

The Medical Cannabis Advocate's Handbook

LEGISLATING COMPASSION

*Getting people together takes more than
getting them in the same room.*

—Jim Rowings & Mark Frederic



LEGISLATING COMPASSION

In the early days of the national movement for medical cannabis, advocates focused on the criminal justice aspects of the issue. Protecting patients and cultivators from arrest and prosecution was, out of necessity, an almost singular priority. As medical cannabis moves into the mainstream, the range of priorities is growing to include defining functional access models, protecting patients' civil rights, ensuring quality controls, and other public health and safety issues.

The contemporary debate presents both a challenge and an opportunity for advocates. The new paradigm for medical cannabis is complicated and more nuanced than ever before. This confusion is reflected in a patchwork of local and state regulations. The outcomes of these regulations are not always beneficial to patients and providers. On a positive note, the broadening focus offers a new chance for advocates to ask for what it is they want, instead of just speaking out about what they do not want. This provides a new opportunity to create regulatory models based on patient needs, but it also requires advocates to be able to articulate their vision of safe access in policy and regulatory terms.

Being prepared to evaluate legislative or administrative regulations for medical cannabis use is increasingly important for patient advocates. Fifteen states and the District of Columbia have already adopted medical cannabis laws and hundreds of local jurisdictions nationwide are grappling with how best to implement them. Fifteen years of experience with medical cannabis laws has taught us that authorizing the use of cannabis for medical purposes is only the first step, and the nuances of the law are extremely important. Implementing the law is a long and complicated process that needs constant attention.

Every legislative proposal must be evaluated for its strengths and weakness on a case-by-

case basis within its own political context. What is feasible in one community may be impossible in another. It is also important to remember that none of the existing medical cannabis laws are perfect and many are actually completely inoperable. Not all legislative or regulatory proposals are developed in good faith. And even the most enthusiastic medical cannabis legislators have made the mistake of creating laws that restrict rather than regulate.

An important part of evaluating proposals is sniffing out insincere models that put onerous restrictions on patients or seek to surreptitiously enact a de facto ban on safe access. It may be necessary for advocates to respond to proposals like this with direct opposition and an entirely new solution - one based on the principles outlined here. The following are general principles for analyzing legislation or administrative guidelines that will be broadly applicable to existing and proposed regulations. It is ASA's position that the true test of successful medical cannabis policy is when the patient community has achieved safe and legal access.

PRINCIPLES FOR EVALUATION

These principles are presented in the context of statewide legislation, but are also applicable to local guidelines. Advocates will have to carefully consider which proposals are appropriate and viable in any given political context.

A Process for Adding New Conditions

In states that have a restrictive list of conditions, a procedure exists for the addition of new conditions to the list of approved ailments that may be effectively treated by cannabis. It is ASA's position that if these restrictions are absolutely necessary, then the procedure to add new conditions should be uncomplicated and time-sensitive. New studies are being published regularly and treat-

ments that are not contemplated by the law should be available to physicians, much like "off-label" use is available in the realm of prescription medication.

Affirmative Defense

An "affirmative defense" refers to a specific type of legal argument during criminal prosecution and trial. The provision of an affirmative defense means that the patient who is being charged for the possession, cultivation, or sale of cannabis has certain things they must prove at trial in order to be found not guilty. The affirmative defense is less desirable than some other defenses, as it shifts the burden to the defendant; in other words, rather than making the prosecutor prove that the defendant was not a patient, an affirmative defense means that the defendant must prove that he or she was.

Age Restrictions

Though some states limit the age of a patient, some of these restrictions may be overcome. More research has begun around using medical cannabis to treat young people and children, and it is important to allow parents, along with their physicians, to determine what the best, most effective medication is for their children.

Allows Dispensaries

A few states have decided against allowing dispensaries. ASA has seen that access in these states has been severely limited. Many patients do not have the skills to cultivate their own medicine. Illnesses often have sudden onset, and patients need immediate access to cannabis to help alleviate symptoms. In addition, new patients dealing with a new illness may have no way of finding underground cultivation collectives. Physicians are legally prevented from telling patients how to access cannabis, thereby complicating things even further. It is imperative that states provide for dispensaries if they wish to have a functional, effective medical cannabis program.

Child Custody

Patients must feel secure about their ability to retain custody of their children. ASA supports state protections that extend to state agencies and family court proceedings surrounding the question of parental custody. Status as a medical cannabis patient should not be a determining factor in these proceedings and medical cannabis use should be treated the same as the use of any other medication.

DUI Protections

The presence of cannabis metabolites within a person's system does not determine impairment, and there are some states that are beginning to recognize that with respect to medical cannabis patients. It is important that patients are not subject to arrest and prosecution solely for having metabolites in their bodies; DUI charges should be linked to actual impairment of the driver. DUI protections do not mean that patients may drive while using medical cannabis. These protections simply allow cannabis to be treated as any other medication under each state's DUI laws.

Edible Allowance

Some states explicitly provide for the manufacture and use of "edible" medical cannabis products. Edibles are important, as this route of administration is ideal for certain ailments and offers ease of administration in several situations. ASA encourages states to allow for edible medical cannabis products, as well as provide patient protection by requiring large-scale manufacturers to abide by state food and beverage guidelines.

Education Requirements for Staff

Few localities have training requirements for the staff of dispensaries. It is ASA's position that dispensary staff, as health care professionals, must have access to as much information as possible in order to best understand the unique nature of the medication they are dispensing. New medical cannabis patients are often unfamiliar with the strains and routes of administration available to them

and a well-educated staff can provide invaluable assistance to these patients.

Employment

Certain civil protections are important to a comprehensive, effective medical cannabis program. Patients must feel secure in their employment. While no state law currently requires employers to allow patients to medicate during work hours, some states do protect employment and require that any dismissal or refusal to hire be based on work performance, not just patient status or a positive drug test.

Explicit Privacy Standards

While medical issues, conditions, and decisions continue to be sacrosanct, the field of medical cannabis tends not to be covered by traditional laws protecting patients' confidentiality. Some states have explicitly protected patients' information and some have even gone so far as to criminalize the violation of these privacy provisions. ASA supports the strictest laws related to patient privacy, as patients who use medical cannabis have a multitude of reasons to wish for the strictest confidentiality.

Housing

Patients who use medical cannabis to manage their symptoms must not have to live in fear of losing their housing just because they utilize medical cannabis. . But while some states protect patients' right to housing, many others do not. Being forced out of housing is an issue that is very real to patients, as many across the country have faced eviction for their medical use of cannabis. ASA supports state protections for patients in their housing, including allowing them to medicate within their homes (subject to other regulations and policies), and allow personal cultivation. Unfortunately, while some states do protect patients, these protections do not extend to federal housing residents.

ID Card Provisions

States have various administrative programs

and each program is vastly different. One area in which programs differ is on the issue of ID Cards. Some states do not require a state ID card while others do. If a state does require ID cards, it is ASA's position that the card should be affordable for patients at every income level. Furthermore, there must be specific provision protecting patient privacy in case law enforcement or other third parties seek access to the ID card records. This may involve destroying patient records after issuing ID cards.

List of Conditions

Every state that has enacted protections for medical cannabis patients has mentioned conditions that may be effectively treated by cannabis. Some states have catch-all provisions, some have restrictive lists, and some provide a rigorous process to add to their "approved ailment" list. ASA's position is that there should be access to medical cannabis for every patient who needs it, and that the decision to use cannabis as a treatment should be left to the patients and their physicians, not the state.

New Criminal Penalties

Some states provide for new criminal penalties related to the medical cannabis program, penalties above and beyond those that are already provided by the criminal justice system. These penalties may be related to fraudulent use of the medical cannabis program, the violation of privacy provisions, or falsely identifying oneself as a participant in the medical cannabis program.

Number of Cultivation Licenses

Medical cannabis cultivation is sometimes regulated at the state level. Within this type of model, there may be competitive license procedures with a cap on the number of licenses that may be issued to cultivators. It is ASA's position that these caps are not useful for patients or cultivators, as they encourage large-scale operations that can draw dangerous federal attention. In addition, these types of

caps make it less likely that cultivators will be able to provide the range of medicine needed by patients. Each strain of cannabis has unique qualities that are useful for different ailments, and large scale cultivation limits access to a large variety of strains and discourages horticultural experimentation.

Number of Dispensing Collective Licenses

There have been attempts by some states to regulate the number of dispensaries within the state. ASA has found that caps at the state level lead to large gaps in access based on geography. In addition, a limited number of dispensaries within a state discourages competition, which negatively impacts the patients' ability to find and/or afford the medicine and mix of services that they prefer.

Organ Transplants

There have been instances across the country of hospitals that have prevented the transplant of organs to current medical cannabis patients. Transplant candidates are among the sickest individuals, and are the most in need of compassion, but they are instead forced to either give up one aspect of their palliative care or die.

Patient-Physician Relationship

Some states require patients to have an ongoing relationship with their doctor, often referred to as a "bona fide" relationship. Generally, the state defines the relationship as being over a set period of time and includes specified types of examinations. ASA's position is that physicians should only treat ailments and recommend treatments that they are familiar with and feel comfortable discussing. Within the medical field, there are many specialties; prohibiting patients from choosing a doctor who specializes in medical cannabis is antithetical to the practice of medicine.

Personal Cultivation

Personal cultivation is the benchmark of safe access. States have been moving to restrict

personal cultivation by patients and their caregivers and it is ASA's position that these restrictions will severely limit or even completely prevent access. The states that have tried to set up large, regulated dispensary and cultivation systems have not found a successful way to implement these plans and if patients are prevented from legally cultivating their medicine, they are left without any options.

Possession Limit

More and more frequently, states are limiting the quantity of medical cannabis that a patient can access or possess at any given time. While it might make sense to have "bar-to-arrest" thresholds that give law enforcement a guide as to what personal medical use looks like, it does not make sense for the state to determine what quantity any patient might need for his or her particular illness. The type and severity of symptoms, the strain of cannabis, and the route of administration all greatly impact the amount that a specific patient may need at any given time. In addition, if patients are cultivating for themselves, possession limits must not immediately criminalize the quantity the patient ends up with at harvest time. It should ultimately be left to the patient and his or her physician to determine how much medical cannabis is enough to effectively treat the patient's illness.

Probation

Citizens who are on probation or parole and who have medical illnesses should have the right to medical care regardless of their status as a criminal. Most states do not provide for the use of medical cannabis while on probation or parole. It is ASA's position that these citizens should be allowed to use the same medications as the rest of the citizens of the state, and that medical decisions should be left to the patient and his or her physician. Keep in mind, too, that some people on probation or parole are serving time for using cannabis and may in fact be serving sentences

related to what should be considered the medical use of cannabis.

Protection from Arrest

The criminal system can provide legal protections in several ways. Some states allow patients to defend themselves in court based on their illness, while other states actually protect patients from arrest. The distinction is significant. Legal defense is expensive and time consuming and may have a terrible impact on a patient's family, work, and social life. ASA supports laws that protect patients from arrest over those that only allow for an affirmative defense.

Reciprocity

More and more frequently, states are providing some measure of legal protections for non-resident patients. Reciprocity generally requires that the patient carry documentation of his or her status as a patient within his or her home state's program. Reciprocity is important, as many states' medical cannabis programs require residency for participation. ASA supports complete reciprocity, affording non-resident patients the same protections as patients who reside within the state.

Regulation Agencies

Regulatory agencies chosen by each state vary. ASA has found that keeping the medical cannabis program within the Department of Public Health or its equivalent provides the most effective assistance to patients and their providers

Restrictions on Criminal History for Caregivers

A few states prohibit patients from having caregivers with criminal histories related to drugs. A caregiver is a person who assists the patient with procuring and administering his or her medication; if the patient trusts his or her caregiver, it is ASA's position that no other requirements be met. These types of restrictions serve no purpose as they do not protect patients from criminals; rather, they

punish the patient for having a family member or trusted confidant who may have a criminal past.

Restrictions on Where Patients can Medicate

Some states dictate the locations where patients can use medical cannabis. While states may believe that visible use of medical cannabis will somehow promote recreational use, it is abhorrent that they try to limit where a sick person can take his or her medicine. It is completely unnecessary and offensive to restrict the use of medication and it is even more offensive to criminalize the violation of these restrictions.

Scheduling

Currently, within the federal and state controlled substances legislation and regulations, medications fall within a particular class or "schedule." A state that decides to place cannabis outside of the most restrictive schedule is stating that cannabis does in fact have medical value and is promoting scientific research. ASA supports the rescheduling of cannabis at the state level and continues to work toward the rescheduling of cannabis at the federal level.

Task Force/Advisory Board

States that have developed a regulated program might create task forces or advisory boards to help guide the administration of the medical cannabis program and to provide assistance in developing regulations. These task forces and advisory boards can be a boon to the program and can provide a voice for patients and health care professionals. ASA supports the development of these programs and encourages the inclusion of patients and health care providers in them.

Taxation

Some states require the payment of sales tax on medical cannabis that is procured at a dispensary. Some states go beyond that and require excise taxes. It is ASA's position that

taxes have no place in medicine and no taxes should be levied on patients. The medical cannabis program is not the proper venue to raise funds for the state, and any fees related to medical cannabis should be directly applied to the cost of administering the program.

Testing Standards

It has been well established that cannabis is not a harmful substance and, as such, should not require mandatory testing in order to ensure the health, safety and welfare of qualified patients. No state authority should require the testing of medical cannabis as a prerequisite to the licensing of any other lawful medical cannabis distribution operation. It is also important for patients to have as much information about their medication and distribution centers should be able to provide patients with information about where there're medicine was produced and should inspect for molds and mildews. Additional testing for compound analysis should be done through standardized laboratories.

Zoning Restrictions

When a state allows for dispensaries, there are often regulations and restrictions that are placed on them. Zoning restrictions are generally related to the so-called "sensitive use" areas, prohibiting dispensaries within a certain distance of schools and playgrounds. ASA has found that dispensaries are not magnets for crime, but in fact appear to be the opposite: they promote community. Where there must be zoning restrictions, ASA encourages the inclusion of a standard of reasonableness.

ASA regards some aspects of regulation to be essential to creating a viable model. Likewise, there are some pitfalls of which advocates must be aware. Consider these priorities when evaluating regulations:

PRIORITIES

At a minimum, the proposed legislation should:

- Protect patients from arrest
- Protect patients' civil rights - i.e. housing, employment, child custody, access to health care
- Authorize personal patient cultivation
- Protect patient privacy
- Permit distribution

PITFALLS

You must find better solutions if the proposed legislation:

- Bans patient cultivation or distribution, implicitly or explicitly
- Places unreasonable restrictions on where distribution can be located
- Establishes unreasonable limits on cultivation or possession
- Imposes unreasonable taxation on medicine
- Provides no protection for patient privacy
- Allows for patients who are arrested to use an affirmative defense rather than providing protection from arrest in the first place

Advocates should carefully consider the priorities and pitfalls in proposed legislation of rules, always keeping in mind that patient welfare should be the guiding principle. In most cases, this will be an easy judgment call to make. However, there may be times when lawmakers or other stakeholders want patients to make unreasonable compromises. If others are pushing to eliminate priorities or include pitfalls, you will have to ask tough questions about their position relative to patient welfare.

- Is the stakeholder trying to use regulations as a way to restrict safe access? What is his or her overall position on medical cannabis?
- Does the stakeholder have a financial interest in the proposal?
- Is the stakeholder's goal to limit competition, consolidate authority, or require patients to purchase something?

Comparison of State Medical Cannabis Laws

	AK	AZ	CA	CO	DC	HI	ME	MI	MT	NV	NJ	NM	OR	RI	VT
Process for Adding New Conditions	X			X			X	X		X		X	X	X	
Affirmative Defense	X	X		X		X	X	X	X	X	X		X	X	
Age Restrictions	X			X	X	X	X	X		X	X		X	X	X
Allows Dispensaries		X	X	X	X		X				X	X		X	
Child Custody Protections		X						X							
Cleanup Legislation	X		X	X	X		X			X			X	X	X
DUI Protections		X												X	
Edibles Allowed			X	X											
Employment Protections		X					X	X						X	
Explicit Privacy Standards	X		X	X			X	X	X	X	X		X	X	X
Housing Protections		X					X	X						X	
New Criminal Penalties			X		X	X		X			X				
Organ Transplant Protections														X	
Patient-Physician Relationship Required	X	X		X	X	X	X		X		X		X	X	X
Personal Cultivation	X	X	X	X		X	X	X	X	X		X	X	X	X
Protection from Arrest	X	X	X			X	X	X	X		X	X	X	X	X
Reciprocity		X					X	X	X					X	
Restrictions on Criminal History for Caregivers	X						X	X	X	X	X			X	X
Restrictions on Where Patients can Medicate	X		X	X	X	X	X	X	X	X	X	X	X	X	
Scheduling												X			
Task Force / Advisory Board					X			X				X	X	X	X
Zoning Restrictions		X	X		X		X							X	
Possession Limit	1 oz	2.5 oz	*	2 oz	2 oz	3 oz	2.5 oz	2.5 oz	1 oz	1 oz	2 oz.	6 oz.	24 oz	2.5 oz	2 oz
Plant Cultivation Limit (mature / immature)	6	12	*	3 / 3		3 / 4	3 / 3	12	6	3 / 4		4 / 12	6 / 18	12	2 / 7

*California's 1996 voter initiative did not set limits for possession or cultivation. Courts have interpreted this to mean patients may possess whatever they reasonably need for treatment. Many individual counties and cities have land use ordinances regulating where and how much may be cultivated, but legal challenges are pending.

MODEL LEGISLATION

For model state legislation on medical cannabis and a model local ordinance for regulating medical cannabis dispensing centers, see the Appendix.