

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

**David “Damien” LaGoy;
Daniel J. Pope;
Plaintiffs,**

v.

**GOVERNOR BILL RITTER, in his capacity
as Governor of Colorado; RONALD S.
HYMAN, in his capacity as Colorado State
Registrar of Vital Statistics; JAMES B.
MARTIN, in his capacity as Executive
Director of the Colorado Department of Public
Health and Environment;
Defendants.**

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COURT USE ONLY

Case No: 2007 CV 6089

**EXPEDITED RELIEF
RESPECTFULLY
REQUESTED**

**MOTION TO ENFORCE COURT ORDER AND STIPULATED SETTLEMENT OF
NOVEMBER 15, 2007 AND APPLICATION FOR INJUNCTIVE RELIEF**

FACTS

1. On November 15, 2007, the Court signed a joint stipulated Order that settled all claims in this case. (See Order, attached hereto and incorporated herein as Exhibit A.) This settlement was carefully and diligently negotiated between all parties and their counsel. As with most settlements, each side compromised on certain issues, and agreed to be bound indefinitely by the components of the settlement. The parties jointly requested that the settlement be made a Court order.

2. The Court's Order/settlement of November 15, 2007 provided in relevant part that:

(3) The Colorado Department of Public Health and Environment shall provide notice to all state-registered medical marijuana patients, caregivers, and the parties to this action of any meeting to discuss possible policy changes or regulatory changes to the Colorado medical marijuana law when such notice is required by the Colorado Open Meetings Act, C.R.S. 24-6-401 *et seq.* and/or the Administrative Procedures Act, C.R.S. 24-4-101, *et seq.*

3. On July 20, 2009, the Board of Health carefully considered well over a full-day of live testimony, as well as extensive written comments, at a properly-noticed open meeting. Much of the testimony concerned medical marijuana patients and their view that "significant responsibility," to them, means only the provision of medical marijuana. After weighing statements of all participants, the Board opted to clarify the meaning of "significant responsibility for managing the well-being of a

patient,” a phrase that appears in the Colorado Constitution, Article XVIII § 14, to mean only the provision of medical marijuana.

4. On November 2, 2009 at approximately 4:39 p.m., Defendants sent an electronic mail to four attorneys announcing an “emergency” Board of Health meeting for the next morning at 10:30 a.m., November 3, 2009 to consider a draft rule that would eliminate the Board’s previous definition of “significant responsibility for managing the well-being of a patient.” (See CHPHE email of November 2, 2009, attached hereto and incorporated herein as Exhibit B.) The ostensible purpose of the meeting was to conform 5 CCR 1006-2, Regulation 2-Definitions to a Colorado Court of Appeals opinion in People v. Clendenin, Case No. 08CA0624, issued October 29, 2009. (See opinion in People v. Clendenin, Case No. 08CA0624), attached hereto and incorporated herein as Exhibit C.)

5. In People v. Clendenin, the Court of Appeals expressly held that the opinion did not address the Board of Health definition:

because defendant had already been tried and convicted when this regulation became effective on August 30, 2009, this regulatory definition is inapplicable to this case. Thus, we need not address whether defendant qualified as a “primary care-giver” under this definition, nor need we decide whether the definition comports with the constitutional “primary care-giver” definition.

6. Notice of the November 3, 2009 meeting was not provided to “all state-registered medical marijuana patients, caregivers,” as required by the Order. The Open Meetings Act, C.R.S. § 24-4-402, requires public notice for all meetings, and there is no reference to, or exception for, “emergency” meetings.

7. The Board of Health meeting was held on November 3, 2009, a meeting which was not open to all members of the public who wished to attend. Phone conference lines set up to listen into the meeting were not operational. Numerous individuals who wished to hear or attend the meeting were denied. The Chairman of the Board of Health declined to permit any testimony or comment from members of the public, other than a brief summary of an email received from one member of the public previous to the meeting.

8. After hearing only the perspective of the Department, the Board of Health unanimously struck the regulatory definition in its entirety. There was no factual finding made of why this meeting was an “emergency.” (A tape of the proceedings has been ordered and will be transcribed, a certified copy of which will be provided to this Court as soon as completed.)

9. At the same meeting, Robert J. Corry, Jr., Esq. submitted a handwritten petition on a related matter for the issuance, amendment or repeal of the same rule pursuant to C.R.S. § 24-4-403(7). (See Corry Petition, attached hereto and incorporated herein as Exhibit D.) The Chairman of the Board of Health refused to permit the Board to consider the petition.

FIRST CLAIM FOR RELIEF

(Enforcement of Court Order / Stipulated Settlement)

10. The Court Order of November 15, 2007 was the result of a stipulated settlement, drafted and negotiated by respective counsel, which supposedly ended this litigation and was supported by adequate consideration. The parties bargained

for and compromised on certain issues. The State committed to notify all patients and caregivers of any meeting and declined to bargain for an “emergency” exception, to which plaintiffs would not have agreed since such a provision would be self-serving and prone to abuse.

11. The Court Order requires:

The Colorado Department of Public Health and Environment shall provide notice to all state-registered medical marijuana patients, caregivers, and the parties to this action of any meeting to discuss possible policy changes or regulatory changes to the Colorado medical marijuana law when such notice is required by the Colorado Open Meetings Act, C.R.S. 24-6-401 *et seq.* and/or the Administrative Procedures Act, C.R.S. 24-4-101, *et seq.*

(emphasis added)

12. The CDPHE did not provide notice of the meeting to all state-registered medical marijuana patients and caregivers.

13. The Open Meetings Act, C.R.S. § 24-6-402(1)(b) defines “meeting” as “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.” The meeting of November 4, 2009 constitutes a meeting under the Open Meetings Act. The Act requires public notice for all meetings, and there is no reference whatsoever to, or exception for, “emergency” meetings.

14. C.R.S. § 24-6-402(7) requires Defendants to maintain a list of all persons who have requested to be notified of any meeting, and to notify such persons. Such notification was not done.

15. C.R.S. § 24-6-402(2)(a) provides that “All meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.” C.R.S. § 24-6-402(8) provides that any regulation adopted at a meeting that does not comply with subsection (2) is void.

16. Defendants did not comply with the Court Order, or with the Open Meetings Act provision requiring the meeting be open to the public at all times. The appropriate remedy is for this Court to enjoin implementation or enforcement of the regulatory modification until a meeting in compliance with the Court Order and Open Meetings Act can be held.

SECOND CLAIM FOR RELIEF

(Declaratory Judgment Pursuant to C.R.C.P. 106(a)(4))

17. C.R.C.P. 106(a)(4) provides that “where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial function has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law...review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion...”

18. In striking the definition on an emergency basis, the Board of Health arbitrarily and capriciously exercised a quasi-judicial function, abused its discretion, and exceeded its jurisdiction.

19. The Board failed to cite any specific evidence or facts as to how this meeting was justified by any “emergency” or why compliance with such requirements would be contrary to the public interest, and thus did not properly comply with the notice, comment, analysis and other requirements of the Administrative Procedures Act, C.R.S. § 24-4-103(6).

20. On the merits, the Board arbitrarily and capriciously misinterpreted the Court of Appeals’ holding in the Clendenin case, which expressly did “not address whether defendant qualified as a “primary care-giver” under this definition, nor need we decide whether the definition comports with the constitutional “primary care-giver” definition.” (See Opinion at 13-14.)

21. The Plaintiffs have no other plain, speedy or adequate remedy at law.

22. Plaintiffs ask the Court to declare that the Defendant’s actions were arbitrary and capricious, contrary to state law, and therefore null and void.

THIRD CLAIM FOR RELIEF

(Preliminary Injunction and Temporary Restraining Order Pursuant to C.R.C.P 65)

23. Plaintiff David “Damien” LaGoy is a registered medical marijuana patient who relies on medical marijuana to help manage and treat life-threatening symptoms including appetite loss, nausea, and weight loss resulting from HIV/AIDS and Hepatitis C. Plaintiff Daniel Pope is a registered caregiver whose legal roles and responsibilities are cast into doubt by the Board’s elimination of

regulatory clarification. Earlier factual findings, testimony, and affidavits submitted to this Court are incorporated herein by reference.

24. The elimination of the definition of “significant responsibility for the well-being of a patient” thrusts the current state of the law into confusion, and thus decreases Mr. LaGoy’s access to medical marijuana, increases Mr. Pope’s confusion, and thereby causes an immediate and irreparable injury that can be prevented by a temporary restraining order stopping the enforcement of the regulatory change.

25. Plaintiffs ask the Court for a Preliminary Injunction and Temporary Restraining Order Pursuant to C.R.C.P 65.

FOURTH CLAIM FOR RELIEF

(Injunctive Relief Pursuant to Open Meetings Act, C.R.S. § 24-6-402)

26. C.R.S § 24-6-402(2)(c) requires, “ Any meeting at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public.”

27. C.R.S § 24-6-402(1)(b) defines a meeting as, “...any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.”

29. C.R.S § 24-6-402(1)(b) defines a state public body to include, “... any board, committee, commission, or other advisory, policy-making, rule-

making, decision-making, or formally constituted body of any state agency, state authority, governing board of a state institution of higher education including the regents of the University of Colorado...”

30. C.R.S § 24-6-402(2)(a) provides, “All meetings of two or more members of any state public body at which any public business is discussed or at which an formal action may be taken are declared to be public meetings at all times.”

31. C.R.S. § 24-6-402(8) provides that any regulation adopted at a meeting that does not comply with subsection (2) is void.

32. The regulatory elimination of the definition of “significant responsibility for the well-being of a patient” was formed by a state public body without public notice in violation of C.R.S § 24-6-402(2)(c).

33. Plaintiffs ask the Court to grant injunctive relief ordering the Defendant’s to conduct public meetings regarding this policy and invalidating the procedurally defective policy.

FIFTH CLAIM FOR RELIEF

(Administrative Procedures Act, C.R.S. § 24-4-103(7))

34. At the November 3, 2009 meeting, Robert J. Corry, Jr., Esq. submitted a handwritten petition on a related matter for the issuance, amendment or repeal of the same rule, which read in its entirety as follows:

iii) “Significant responsibility for managing the well-being of a patient” means doing more than merely supplying a patient who has a debilitating medical condition with marijuana, if such non-medical

marijuana products or services are needed, requested, and purchased by the patient.”

35. C.R.S. § 24-4-403(7) provides that an agency “shall” consider and act on any petitions on the same matter if a meeting is held:

Any interested person shall have the right to petition for the issuance, amendment, or repeal of a rule. Such petition shall be open to public inspection. Action on such petition shall be within the discretion of the agency; but when an agency undertakes rule-making on any matter, ***all related petitions*** for the issuance, amendment, or repeal of rules on such matter ***shall be considered and acted upon in the same proceeding***. (emphasis added.)

36. The Chairman of the Board of Health refused to permit the Board to consider the petition.

37. The Board made no factual findings of how “compliance with the [notice] requirements of this section would be contrary to the public interest,” as required by C.R.S. § 24-4-103(6).

38. The rule is invalid as it does not substantially comply with the provisions of the Administrative Procedures Act, pursuant to C.R.S. § 24-4-103(8.2).

SIXTH CLAIM FOR RELIEF

Declaratory Judgment pursuant to C.R.C.P. 57 and Colorado Declaratory Judgment Act, C.R.S. § 13-51-101 *et seq*)

39. A genuine controversy exists between Plaintiffs and Defendants for which Plaintiffs are entitled to relief under C.R.C.P 57 and C.R.S. § 13-51-101 *et seq.*

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

- A. Enter judgment in Plaintiffs' favor against Defendants;
- B. Grant Plaintiffs' Declaratory Judgment finding that the Board of Health regulatory elimination of the definition of "significant responsibility for the well-being of a patient" in 5 CCR 1006-2, Regulation 2-Definitions, was adopted in an arbitrary manner.
- C. Enter a temporary and permanent injunction ordering the Defendants, and all those acting in concert with them, to cease and desist from enforcement of the regulatory change.
- D. Award Plaintiffs' their reasonable attorney fees and costs pursuant to the Colorado Sunshine Law C.R.S. 24-6-402(9) and other applicable provisions;
- E. Grant Plaintiffs any and all other relief the Court deems necessary and proper.

CERTIFICATION

Pursuant to Rule 65, Robert J. Corry, Jr. contacted opposing counsel, Anne Holton, Esq. and Jennifer Weaver, Esq., of the Office of the Colorado Attorney General, on the morning of November 4, 2009 and made efforts to resolve this issue, discussed the substance of the legal claims, and notified opposing counsel that this filing seeking immediate injunctive relief is imminent. Additionally, counsel will be notified through the electronic filing system and by separate communication of the filing of this petition.

DATED: November 5, 2009

Respectfully submitted,

(original signature on file)

/s/ Robert J. Corry, Jr.

Robert J. Corry, Jr.

(original signature on file)

/s/ Brian Vicente

Brian Vicente

(original signature on file)

/s/ Sean T. McAllister

Sean T. McAllister

(original signature on file)

/s/ Lauren C. Davis

Lauren C. Davis

VERIFICATION / AFFIDAVIT OF ROBERT J. CORRY, JR.

I, Robert J. Corry, Jr., hereby states as follows under penalty of perjury:

1. I am an attorney in good standing licensed to practice law in the State of Colorado.
2. I personally received the CDPHE electronic mail referenced above on November 2, 2009, personally attended the Board of Health meeting referenced above on November 3, 2009, personally wrote out and submitted the petition referenced above, and otherwise witnessed all factual allegations contained in the above pleading, and all factual allegations herein are true and correct to the best of my knowledge.

(original signature on file)
/s/ Robert J. Corry, Jr.
Robert J. Corry, Jr.