OREGON MEDICAL MARIJUANA ACT AMENDED
Limits increased, some affirmative defenses repealed, other changes enacted

by Leland R. Berger*

Background and Legislative History[1]

Win or lose a statewide initiative, some legislative response seems inevitable.

Following passage of the Oregon Medical Marijuana Act (hereinafter 'the Act' or 'OMMA') at the November, 1998 General Election, for example, the 1999 legislature amended the Act at the insistence of law enforcement, restrained only by legislators who believe that the initiative power reflects the voice of the people, and by supporters of the Act. The narrow defeat of Measure 33 at the 2004 general election, combined with the passage of a bill in the House during the 2003 session that died in the Senate made some legislation amending the OMMA this session inevitable.

Following the 2003 session, Senator Bill Morissette (D-Springfield), (the chair of the Senate Health and Human Services Committee who refused to give the 2003 bill that passed the House a hearing in the Senate), wrote to Dr. Grant Higginson, the State Health Officer, requesting he convene an interim legislative advisory committee. This committee, composed of patients and their advocates, program administrators and law enforcement representatives met 5 times. Although law enforcement representatives refused to attend the final meeting to discuss the compromise Dr. Higginson had drafted, some advocates (including our own Brian Michaels) presented this draft to Senator Morissette who in turn introduced it as SB772.

Hearings were held before the Senate Health and Human Services Committee, however, the Committee closed before the bill was finalized. The bill was re-introduced as SB1085 in the Rules Committee at the request of Senator Morissette and Senator Jeff Kruse (R-Roseburg, Vice-chair of the Senate Health and Human Services Committee). Subject to an agreement on amending it in the House, the Bill passed out of the Senate Rules Committee and, by a unanimous vote, out of the Senate.

By the time it got to the House, the only Committee still open was the House State and Federal Law Committee. The previously agreed upon amendment was added, but also stuffed into the bill was a provision amending ORS §475.340 in a way which would have allowed employers to discriminate against patients based solely on their use, and, in doing so, would have legislatively 'fixed' the Court of Appeals' decision in *Washburn v. Columbia Forest Products*, 197 Or App 104, 104 P3d 609, *rev. allowed* 339 Or 156 (2005). With these amendments, SB1085 passed back out to the Senate, where it seemed as if it were dead.

During the final all night session of 2005 Legislature, a Senate Conference Committee deleted the offending amendment and the bill passed out of the Senate, and re-passed in the House. On August 29, 2005 the Governor signed this bill into law. The amendments will become effective on January 1, 2006.

Section analysis

Section 1 amends the OMMA's definitions statute, ORS §475.302, in two ways. It adds to the definition of 'Delivery' this sentence: ""Delivery" does not include transfer of marijuana by a registry identification cardholder to another registry identification cardholder if no consideration is paid for the transfer."

This is somewhat ambiguous as application of this definition to the term 'delivery' as it is used elsewhere in the Act[2] can create a construction contrary to the intent of this legislation. The clear intent of this section was to codify that cardholders sharing medical marijuana (including 'usable marijuana,' seedlings or starts and mature plants) are protected from state criminal law, so long as they are within the limits, and not engaging in unprotected activity.

The second amendment is to define a "Marijuana grow site" as 'a location where marijuana is produced for use by a registry identification cardholder and that is registered under the provisions of Section 8 of this 2005 Act.' More on this in the discussion on Sections 8 and 9, below.

Section 2 amends ORS §475.306 (the statute governing limits for cardholders) by repealing the limits (they are re-defined in Section 9) and also repealing the cardholder affirmative defense for being over the limit. It enacts a new requirement, at law enforcement's request, that cardholders who are 'using or transporting marijuana in a location other than the residence of the cardholder' must possess the registry identification card when doing so.

More significantly, Section 2 amends the direction to the Department of Human Services to define by rule when a plant is mature and when it is immature by enacting this definition: "a plant that has no flowers and that is less than 12 inches in height and less than 12 inches in diameter is a seedling or a start and is not a mature plant." The legislative intent here was that to constitute a 'mature plant,' all three prerequisites must be met.

Section 3 amends §475.309, the registry section of the OMMA to include a requirement that a new category of person (denominated 'the person responsible for the grow site') register, and also requiring that the applicant (*i.e.* patient) state in writing "whether the marijuana will be produced at a location where the cardholder or designated primary caregiver is present or at another location. It also adds 'the person responsible for the grow site' to cardholder and designated primary caregiver to define which people can collectively possess the permitted amounts of medical marijuana.

Section 4 extends the protections of the OMMA to licensed health care professionals in licensed health care facilities who are administering medical marijuana to a patient who resides in the facility. Denominated the 'Ken Brown' provision, for the Measure 33 co-chief petitioner who was paralyzed from the neck down in an accident involving a drunk driver, this provision was a part of the legislative advisory committee proposal. At the request of counsel for the Oregon Medical Association, this section also clarifies that no licensed health care professional may be required to administer medical marijuana, and, paralleling language from §475.340 related to employment, provides that no licensed health care facility is required 'to make accommodations for

the administration of medical marijuana.' It also provides that if the method of administration of the medical marijuana is smoke, that there be adequate ventilation.

Section 5 amends §475.331, relating to disclosure of registry information to law enforcement. It expands the required registry to include 'the address of the authorized marijuana grow sites.' It mandates that the Department of Human Services develop a system which would allow law enforcement to verify, 24 hours a day/7days a week whether a person is registered as a patient or a designated primary caregiver. It codifies the current practice of requiring 'adequate identification, such as a badge number or similar authentication of authority.' Most significantly, post-*Raich*,[3] it prohibits the re-release or use of this information 'for any purpose other than verification' that the cardholder is a cardholder and that the place is an authorized marijuana grow site.'

Although Section 5 does not require the creation of a Person Responsible for a Marijuana Grow Site registry, advocates for the OMMA anticipate that the Department of Human Services will include such a registry as a part of the registry required to be created under Section 8 of this 2005 Act.

Section 6 adds to the OMMA the new material contained within Sections 7,8,9 and 10 of the 2005 amendment.

Section 7 creates a formal Advisory Committee to codify the existing process.

In the summer of 2002, patients and their advocates protested the Department's decision to withhold the issuance of cards incidental to their discovery of three cards being issued where the attending physician's signature was forged. The *ad hoc* committee met monthly at first, and has met quarterly for the last two years.

One interesting facet of the new advisory committee is that the director of the Department of Human Services is required to appoint 11 members 'from persons who possess registry identification cards, designated primary caregivers of person who possess registry identification cards and advocates of the Oregon Medical Marijuana Act.' As law enforcement has consistently opposed the Act, presumably the committee will have no law enforcement representation.

This provision was a part of the legislative advisory committee's proposal, originally introduced as SB772.

Section 8 is entirely new, and was the result of legislative compromise[4].

This section mandates that the department create 'a marijuana grow site registration system to authorize production of marijuana by a registry identification cardholder, a designated primary caregiver who grows marijuana for the cardholder or a person who is responsible for a marijuana grow site.' The grow site registry card is issued to the registry identification cardholder (patient), who is required to display the card at the grow site, whenever marijuana is being produced. If marijuana is being cultivated for more than one registry identification cardholder (patient) at one grow site, each registry identification cardholder's grow site registration card must be posted there.

This section also provides that:

> All usable marijuana, plants, seedlings and seeds associated with the production of marijuana for a registry identification cardholder by a person responsible for a grow site are the property of the registry identification cardholder and must be provided to the registry identification cardholder upon request.

If a patient is convicted of manufacturing or delivering a Schedule 1 or 2 controlled substance, the patient's grow site registration card is restricted in that the patient is prohibited from cultivating for 5 years. The patient could still designate a person responsible for a marijuana grow site to cultivate for him or her, but the patient could not be present at the grow site. A similarly convicted non-patient would also be so restricted. A second violation results in a lifetime restriction.

Finally, this section authorizes the patient or the designated primary caregiver to:

> reimburse the person responsible for a marijuana grow site for the costs of supplies and utilities associated with the production of marijuana for the registry identification cardholder. No other costs associated with the production of marijuana for the registry identification cardholder, including the cost of labor, may be reimbursed.

Section 8a clarifies that the grow site restrictions incidental to MCS/DCS convictions only applies if the conviction relates to a 'violation of ORS 475.992(1)(a) or (b) that occurred on or after the effective date of this 2005 Act.' The intent here was that the offense post date the act, not just the date of the conviction, so as to avoid *ex post facto* problems.

Section 9 sets the new limits for production and possession under the OMMA.

Patients can have up to 6 mature plants, 18 marijuana starts or seedlings and up to 24 ounces of usable marijuana. Unlike current law, there is no distinction in amounts depending on whether one is at the marijuana grow site or away from the garden. Patients whose cards are restricted by virtue of an MCS/DCS conviction are limited to possessing one ounce.

Multi-patient gardens are more complicated.

If the patient, or the patient's designated primary caregiver is **not** present at the garden, the 'person responsible for the marijuana grow site' may produce up to 6 mature plants, 18 starts or seedlings and may possess up to 24 ounces of usable marijuana for up to four registry identification cardholders or their designated primary caregivers per year. Thus, a total of 24 mature plants, 76 seedlings or starts and 6 pounds of usable marijuana may be present at such a location. When the garden ceases producing marijuana, or upon request from the patient or the patient's designated primary caregiver, the person responsible for the grow site must provide all marijuana produces to the patient or the cardholder's designated primary caregiver.

What is less clear are the different permutations which currently exist. For example, in a multi-patient dwelling, where all are present at the garden site, it would

follow that there could be 6 mature plants, 18 starts or seedlings and 24 ounces for each patient. As there is no restriction in the OMMA as to the number of patients for whom a person can be the 'designated primary caregiver'[5], it should follow that such a caregiver actually present at the grow site should be able to cultivate 6 mature plants, 18 starts or seedlings and possess 24 ounces for each patient for whom the person is providing care. There was some discussion during the hearings on SB772, however, suggesting that the legislature reads the statutory definition of 'designated primary caregiver' less broadly than do the advocates of the law.

OMMA advocates hope and expect that these scenarios will be clarified through administrative rulemaking.

Section 10 codifies the current practice in many counties limiting the number of plants or quantity of usable marijuana seizable by law enforcement to those plants or seedlings or usable marijuana 'that are in excess of the amount or number authorized.' This would prohibit the practice of other counties where law enforcement have a scorched earth policy of taking all the medicine.

Section 11 corrects an oversight in the section protecting physicians by clarifying that the physicians who are protected are the 'attending' physicians. *See*, ORS 475.302(1), OAR 333-008-0010 (1).

Section 12 repeals the that portion of the affirmative defense for non-cardholders which allowed medical necessity evidence to explain possession or cultivation outside of the statutory limits. It does not repeal the overall defense, and leaves intact the choice of evils defense and the ability to present medical necessity evidence.

Concluding thoughts

The 2005 legislative amendments to the OMMA are principally predicated on three premises. The first, articulated by Stormy Ray, (a co-chief petitioner of the 1998 initiative) during a hearing before the Senate Health and Human Services Committee is that the production of therapeutic cannabis for patients is a charitable event. The second, articulated repeatedly by Stormy Ray Foundation board member Jerry Wade is that the patient owns the medicine. The third, explained in some detail on the SRF website[6] is the ability to produce a perpetual supply of therapeutic grade cannabis using 18 starts and six mature plants.

The fundamental flaw here is two-fold. First, although this system may work for Stormy and Jerry, it will not work for all patients. Most simply stated, it presupposes that codifying the ability to share medicine will make up for crop failure. Second, for many outdoor annual patients and their growers, the limits are inadequate to provide for a year's supply. And lastly, those for whom more medical cannabis is medically necessary will be unable to defend against MCS/DCS/PCS charges, and will be left only to argue mitigation at sentencing.

On the other hand, many, many patients who are currently outside the protection of the OMMA will be able to come within the protection. The new limits are higher than any other state legislature has approved. Codification of 24/7 access for verification and

the restriction on the redistribution of the patient verifying information will greatly help patients. And the legislative mandate that convicted patients be restricted only as to cultivation creates an additional argument why probationers should be allowed to use this medicine while on probation.
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The assistance of

Attorneys Anthony L. Johnson and Brian L. Michaels, and OMMA Advocates Dr. Rick Bayer (Co-chief Petitioner, OMMA (1998)), Madeline Martinez (Executive Director, Oregon NORML), Alicia Williamson (Board Member, Oregon NORML), John Sajo (Voter Power, Co-chief petitioner and spokesman for Measure 33 (2004)), and Laird Funk (Volunteer Lobbyist)

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[1] Legislative History of SB 772 from Oregon Legislature's website:

SB 772 By Senator MORRISETTE -- Relating to medical marijuana.

2-21(S) Introduction and first reading. Referred to President's desk.
2-23 Referred to Human Services, then Ways and Means.
3-10 Public Hearing held.
4-28 Public Hearing held.
6-1 Work Session held.
8-5 In committee upon adjournment.

Legislative History of SB1085 from Oregon Legislature's website:

SB 1085 By COMMITTEE ON RULES (at the request of Senator Bill Morrisette and Senator Jeff Kruse) -- Relating to medical marijuana.

6-23(S) Introduction and first reading. Referred to President's desk.
6-27 Referred to Rules, then Budget.
7-1 Public Hearing and Work Session held.
7-8 Recommendation: Do pass with amendments and be referred to Budget by prior reference. (Printed A-Eng.)
7-14 Work Session held.
7-19 Recommendation: Do pass the A-Eng. bill.
Second reading.
7-20 Third reading. Carried by Kruse, Morrisette. Passed.
Ayes, 30.

Carter, absent, granted unanimous consent to be recorded as voting aye.
7-21(H) First reading. Referred to Speaker's desk.
Referred to State and Federal Affairs.
7-29 Public Hearing and Work Session held.
7-30 Recommendation: Do pass with amendments and be printed B-Engrossed.
8-1 Rules suspended. Second reading.
8-2 Third reading. Carried by Flores. Passed.
Ayes, 39; Nays, 14--Ackerman, Avakian, Barnhart, Beyer, Buckley, Dingfelder, Hansen, Holvey, Kropf, Merkley, Nolan, Rosenbaum, Shields, Wirth; Excused, 2--Barker, Brown; Excused for Business of the House, 5--Farr, Greenlick, Kitts, March, Thatcher.
Vote explanation(s) filed by Tomei.
8-3(S) Rules suspended. Senate refused to concur in House amendments.
Ayes, 19; Nays, 11--Atkinson, Beyer, Ferrioli, Kruse, Morse, Nelson, Starr, B., Starr, C., Westlund, Whitsett, Winters.
8-3(H) Representatives Flores, Olson, Macpherson appointed House conferees.
8-4(S) Senators Prozanski, Atkinson, Morrisette, appointed Senate conferees.
Work Session held.
Conference Committee Recommendation: The Senate concur in House amendments dated 07-30 and B-Engrossed bill be further amended and repassed.
(Amendments distributed.)
8-4(H) Conference Committee Report read in House.
8-4(S) Rules suspended. Senate adopted Conference Committee Report and repassed bill.
Ayes, 26; Absent, 1--Whitsett; Attending Legislative Business, 3--Deckert, Devlin, Westlund.
8-4(H) Rules suspended. House adopted Conference Committee Report.

[2] The term delivery is included in the definition of "Medical use of marijuana" in §475.302(7) (post 1/1/06, 475.302(8)), in explaining the scope of exception from state criminal law in §475.309(1), in §475.316(1)(c) and (1)(d) in explaining what conduct takes one out of the protection of the law (delivery to a noncardholder or delivery to anyone for consideration) and in §475.342, explaining generally that what is not authorized by the OMMA is not protected from criminal prosecution.

[3] *Gonzales v. Raich*, 542 US ___, 125 S. Ct 2195, 162 LEd2d ___ (2005) (Holding that congress' commerce clause power authorizes the federal criminalization of the personal, intrastate cultivation, non-commercial distribution and medical use of therapeutic cannabis.)

[4] In addition to Senators Morrisette and Kruse, Senator Floyd Prozanski (D-Eugene) and Representative Steve March (D-Portland) were closely involved in the drafting of this bill.

[5] Although not central to her ruling in the case, Senior Klamath County Judge Karla Knieps opined, in a Clackamas County case, that as there is no statute or administrative rule authorizing a designated primary caregiver to provide care to more than one patient, there was no protection under the OMMA for those who did so. DHS raised a similar argument in the defense of a declaratory judgment action.

[6] www.stormyray.org/ommaway/patient_garden.htm