Article XVIII § 14(3)(a). This means that any physician is free to advise as many patients as she chooses, and cannot be legally denied any rights or privileges, i.e., the license to practice medicine, for doing so. Further, requiring a single physician's name on

the card makes no sense. As to any given patient, there could be many doctors who, through the years of the patient's history, diagnose the patient with a debilitating medical condition or conditions. There is no legal requirement that a patient disclose his complete medical history to the Health Department that issues the cards. Requiring the physician's name on the card also invites unnecessary disclosure and further witch hunts by law enforcement that may come into contact with the registry cards, and which have shown little restraint in persecuting courageous doctors who try to do the right thing by their patients.

Section 1(2)(b), page 4:

I have no objections to, or concerns with, this subsection.

Section 1(2)(c), page 4:

Eliminates confidentiality of registry card. This is unconstitutional. The Colorado Constitution, Article XVIII § 14(3)(a) provides that the registry is confidential. In 2001, the Legislature passed a criminal statute creating a misdemeanor criminal offense for any person, including law enforcement or government officials, who discloses information within the medical marijuana registry without the patient's consent. C.R.S. § 18-18-406.3.

Section 1(2)(d), page 4:

Requires physician "recommendation" [sic] to be on a state-prescribed form. The Colorado Constitution, Article XVIII § 14(1)(j) defines "written documentation" as "a statement signed by the patient's physician or copies of the patient's pertinent medical records" as the requirements to obtain a registry card. Thus, a patient need only submit his medical records to confirm his diagnosis of a debilitating medical condition and physician advice, in order to obtain the registry card. Furthermore, physician advice need not even be written and can be verbal. The constitution only requires that "[t]he patient was advised by his or her physician ... that the patient might benefit from the medical use of marijuana," The first jury trial in Colorado that used the constitutional affirmative defense of medical marijuana involved verbal advice by a physician. See People v. Margenau, Gunnison District Court Case No. 05CR42. The jury acquitted my client Ryan Margenau of all felony counts even though he did not have a shred of paper reflecting this physician advice. The physician testified at trial that he verbally advised Mr. Margenau, the judge and conservative rural jury accepted that as a valid defense, Mr. Margenau walked out of court with all of his marijuana and grow equipment, and the prosecution did not waste time and taxpayer monies appealing the verdict, because the result was legally obvious and there was no error by the District Court in permitting the defense based on verbal advice. Further, SB10-109 uses incorrect terms. No where does the constitution refer to a "recommendation" by a physician. All the constitution requires is that the physician provide "advice" that marijuana "might" benefit the patient, or that the

condition “may” be alleviated by the use of marijuana. Colorado Constitution, Article XVIII § 14(1)(a)(II); § 14(2)(a)(II); § 14(c)(I); § 14(c)(II); § 14(3)(b)(I). There is no requirement of a “recommendation” in the constitutional provision. It only requires physician “advice,” and that “advice,” verbal or otherwise, need only be that the patient “might” or “may” benefit from marijuana. Thus the voters engraved in stone a sensible standard, permitting access to medical marijuana, perhaps because the concept of a leafy plant is not offensive to a majority of mature adult voters. Unfortunately this bill tightens the voters’ expressed desire to an unconstitutional degree. Physician “advice” under this constitutional provision is not a written “prescription,” as Attorney General John Suthers concluded in a formal opinion holding that medical marijuana sales can be taxed. Colorado Attorney General Formal Opinion No. 09-06 (November 16, 2009.)

Section 1(2)(e), page 4:

I have no objections to, or concerns with, this subsection, other than concerns expressed above regarding the definition of “bona fide physician-patient relationship.”

Section 1(2)(f), page 5:

I have no objections to, or concerns with, this subsection.

Section 1(2)(g), page 5:

I have no objections to, or concerns with, this subsection.

Section 1(2)(h), page 5:

Provides that the Department has the authority to impose “sanctions” for physicians who violate this bill, including revocation or suspension of the physician’s “privilege” to make medical marijuana “recommendations.” Government bureaucrats in this Department have no authority to revoke any privilege held by physicians, to whom the voters provided strong immunity in relation to advice given to medical marijuana patients. Please refer to comments above, detailing the unambiguous command of the Colorado Constitution, Article XVIII § 14(c)(2) that “No physician shall be denied any rights or privileges for the acts authorized by this subsection.” Please also refer to comments above detailing that this is not a “recommendation,” it is “advice.” Even federal appeals courts have determined that physicians are immune under the First Amendment to the U.S. Constitution for advice given to a patient. Conant v. Walters, 309 F.3d 629 (9th Cir. 2002), *cert. denied*, 124 S.Ct. 387 (2003) (physician has First Amendment right to advise patients re medical marijuana and cannot be prosecuted or otherwise have license affected).

Section 1(3)(a), page 5:

Requires that a physician “certify to the department” that a patient may benefit from the medical use of marijuana. The constitution does not require the physician to have any communication whatsoever with the health department or any other government bureaucracy. All communications between the physician and patient are confidential and privileged, and it is the patient who holds this privilege and decides whether to waive it and seek optional state registration. Increasing numbers of patients opt to cut out the health department out altogether, as patients suffer the State’s four month-delay in issuing registry cards, and as patients continue to rack up court victories with physician advice and no registry cards, and wellness centers correctly accept physician advice alone. By its own delays, excessive fees, and hoarding millions of dollars in patient funds, the State is rendering registry cards irrelevant and superfluous to the process.

Section 1(3)(b), page 5-6:

Requires physicians maintain separate record-keeping system for patients for whom physician has “recommended” medical marijuana and will turn over these “separate but equal” patient records to the government upon demand so bureaucrats can go through peoples’ private medical records. Such an intrusive provision does not belong in the United States of America.

Section 1(3)(c)(I), page 6:

Prohibits a physician from being compensated for his or her work, except by the patient directly. This is a requirement that no doctor in any other specialty must follow. Most doctors are compensated by the hospitals in which they practice, and doctors rarely collect money directly from their patients. Typically, in all areas of medicine payments for medical services are made to third parties, receptionists, or cashiers.

Section 1(3)(c)(II), page 6:

Prohibits a physician from offering a discount to patients. Under this section, physicians are prohibited from helping poor or disadvantaged people, disabled veterans, homeless, and others on limited incomes, unless the doctors charge a homeless man the same price as a millionaire. We thought the problem was that docs were making “too much” money from medical marijuana. There is nothing wrong with discounts for suffering patients. Low-cost or discounted medical services should be encouraged, not prohibited. This bill hurts suffering people who happen to benefit from marijuana. But doctors could still legally hand out Oxycontin like candy, for free.

Section 1(3)(III), page 6:

Prohibits a physician from seeing patients at locations where medical marijuana is distributed. The same standard, applied to any other drug, would eliminate all hospitals where drugs are distributed, essentially every hospital in Colorado nearly of which have their own pharmacies in the same building under the same roof. Medical marijuana caregivers are happy to comply with reasonable regulations (although we are a freedom-loving bunch and will regulate ourselves better than government can), but should not be held to a standard with which no hospital could comply.

Section 1(3)(IV), page 6:

I have no objections to, or concerns with, this subsection.

Section 1(4), page 6-7:

Creates the “Medical Marijuana Review Board,” which will intrude upon and interfere with confidential physician decisions regarding individual patients under the age of 21. The specter of these vulnerable young patients facing a Government board of overseers for “permission” to access his or her constitutionally-protected, physician-recommended medicine does not belong in a free country. This Board’s very existence is unconstitutional.

Section 1(5), page 7:

I have no objections to, or concerns with, this subsection.

Section 1(6), page 8:

I have no objections to, or concerns with, this subsection, other than to point out that the Legislature’s April 20, 2009 transfer of \$258,735.00 in patient funds to the general fund is probably unconstitutional under the Colorado Constitution Article XVIII § 14(3)(i) which allows the fees to be collected to administer the registry card program, not to enrich government’s coffers for general pork projects. Colorado’s suffering medical marijuana patients are not the Legislature’s personal piggy bank. These monies should be refunded to patients.

Section 2, page 8:

I have no objections to, or concerns with, this subsection other than those stated above regarding the existence of the “Medical Marijuana Review Board.”

Section 3, page 9:

I have no objections to, or concerns with, this subsection other than those stated above.

Section 4, page 9:

I have no objections to, or concerns with, this subsection.

Section 5, page 9:

Safety clause. There is no evidence whatsoever that this bill is “necessary for the immediate preservation of the public peace, health, and safety.” As of September 30, 2009, over 800 physicians in Colorado have advised patients that marijuana might benefit them. No negative impacts on public peace, health, and safety have resulted from these recommendations. In fact, this bill would *harm* public health and safety for all of the reasons detailed above.

In conclusion, in working to help build this community over the past nine years, I understand that marijuana remains a controversial medicine, although that is rapidly shifting with even the conservative American Medical Association accepting it. Luckily, the majority rules, and Colorado’s compassionate voters are more numerous than those who would deny others this miracle medicine.

SB 10-109 is larger and more significant than just medical marijuana. It creates unprecedented governmental intrusion into the sacrosanct physician-patient relationship. The bill opens the door to further government oversight of doctors in all fields. In conceptualizing SB 10-109, it may be helpful to consider another controversial medical issue, abortion. Using SB 10-109 as a model, we have drafted proposed legislation, attached, for regulating the physician-patient relationship in the abortion industry. If SB 10-109 were to become law and withstand legal challenge, then the Colorado Legislature would set forth a national blueprint for further regulation of that industry. The government “Abortion Review Board” for abortion patients under 21 years of age, closely modeled after this bill, would be very interesting to watch.

Thank you for considering these comments. Please call me at 303-634-2244 or email me at Robert.Corry@comcast.net with any questions.

Sincerely,

Robert J. Corry, Jr.
Attorney and Counselor at Law

Attachments:

SB 10-109

Model Legislation “Concerning Regulation of the Physician-Patient Relationship for Abortion Patients”