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MEMORANDUM

TO: Harlan Hibbard and Julie Selsberg
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 23, 2016
SUBJECT: Proposed initiative measure 2015-2016 #124, 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.

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 or fewer months 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, 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 psychological or psychiatric state that causes impaired judgment, 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 to serve as witnesses, and to preclude one of the witnesses from being related to the individual, be entitled to any portion of the individual's estate, or to own or operate 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 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "*Be it Enacted by the People of the State of Colorado.*" To comply with this constitutional requirement, the word "voters" should be changed to "People" at the beginning of the proposed initiative.

2. 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?
3. What will be the effective date of the proposed initiative?
4. The term "healthcare provider" is defined in section 25-48-102 (5). While the term "healthcare" as one word appears in the Colorado Revised Statutes thirty-three times, the more prevailing use in current law—over two thousand three hundred times—is to split the term into two words ("health care"). Throughout the measure, the term 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?
5. Throughout the measure there are several instances (see Technical Comment #17 below) where the term "aid-in-dying medication" is used, rather than the defined term "medical aid-in-dying medication." Is there a difference when the term "aid-in-dying medication" is used rather than the defined term? Also, in some instances, the term "medication" is used without "medical aid-in-dying" preceding it. In these instances, does "medication" have a different meaning than the defined term? (See, e.g. §§25-48-106 (1) (f) and 25-48-120.)
6. In the definition of "mental capacity," what is meant by the phrase "and as pursuant to the Colorado medical treatment decisions [sic] act, section 15-18-103 (6) of the Colorado Revised Statutes"? It appears that section 15-18-103 (6) defines "decisional capacity" (not "mental capacity") as used in the "Colorado Medical Treatment Decision Act," article 18 of title 15, Colorado Revised Statutes. Do the proponents intend "mental capacity" to have the same meaning as "decisional capacity"? Or does a person need to satisfy the criteria in the first clause of the definition and also have decisional capacity, as defined in section 15-18-103 (6), to have "mental capacity"? As written, it is unclear how decisional capacity affects, or interplays with, the definition of "mental capacity." Would the proponents consider clarifying this definition?
7. The term "prognosis of six months or less" is defined in section 25-48-102 of the proposed initiative, but that term is not used consistently throughout the measure. When the term "prognosis" is used, for example, in section 25-48-102

- (6) (c) (I), is the term intended to refer to "prognosis of six months or less"? If so, would the proponents consider using the defined term in that provision? Would the proponents consider using the defined term "prognosis of six months" consistently throughout the measure where the term "prognosis" or "six-month prognosis" has been used, if the intent is for the meaning of "prognosis" to be the same as "prognosis of six months or less"?
8. In section 25-48-104 (2) (c), the provision appears to preclude a person who is designated as "qualified power of attorney" or "durable power of attorney" for a terminally ill individual to serve as a witness to the individual's written request for medical aid in dying. However, under the law, a person is not "designated as" a power of attorney. That is not a title or office; rather, power of attorney is an authorization to act for another person. Accordingly, it may be more appropriate to rephrase the last clause in that provision as "nor a person with the individual's qualified power of attorney or durable medical power of attorney . . ."
 9. In section 25-48-106 (1) (f), the measure specifies that the attending physician is to refer the individual to a licensed mental health professional if he or she believes the individual "may be suffering from a psychological or psychiatric state causing impaired judgement."
 - a. The measure does not define any of these terms. What is meant by "psychological or psychiatric state" and "impaired judgment"? Is impaired judgment different than lacking mental capacity? Would the proponents consider defining these terms or clarifying their meaning in the measure?
 - b. Could an individual have mental capacity but still be in a psychological state that impairs his or her judgment? If so, would that disqualify the individual from obtaining medical aid-in-dying medication?
 - c. If a person's judgment is impaired, can he or she still request, under section 25-48-103, medical aid in dying? That section does not use the impaired judgment standard for purposes of the right to request and receive medical aid-in-dying medication.
 - d. Under section 25-48-107, if the attending physician or consulting physician believes the individual may be suffering from a psychological or psychiatric state that impairs his or her judgment, the physician is to refer the individual to a licensed mental health professional for "a determination of whether the individual is mentally capable and making

an informed decision." However, the definitions of "mental capacity" and "informed decision" do not refer to impaired judgement or having a psychological or psychiatric state that impairs judgment. How do these different standards work together, and what is the mental health professional determining?

10. In section 25-48-111 (1) (e), the term "licensed mental health provider" is used. Does this term have a different meaning than the defined term "licensed mental health professional"? If not, would the proponents consider using the defined term consistently throughout the measure?
11. In section 25-48-111 (1) (f), the attending physician is to make a notation of "notification of the right to rescind a request" for medical aid in dying. Assuming this refers to the attending physician's obligation, under section 25-48-106 (1) (i), to inform the individual of the right to rescind, would the proponents consider making it clear, in this provision, that the attending physician is to make a notation that the attending physician notified the individual of this right?
12. Do the proponents anticipate that section 25-48-111 will have a fiscal impact on the department of public health and environment for retaining dispensing records and conducting an annual review of medical records?
13. With regard to section 25-48-111, does the measure need to authorize the department to inspect a physician's records, or specifically require a physician to open his or her records to annual review by the department?
14. In section 25-48-112, which outlines the form for a written request for medical aid in dying, the form specifies that the individual is attesting that he or she has an illness that the "attending physician has determined is a terminal illness and which has been medically confirmed." Should this provision include reference to the requirement that the person has a terminal illness "with a prognosis of six months or less"?
15. With regard to the notation at the end of the form, indicating disqualifiers applicable to one of the witnesses, should the form also state the individuals who are precluded entirely from serving as witnesses, pursuant to section 25-48-104 (2) (c)?
16. In the portion of the attestation in the form, in the sentence that begins "I request that my attending physician prescribe ... ," the second clause of that sentence states: "I authorize my attending physician to contact my pharmacist

- about my request." Section 25-48-106 (1) (l) in the measure authorizes the physician either to dispense the medication directly to the qualified individual or deliver a prescription to a pharmacist, who is then to dispense the prescription to the qualified individual, attending physician, or other authorized individual. What, then, is meant by the phrase "contact my pharmacist about my request" as used in the written request form? It appears that a pharmacist may not be needed if a physician is able to dispense directly to the individual, so a pharmacist would not always be notified. Should the form be modified to allow for either method of dispensing the medication?
17. What happens if the patient has a condition, either due to the terminal illness or another medical condition, that prohibits the person from making an oral request for medical aid in dying? Similarly, what if the patient has a physical condition that prohibits the person from making a written request for medical aid in dying? Are those patients precluded from obtaining medical aid in dying?
 18. Have the proponents considered the costs to the patients, or possibly to the state in the case of Medicaid clients, for medical aid-in-dying medication and the required physician consultations? What happens to a patient who is unable to avail himself or herself of medical aid in dying due to financial barriers?
 19. Section 25-48-118 requires a health facility to notify a physician of its policy regarding prescriptions for medical aid-in-dying medication. Have the proponents considered requiring a similar notification for patients upon entering a health care facility?
 20. Do the proponents expect that there will need to be changes to the laws or rules concerning Medicaid to allow Medicaid clients to avail themselves of medical aid in dying?

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. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being

changed. For example, if you intend to add a new article to title 25 of the Colorado Revised Statutes, you would include the following amending clause:

SECTION 1. In Colorado Revised Statutes, **add** article 48 to title 25 as follows:

2. In an article heading, the title of the article should be in lowercase, bold-faced type and each word should be initial-capped with the exception of words such as "the," "a," "to," "of," etc. In hyphenated phrases, only the first word should be initial-capped. For example, the article heading for proposed article 48 should appear as follows:

ARTICLE 48

End-of-life Options

3. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes should be in lowercase, bold-faced type, not in small capital letters.
4. In definitions sections, the words being defined should appear in alphabetical order. The definition for "mental capacity" should appear after the definition for "medically confirmed" rather than after "consulting physician," should be numbered as subsection "(10)," and the preceding and succeeding subsections should be renumbered accordingly.
5. References to the name of an act contained in the Colorado Revised Statutes (a short title) should include the full, exact name as set out in the short title. For example, with regard to the reference to the "Colorado Medical Treatment Decision Act" in the definition of "mental capacity" in 25-48-102 (4), the name of the act should be initial-capped and placed in quotation marks and should include a statutory citation as follows: "'Colorado Medical Treatment Decision Act', article 18 of title 15, C.R.S." Alternatively, if referring to a specific provision of the act, the appropriate format would be "section 15-18-103 (6), C.R.S., of the "Colorado Medical Treatment Decision Act"." Additionally, the word "decision" as used in the short title of that act is used in the singular form. Additionally, in section 25-48-119 (4), "COLORADO CRIMINAL CODE" should be in quotation marks and initial-capped.
6. The standard format for citing provisions in the Colorado Revised Statutes is:
 - a. For a section that is not within the same title as the law where the reference is being added: "section 15-18-103 (6), C.R.S."

- b. For an article that is not within the same title as the law where the reference is being added: "article 2 of title 42, C.R.S."
- c. For a part that is not within the same title as the law where the reference is being added: "part 3 of article 43 of title 12, C.R.S."

The words "of the" should not be used before "Colorado Revised Statutes" or "C.R.S." when citing a statutory section. In the sections listed in number 7, below, "of the" should be removed from the citations.

7. It is standard drafting practice to use the abbreviation "C.R.S." instead of spelling out "Colorado Revised Statutes." If it is spelled out, the words should be initial-capped. In 25-48-102 (4), (5), (7), and (14) (a), 25-48-106 (1) (I) (I), 25-48-109 (2), 25-48-115 (4), 25-48-119 (1), (2), and (4), 25-48-120 (2), 25-48-121, and 25-48-123 (1), (2), and (3), "COLORADO REVISED STATUTES" should be changed to "C.R.S."
8. "C.R.S." and "Colorado Revised Statutes" should be set off with commas, for example:

In section 25-48-102 (4): "section 15-18-103 (6), C.R.S."

In section 25-48-102 (5): "section 25.5-6-203 (1) (c) (I), C.R.S."

In section 25-48-102 (7): "article 36 of title 12, C.R.S., or"

9. 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 be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumerated paragraph after a colon;
 - c. The first letter of proper names, excluding the names of government agencies.

In the proposed initiative, the first word following subsection, paragraph, subparagraph, and sub-subparagraph enumerations *should* be initial-capped.

In the proposed initiative, the following words *should not* be initial-capped:

- In section 25-48-102 (5), "and" following "25-3-103.7 (1) (f.3)";
- In section 25-48-102 (6) (c) (V), "palliative,";
- In section 25-48-102 (7), "article," "title," and "part";

- In section 25-48-102 (11), "board of medical examiners" (but see below comment about using the correct name of the board) and "state";
- In section 25-48-102 (14) (a), "title";
- In section 25-48-106 (1) (k), "a" before "prescription,";
- In section 25-48-106 (1) (l) (II), "article," "title," and "to" after "statutes,";
- In section 25-48-111 (1) (d), "individual";
- In section 25-48-111 and (2) (b), "with";
- In section 25-48-112 (1), in the form: "in" in the heading and "from" before the second blank line;
- In section 25-48-115 (4), "article" and "title";
- In section 25-48-116 (2), "section";
- In section 25-48-119 (4), "title"; and
- In section 25-48-123 (1), (2), and (3), "article," "of," and "or."

10. In the definition of "physician" in section 25-48-102 (11) of the proposal, reference is made to the "board of medical examiners for the state of Colorado." If the intent is to refer to the board that oversees physicians licensed to practice medicine in Colorado, the correct name of that body is the "Colorado medical board."

11. In the definition of "Qualified individual" in section 25-48-102 (13) and in section 25-48-103 (a), the phrase "of the state" and "of Colorado," respectively, following "resident" is redundant since "resident" is defined as a person able to demonstrate residency in Colorado.

12. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs. Sectioning and paragraphing should follow the C.R.S. format:

- (1) {Subsection - regular numeral}
- (a) {Paragraph - lowercase letter}
- (I) {Subparagraph - capitalized Roman numeral}
- (A) {Sub-subparagraph - capital letter}
- (B) {Sub-subparagraph - capital letter}
- (II) {Subparagraph - capitalized Roman numeral}
- (b) {Paragraph - lowercase letter}

13. In section 25-48-102 (7) of the proposed initiative, the phrase "FOR THE PURPOSES OF THIS ARTICLE" is redundant. The introductory portion at the beginning of the section states that all defined words are "[a]s used in this article, unless the context otherwise requires."
14. The United States Code is the official federal code, and references to federal law as found in the United States Code should be in the following form:
 - a. section 101 of the federal "Immigration and Nationality Act", 8 U.S.C. 1101 (a) (20)
 - b. federal "Emergency Planning and Community Right-to-Know Act of 1986", 42 U.S.C. sec. 1101 et seq.

In section 25-48-120 (2), the name of the federal act should be in quotation marks and initial-capped as follows: "SECURE AND RESPONSIBLE DRUG DISPOSAL ACT OF 2010."

15. The first sentence or portion of a sentence of a statutory provision should directly follow the headnote. For example:

25-48-103. Right to request medical aid-in-dying medication. (1) AN ADULT RESIDENT . . .IF:

16. The new article being added in the proposed initiative does not contain any parts. Therefore, the phrase "OF THIS PART" is meaningless and should not be used in the following sections: 25-48-103 (1) introductory portion, 25-48-104 (1) and (2) (a) (I), 25-48-106 (1) (b), (1) (f), and (1) (h) (III), 25-48-107 (1) (d), 25-48-111 (2) (a), and 25-48-116 (2).
17. The term "medical aid-in-dying medication" is defined in section 25-48-102 of the proposed initiative. For consistency and to avoid confusion or misinterpretation, the term should be used in its entirety whenever it is used. The word "medical" should be inserted at the beginning of the phrase in the following places: Sections 25-48-103 (1) (c), 25-48-104 (1), 25-48-106 (1) (h) (I), (1) (h) (II), (1) (h) (IV), (1) (i), (1) (k), and (1) (l) (I), 25-48-107 introductory portion, 25-48-108 (1) and (3), 25-48-109 (1), 25-48-110 (1) and (2), 25-48-112 (1) [three places in the form], 25-48-114 (2), 25-48-115 (1) and (2), and 25-48-118 (1) [three places].
18. Except in a definition section, where an introductory portion is not numbered, each paragraph in the Colorado Revised Statutes should be numbered if it is broken down into two or more paragraphs. In section 25-48-107, the

- introductory portion that begins "BEFORE AN INDIVIDUAL" should be numbered as subsection (1). The following paragraphs should be renumbered as (a) and (b), followed by (I), (II), (III), and (IV).
19. Section 25-48-109 should begin on a new line as should paragraph (b) in section 25-48-111 (1).
 20. In section 25-48-111 (1) (g), the word "the" should be inserted before "attending physician" to make it grammatically correct.
 21. In 25-48-(1) (f) and (1) (g), the word "A" should be inserted before "notation" at the start of each sentence.
 22. When citing a provision within the same statutory section, the standard format changes. In section 25-48-111 (2) (a), the reference to "SECTION 25-48-111 (1) OF THIS PART." should be changed to "SUBSECTION (1) OF THIS SECTION."
 23. In section 25-48-112 (1), in the "Declaration of witnesses" section, in the third clause, the word "UNDULY" should be changed to "UNDUE" to make it grammatically correct.