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MEMORANDUM

TO: Jaren Ducker and Julie Selsberg
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 4, 2016
SUBJECT: Proposed initiative measure 2015-2016 #145, concerning Medical Aid in Dying

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

An earlier version of this proposed initiative, proposed initiative 2015-2016 #124, was the subject of a memorandum dated March 23, 2016, and was discussed at a public meeting on March 25, 2016. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the **Colorado Revised Statutes** appear to be:

1. To enact the "Colorado End-of-life Options Act," which authorizes a terminally ill individual to request a prescription for medical aid-in-dying medication to end the individual's life if he or she:
 - a. Is an adult resident of Colorado;
 - b. Has been diagnosed with a terminal illness with a prognosis of six months or less to live;
 - c. Has mental capacity, as determined by his or her attending physician; and
 - d. Has voluntarily expressed the desire to receive a prescription for medical aid-in-dying medication by requesting the prescription at least twice orally and at least once in writing;
2. To permit a physician to prescribe medical aid-in-dying medication to a patient with a terminal illness who chooses to take medical aid-in-dying medication;
3. To outline the responsibilities of the attending physician, including:
 - a. Determining whether the requesting individual has a terminal illness, has a prognosis of six months or less, is mentally capable, is making an informed decision, and is making the request voluntarily;
 - b. Requesting the individual to demonstrate proof of residency;
 - c. Referring the individual to a consulting physician to confirm that the individual is qualified to request aid-in-dying medication;
 - d. Providing full disclosure to ensure that the individual is making an informed decision; and
 - e. Informing the individual of the right to rescind the request at any time;
4. To require a consulting physician to examine the individual and his or her medical records and confirm, in writing, to the attending physician that the individual:
 - a. Has a terminal illness and a prognosis of six months or less to live;

- b. Is making an informed decision; and
 - c. Is mentally capable, or, if the consulting physician is unable to confirm mental capacity, provide documentation that the consulting physician has referred the individual for an evaluation by a licensed mental health professional;
5. To prohibit an attending physician from writing a prescription for medical aid-in-dying medication unless both the attending physician and a consulting physician determine the individual is mentally capable and is making an informed decision;
 6. To require the attending or consulting physician to refer the individual to a licensed mental health professional if he or she believes that the individual may be suffering from a mental disorder that renders the individual mentally incapable of making an informed decision, and to preclude the attending physician from writing a prescription for medical aid-in-dying medication unless the licensed mental health professional informs the attending physician, in writing, that the individual is mentally capable and making informed decisions;
 7. To require, as a condition of receiving a prescription for medical aid-in-dying medication, that an individual with a terminal illness make an informed decision, as that term is defined in the measure;
 8. To specify that an individual who requests medical aid-in-dying medication may rescind the request at any time, regardless of his or her mental state;
 9. To outline the process for an individual to request medical aid-in-dying medication, including a fifteen-day minimum period between the two required oral requests and a written request, in substantially the same form as set forth in the measure, that is signed and dated by the requesting individual and witnessed by two individuals who attest that the individual is mentally capable, acting voluntarily, and not being coerced;
 10. To preclude the attending physician or persons with the individual's power of attorney from serving as witnesses, and to preclude one of the witnesses from being related to the individual or entitled to any portion of the individual's estate or from owning or operating a health care facility where the individual resides;
 11. To require the attending physician to document in the individual's medical record the procedures he or she followed in providing medical aid in dying, to

- require a health care provider who dispenses medical aid-in-dying medication to file a copy of the dispensing record with the Colorado department of public health and environment, and to require the department to annually review a sample of records maintained by health care providers who dispense medical aid-in-dying medication to terminally ill individuals;
12. To specify that a provision in a contract, will, or other agreement that affects an individual's right to request medical aid in dying is invalid;
 13. To state that self-administering medical aid-in-dying medication does not affect a life, health, or accident insurance or annuity policy;
 14. To grant immunity from civil and criminal liability and from professional discipline to a person who participates in good faith under the act;
 15. To specify that actions taken in accordance with the act do not constitute suicide, assisted suicide, mercy killing, homicide, or elder abuse;
 16. To specify that a health care provider is not obligated to prescribe medical aid-in-dying medication;
 17. To permit a health care facility to prohibit a physician from writing a prescription for an individual who intends to use medical aid-in-dying medication on the facility's premises;
 18. To provide that a person commits a class 2 felony if the person purposely or knowingly:
 - a. Alters or forges a medical aid-in-dying medication request without the terminally ill individual's authorization;
 - b. Conceals or destroys a rescission of a request for medical aid-in-dying medication; or
 - c. Coerces or exerts undue influence to get a terminally ill individual to request, or to destroy a rescission of a request for, medical aid-in-dying medication;
 19. To require any person who has custody or control of unused medical aid-in-dying medication to dispose of the medication by lawful means; and
 20. To specify that the act does not change the legal effect of advance medical directives.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. The term "healthcare provider" is defined in section 25-48-102 (5). However, throughout the measure, the term "healthcare" appears both as a single word and as two separate words. When the term "health care provider" appears in the measure, is the intent for the term to have a different meaning than the defined term "healthcare provider"? If not, the proponents should use the term consistently throughout the measure. Also, would the proponents consider using the more prevalent usage in current law, i.e., "health care" as two words rather than as a single word?
3. With regard to the definition of "mental disorder," the term is defined as "a psychiatric or psychological illness as classified in the diagnostic and statistical manual of mental disorders that impairs the ability to function in ordinary life" and raises the following questions:
 - a. Given that the Diagnostic and Statistical Manual of Mental Disorders" (DSM) has multiple editions and is updated periodically, what version of the DSM do the proponents intend to apply when determining whether an individual has a mental disorder? Do the proponents intend that a physician refer to the version of the DSM in effect at the time of the evaluation of the individual? If so, would the proponents consider clarifying that intent? See, for example, reference to the DSM in current law in section 10-16-104 (1.4) (a) (III), C.R.S., as it will become effective on January 1, 2017, which refers to the DSM "in effect at the time of the diagnosis."
 - b. Are all mental disorders, as contemplated by the measure, psychiatric or psychological illnesses? Is that phrase intended to narrow the scope of mental disorders, as listed in the DSM, that would potentially trigger a mental health evaluation?
 - c. What types of psychiatric or psychological illnesses are listed in the DSM? How many illnesses are classified in the DSM as a "psychiatric or psychological illness"? Would a psychiatric or psychological illness

- include a biologically-based mental illness, such as schizophrenia or bipolar affective disorder? Would it include a drug or alcohol disorder?
- d. Who determines if a mental disorder "impairs the ability to function in ordinary life"? Is that defined in the DSM or determined by the attending or consulting physician?
 - e. Does the language "impairs the ability to function in ordinary life" impose a standard that conflicts with the standard in section 25-48-106 (1) (f) and 25-48-108 (2), which refer to a mental disorder "that renders the individual not mentally capable of making an informed decision." If read together, a physician is to refer an individual for a mental health evaluation if the individual has a mental disorder that (a) impairs the ability to function in ordinary life and (b) renders the individual not capable of making an informed decision. Is that the proponents' intent? The ability to function in ordinary life appears to be different from the ability to make an informed decision. Does the physician need to determine that the individual satisfies both standards in order to be required to refer the individual for an evaluation?
4. In section 25-48-120, the correct citation to the actual federal legislation known as the "Secure and Responsible Drug Disposal Act of 2010" is Pub.L. 111-273. The measure refers, instead, to 21 U.S.C. sec. 822 and 828 and 28 U.S.C. sec. 994. While the "Secure and Responsible Drug Disposal Act of 2010" amended 21 U.S.C. sec. 822 to add a new paragraph (g) and made a conforming amendment to 21 U.S.C. sec. 828 (b) to add a new subparagraph (3), those two sections of the U.S.C., in their entirety, do not constitute the "Secure and Responsible Drug Disposal Act of 2010." Moreover, the federal act did not amend or enact 28 U.S.C. sec. 994. Therefore, citations in the measure do not appear to be the accurate citation for the federal "Secure and Responsible Drug Disposal Act of 2010." Would the proponents consider restoring the reference to the public law citation for the federal act, or eliminate the citations entirely?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these

comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. The amending clause, (SECTION 1) should say “**add** article 48 *to* title 25 as follows” rather than “**add** article 48 *of* title 25 as follows.” [Italics added for emphasis. They should not be used in the actual amending clause.]
2. In section 25-48-101, the hyphenated phrase “End-of-Life” should be “End-of-life.”
3. The citation at the end of section 25-48-102 (4), “25.5-6-203 (1) (c) (I),” should have an uppercase Roman numeral rather than lowercase.
4. When the acronym “C.R.S.” is used at the end of a sentence, the last period in the acronym takes the place of the period at the end of the sentence. The extra period should be removed at the end of the paragraph in the following places:
25-48-102 (4) and (6);
25-48-109 (2);
25-48-121; and
25-48-123 (3). “C.R.S.” should also be capitalized in this section.
5. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should begin with uppercase letters:
 - a. The first letter of the first word of each sentence, for example:

In the second sentence of section 25-48-121, which begins “ACTIONS TAKEN IN ACCORDANCE...,” “actions” should begin with an uppercase “A”.
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon, for example:

In section 25-48-102 (5) (a), the word “made” should begin with an uppercase “M,” and, in subsection (5) (a) (I), the word “his” should begin with an uppercase “H.” The beginning of the other paragraphs, subparagraphs, and sub-subparagraphs should also be in uppercase.
 - c. The title of a publication, i.e., “Diagnostic and Statistical Manual of Mental Disorders,” as used in 25-48-102 (11).

- d. Each word of the short titles of Colorado and federal acts should begin with uppercase letters, except articles such as “the,” “of,” “a,” etc. In section 25-48-120 (2), in the short title of the federal act, the word “disposal” should also begin with an uppercase “d.”
- 6. In section 25-48-102 (5) (c) (V), the Roman numeral (V) should be in uppercase.
- 7. In section 25-48-102 (12), the paragraph should end with a period.
- 8. In section 25-48-106 (1) (h), the second subparagraph is numbered as “(III)” and should be “(II).”
- 9. In section 25-48-106 (1) (i), the paragraph should end with a semi-colon.
- 10. Words in the middle of a sentence should not be capitalized. In section 25-48-106 (1) (l) (II), the word “to,” which follows “C.R.S.,” should begin with a lowercase “t” and in section 25-48-112, the word “from,” which appears before the second blank line, should begin with a lowercase “f”:

I AM SUFFERING FROM _____, WHICH MY ATTENDING PHYSICIAN ...

It would also increase readability if “from” was directly following the word “suffering” rather than appearing on a separate line.

- 11. If a section is broken down into two or more paragraphs, each paragraph must have a number or letter, beginning with “(1).” Sections 25-48-107 and 25-48-120 in the proposed initiative are incorrectly numbered because the first paragraph in each section has no number. The correct numbering should be:

25-48-107. Consulting physician responsibilities. (1) Before an individual who is requesting ... must:

- (a) Examine the individual ... records;
- (b) Confirm, in writing, ... physician:
 - (I) That the individual ... illness;
 - (II) The individual has ... less;
 - (III) That the individual is ... decision; and
 - (IV) That the individual is mentally ... 25-48-108.

25-48-120. Safe disposal of unused medical aid-in-dying medications. (1) A person who has custody ... by:

- (a) Returning the unused medical ... law; or
- (b) Lawful means in accordance ... act.

- 12. In section 25-48-111 (2) (a), the word “subsection” should not have a hyphen.

13. The correct format for a citation to the United States Code is: 21 U.S.C. sec. 822 and 828.