



HB 68

Board of Medical Examiners

Testimony

House Human Services Committee

By Dr. Anna Earl, Board Chair

Chairman Howard and members of the committee, my name is Dr. Anna Earl. I am the Chair of the Montana Board of Medical Examiners and am here today on the Board's behalf to provide information if needed. The Board of Medical Examiners is a licensing board whose primary mission is to protect health care consumers through proper licensing and regulation. Along with physicians, the board licenses EMTs, residents, physician assistants, telemedicine physicians, podiatrists, nutritionists and acupuncturists.

The Board has been monitoring the medical marijuana certification process since the summer of 2009. After media accounts stated there were traveling certification clinics with large number of individuals being certified in a single day, we organized an informational meeting in November 2009 to become better educated about the law, to identify any potential issues or gaps, and to understand the process being utilized by clinics. We clearly saw a need to provide guidance to physicians who were doing certifications for medical marijuana and adopted a position paper in May of 2010 stressing that a standard of care must be followed. I have provided a copy of the position paper with my written testimony.

HB 68 is an attempt to rein in the perceived abuses. The Board appreciates the effort and significant time that has been devoted to this issue by Representative Diane Sands and the Children, Families, Health, and Human Services Interim Committee members. We were able to provide the committee with information from the Board's perspective and were grateful for that opportunity.

The current medical marijuana program does stress the importance of physician involvement and now needs to ensure appropriate safety measures are in place to prevent abuse and protect patients. The Board stands firm on our position that the process of a physician certifying for medical marijuana is the same process that the physician uses in prescribing medicine for other problems, and physicians should not stray from medical standards of practice.

The Board is already well positioned to identify clinical standards to protect the general public's safety as well as the safety of patients. We believe an ongoing relationship with a physician is needed to ensure this drug is actually being effective in easing pain or discomfort. The board is prepared to discipline physicians who do not follow the expected standard of care and has in place a well established complaint process.

The board is grateful for the interest to ensure "bad medicine" does not grow from the public's desire to see compassionate care and pain relief to those individuals stricken with painful illnesses and diseases. As you deliberate the merits *(continued on page 4)*

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Certifications by Teleconference

The Board of Medical Examiners ruled that the use of teleconference technology for initial medical marijuana certifications does not meet standard of care, amending the position paper in November 2010.

The public expects, and deserves, a certain level of quality to be delivered. The board has noted those who are seeking certifications have debilitating conditions that demand physician attentiveness and ongoing monitoring. Physicians should complete a "hands on" physical examination. Further, the physician should complete the full assessment themselves and not delegate a part of the certification process to other medical staff.

Complaints

The Board of Medical Examiners has had six complaints filed against physicians that relate to medical marijuana. Disciplinary action was taken against one physician, one physician has been noticed, two complaints were dismissed, and two are under review.

Medical Marijuana Certifications

As of December 10, 2010 there are 359 physicians in Montana who have certified one or more patients for medical marijuana. This is 9% of physicians who hold an active license.

Approximately 32 physicians have certified over 100 patients. Current law discourages the Board to look more closely at physicians who are certifying high numbers of individuals. (50-46-103 and 40-46-201, MCA)

Current law also does not give the BOME authority to look at physicians practicing in a work environment that advertises certifications will be done quickly, with or without medical records.

The law is clear that BOME can create a board generated complaint if it knows the licensee by name and cannot discipline a physician for providing written certifications to qualifying patients.

Physicians should not toss their medical education and training out the window to certify an individual for medical marijuana.

Standard of Care: Board Position Paper Clarifies and Protects

In May 2010, the Board of Medical Examiners adopted a position paper to provide needed guidance to physicians engaged in medical marijuana certifications. The position paper has served as a guiding post on physician care for the BOME, physicians, patients, and other state agencies.

Physician's Written Certification for Medical Marijuana and the Bona Fide Physician-Patient Relationship

In 2004 Montana voters approved the use of medical marijuana through the passage of Initiative 148 which was codified as The Medical Marijuana Act ("The Act") in Title 50, Chapter 46. The Act permits individuals to grow, possess and use marijuana to treat certain chronic medical conditions, and permits other individuals, called caregivers, to grow, possess and transfer marijuana to designated clients who are certified to use marijuana for medical conditions. According to the Act, in order for a person to be permitted to use marijuana for a medical condition, a Montana-licensed doctor of medicine or osteopathy must conduct a proper medical evaluation and certify that the person has one of the conditions specified or the patient must present his or her medical record to the Department of Public Health and Human Services which enforces the Act.

The mission of the Board of Medical Examiners is to protect the public by ensuring that physicians are properly trained and provide medical services within their scope of competence. The Board of Medical Examiners takes no position on the general suitability of marijuana in the treatment of medical disorders, but does have an obligation to protect the public by ensuring that physicians provide medical services via a bona fide physician-patient relationship that meet the generally accepted standards of care. *continued, page 3*

Medical Marijuana Certification Position Paper, continued

The Board of Medical Examiners is concerned about reports of physicians who are certifying patients to use marijuana for medical conditions in a mass screening format and physicians who are conducting certifying evaluations exclusively through Internet consultations.

It is the Board of Medical Examiners' position that the certification of an individual to use marijuana for a medical condition requires the same standard of care as required when any conventional medication is prescribed. The Medical Marijuana Act requires the physician to conduct a "full assessment" as part of "a bona fide physician-patient relationship." (MCA 50-46-2101(11)). Therefore, a physician who certifies a patient for medical marijuana is held to the same generally accepted standards of care as apply to every other medical practice.

Generally accepted standards of care in any treatment process require the following in an amount adequate and appropriate to the patient, condition and treatment under consideration:

- Taking a medical history
- Performing a relevant physical examination
- Reviewing prior treatment and treatment response
- Obtaining and reviewing relevant diagnostic test results
- Discussing advantages, disadvantages, alternatives, potential adverse effects and expected response to the treatment recommended, and ensuring that the patient understands them
- Monitoring the response to treatment and possible adverse effects
- Creating and maintaining patient records
- Notifying the patient's primary care physician when appropriate

Consistent with 50-46-201(4), MCA, the Board of Medical Examiners will not apply a higher or special standard of care to the certification of individuals to use marijuana for medical conditions. Neither will the Board apply a lesser or special standard. If the physician fails to meet the generally accepted standards of practice when certifying a patient to use marijuana for a medical condition, the physician may be found to be practicing below the acceptable standard of care and subject to disciplinary action for unprofessional conduct.

The Board cautions physicians that a mass screening format or group evaluations, whether for student athletes or those desiring medical marijuana, inherently tend towards inadequate standards of care. A physician involved in mass screening settings or clinics offering group evaluations for medical marijuana certification must meet the standard of care which the people of Montana rightfully expect and deserve.

Similarly, a written certification provided after a patient evaluation conducted exclusively through currently available electronic methods or the Internet may be inadequate to evaluate the complex medical conditions for which marijuana is an approved therapy. The practice of telemedicine in Montana requires a Montana license and adherence to the same standards of care as required of all Montana-licensed physicians.

Addendum

The Board of Medical Examiners recognizes the statutory requirements that a written certification for medical marijuana requires a full assessment be completed by a physician, 50-6-102, MCA. At the current time, the standard of care for physicians certifying individuals for medical marijuana requires a "hands on" physical examination by a physician. The exclusive use of teleconference methods to certify individuals does not meet this level of standard of care.

Adopted: November 19, 2010

Questions and Answers

Q Why hasn't BOME shut down the traveling medical marijuana clinics?

A BOME does not have the legal authority to investigate a facility or business. The board may initiate an investigation against a licensee, but only if a licensee can be identified.

Q Can't BOME do something about physicians who are certifying hundreds of individuals?

A We can with your help and after you have filed a complaint with the board. The names of these physicians are oftentimes kept confidential and cannot be directly obtained by the BOME. The board will act on any complaint filed against a licensee. Seven complaints have been filed for reasons related to certifications.

Q Can't BOME do something about out of state physicians who are certifying individuals?

A The licensure laws do not require that a physician be a resident of Montana to be granted an active license. Many health care facilities depend on out of state physicians to temporarily cover shifts or a vacancy until a position can be filled. As for certifying for medical marijuana, the Medical Marijuana Act deems information about these physicians as confidential and, thus, the names cannot be obtained by the BOME. The board does act on any complaint filed against a licensee.

Q Has the BOME done anything to stop what looks to be "bad medicine?"

A The board has acted on every complaint filed against a licensee. Six complaints have been filed for reasons related to medical marijuana. One physician was disciplined and a second has been noticed. In addition, the board has drafted a guidance document (position paper) that stresses the point that a physician must follow the medical standard of care.

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of this bill we ask for your consideration to improve the bill in three areas.

Definition of "debilitating medical condition" in 50-46-102, MCA

The definition of "debilitating medical condition" is expanded in this bill. This listing of medical conditions is problematic for several reasons. One, it appears to guarantee a medical marijuana card for any person with a specific diagnosis. This simply does not follow the medical practice of care. A treatment recommendation should be tailored for each patient and the diagnosis. Two, the listing has resulted in a new "rubberstamping" business model for opportunistic individuals where physicians merely confirm another physician's diagnosis for the sole reason of issuing a certification for medical marijuana. Three, there may be other rare conditions not listed where medical marijuana may be a useful treatment. A patient having a condition listed should not, per se, qualify unless that condition is active and causing serious impairment of function/quality of life at the time of certification and the impairment is not just a short term situation related to injury, etc. It should be encouraged that medical marijuana not be the initial treatment for a condition, but one to consider when traditional medical treatment options have failed.

Definition of "standard of care" in 50-46-102, MCA

The bill includes the definition for standard of care. The Board wants to alert the committee that "standard of care" is not a fixed medical term, but one that changes to be consistent with contemporary medical knowledge.

References to dosage in Section 8 of 50-46-201

The reference to a specified amount is medically problematic as it is not a pharmacologic product for which there is standardization. The Board would not be able to assess in any given complaint whether the "dosage" met an approved standard of care.

Thank you for your thoughtful consideration of this bill. I am available to answer questions.

Board Quick Facts

- License and regulate acupuncturists, emergency medical technicians, nutritionists, physicians, residents, telemedicine physicians, physician assistants and podiatrists
- 9,923 active licensees
- 4,108 active licensed physicians of which 2,532 are in-state
- Receive about 170 complaints each year
- Takes an average of 30 days to get a license to practice medicine in Montana
- Board has 13 members. 12 members are appointed by the Governor and confirmed by the Senate. One member is selected by MT Academy of Physician Assistants.
- Board members serve staggered four year terms
- Board meets a minimum of six times/year

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