

## RESOLUTION 6-01-2003

### DIGEST

#### Dying: California Death With Dignity Act

Adds Chapter 3.95 (commencing with section 7195) to Part I of Division 7 of the Health and Safety Code to permit a qualified patient to end his life with physician assistance.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

None known.

#### Reasons:

This resolution adds Chapter 3.95 (commencing with section 7195) to Part I of Division 7 of the Health and Safety Code to permit a qualified patient to end his life with physician assistance. This resolution should be approved in principle because it enacts a comprehensive, and previously tested, program for assisting patients facing terminal diseases to end their lives with dignity.

This resolution defines a situation in which a “capable” and “qualified patient” may choose to terminate his or her life. In so doing, it outlines specific procedures and safeguards which must be followed to ensure that this is a well-considered decision. The definitions used in this proposed act are specifically limited to the provisions of this act and thus should not create conflicts with other laws (such as the Probate Code.) Moreover, the definitions of “capable” and the exclusion of persons as witnesses to a request for termination of life who also stand to benefit from the “qualified patient’s” death, are similar to those in the Probate Code, thus carrying on policies which insure that vulnerable persons are not taken advantage of.

This resolution also contains language which exempts physicians from liability where they have acted in good faith reliance on the statute in counseling a “qualified patient” and prescribing medication. It further provides that no insurance, life, health or accident policy can be affected by a qualified person making use of the statute. Thus, this resolution facilitates communication among physicians, patients and families on end of life decisions by eliminating the potential for liability from having had such communications.

The Oregon statute which is the basis of this resolution has been in effect for several years and arose out of the recommendation by the Supreme Court that the states experiment in this field. That statute has worked effectively in Oregon without apparent conflicts with other laws or abuses. It has been used by only 1/8 of 1% of persons dying in Oregon since that state enacted it. A recent state agency report in Oregon confirms that physicians are doing a better job of addressing end of life issues under the new statute.

While this resolution leaves some questions, such as how an Advance Health Care Directive under California law might interact with the provisions of this statute, the benefits of the resolution far outweigh the minimal potential for conflict with existing laws.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of the California Bar Associations recommends that legislation be sponsored to add Chapter 3.95 (commencing with Section 7195) to Part 1 of Division 7 of the Health and Safety Code to read as follows:

1 §7195

2 This Chapter shall be known as the California Death With Dignity Act.

3  
4 §7195.1

5 The following words and phrases, whenever used in sections 7195 through 7199.1 of this  
6 code, have the following meanings:

7 (1) "Adult" means an individual who is 18 years of age or older.

8 (2) "Attending physician" means the physician who has primary responsibility for the care of  
9 the patient and treatment of the patient's terminal disease.

10 (3) "Capable" means that in the opinion of a court or in the opinion of the patient's attending  
11 physician or consulting physician, psychiatrist or psychologist, a patient has the ability to make and  
12 communicate health care decisions to health care providers, including communication through  
13 persons familiar with the patient's manner of communicating if those persons are available.

14 (4) "Consulting physician" means a physician who is qualified by specialty or experience to  
15 make a professional diagnosis and prognosis regarding the patient's disease.

16 (5) "Counseling" means one or more consultations as necessary between a state licensed  
17 psychiatrist or psychologist and a patient for the purpose of determining that the patient is capable  
18 and not suffering from a psychiatric or psychological disorder or depression causing impaired  
19 judgment.

20 (6) "Health care provider" means a person licensed, certified or otherwise authorized or  
21 permitted by the law of this state to administer health care or dispense medication in the ordinary  
22 course of business or practice of a profession, and includes a health care facility.

23 (7) "Informed decision" means a decision by a qualified patient, to request and obtain a  
24 prescription to end his or her life in a humane and dignified manner, that is based on an appreciation  
25 of the relevant facts and after being fully informed by the attending physician of:

26 (a) His or her medical diagnosis;

27 (b) His or her prognosis;

28 (c) The potential risks associated with taking the medication to be prescribed;

29 (d) The probable result of taking the medication to be prescribed; and

30 (e) The feasible alternatives, including, but not limited to, comfort care, hospice care and  
31 pain control.

32 (8) "Medically confirmed" means the medical opinion of the attending physician has been  
33 confirmed by a consulting physician who has examined the patient and the patient's relevant medical  
34 records.

35 (9) "Patient" means a person who is under the care of a physician.

36 (10) "Physician" means a doctor of medicine or osteopathy licensed to practice medicine by  
37 the Medical Board for the State of California.

38 (11) "Qualified patient" means a capable adult who is a resident of California and has  
39 satisfied the requirements of this Chapter in order to obtain a prescription for medication to end his  
40 or her life in a humane and dignified manner.

41 (12) "Terminal disease" means an incurable and irreversible disease that has been medically  
42 confirmed and will, within reasonable medical judgment, produce death within six months.

43  
44 §7195.3

45 (1) An adult who is capable, is a resident of California, and has been determined by the  
46 attending physician and consulting physician to be suffering from a terminal disease, and who has  
47 voluntarily expressed his or her wish to die, may make a written request for medication for the  
48 purpose of ending his or her life in a humane and dignified manner in accordance with this Chapter.

49 (2) No person shall qualify under the provisions of this Chapter solely because of age or  
50 disability.

52 §7195.5

53 (1) A valid request for medication under this Chapter shall be in substantially the form  
54 described in section 7199, signed and dated by the patient and witnessed by at least two individuals  
55 who, in the presence of the patient, attest that to the best of their knowledge and belief the patient is  
56 capable, acting voluntarily, and is not being coerced to sign the request.

57 (2) One of the witnesses shall be a person who is not:

58 (a) A relative of the patient by blood, marriage or adoption;

59 (b) A person who at the time the request is signed would be entitled to any portion of the  
60 estate of the qualified patient upon death under any will or by operation of law; or

61 (c) An owner, operator or employee of a health care facility where the qualified patient is  
62 receiving medical treatment or is a resident.

63 (3) The patient's attending physician at the time the request is signed shall not be a witness.

64 (4) If the patient is a patient in a long term care facility at the time the written request is  
65 made, one of the witnesses shall be an individual specified by the State Ombudsman as defined in  
66 Welfare and Institutions Code section 9701

67  
68 §7196

69 (1) The attending physician shall:

70 (a) Make the initial determination of whether a patient has a terminal disease, is capable, and  
71 has made the request voluntarily;

72 (b) Request that the patient demonstrate California residency pursuant to this Chapter;

73 (c) To ensure that the patient is making an informed decision, inform the patient of:

74 (A) His or her medical diagnosis;

75 (B) His or her prognosis;

76 (C) The potential risks associated with taking the medication to be prescribed;

77 (D) The probable result of taking the medication to be prescribed; and

78 (E) The feasible alternatives, including, but not limited to, comfort care, hospice care and  
79 pain control;

80 (d) Refer the patient to a consulting physician for medical confirmation of the diagnosis, and  
81 for a determination that the patient is capable and acting voluntarily;

82 (e) Refer the patient for counseling if appropriate pursuant to section 7196.2;

83 (f) Recommend that the patient notify next of kin;

84 (g) Counsel the patient about the importance of having another person present when the  
85 patient takes the medication prescribed pursuant to this section and of not taking the medication in a  
86 public place;

87 (h) Inform the patient that he or she has an opportunity to rescind the request at any time and  
88 in any manner, and offer the patient an opportunity to rescind at the end of the 15 day waiting period  
89 pursuant to section 7196.6;

90 (i) Verify, immediately prior to writing the prescription for medication under this Chapter,  
91 that the patient is making an informed decision;

92 (j) Fulfill the medical record documentation requirements of this Chapter;

93 (k) Ensure that all appropriate steps are carried out in accordance with this Chapter prior to  
94 writing a prescription for medication to enable a qualified patient to end his or her life in a humane  
95 and dignified manner; and

96 (l)(A) Dispense medications directly, including ancillary medications intended to facilitate  
97 the desired effect to minimize the patient's discomfort, provided the attending physician is registered  
98 as a dispensing physician with the California Medical Board, has a current Drug Enforcement  
99 Administration certificate and complies with any applicable administrative rule; or

100 (B) With the patient's written consent;

101 (i) Contact a pharmacist and inform the pharmacist of the prescription; and

102 (ii) Deliver the written prescription personally or by mail to the pharmacist, who will  
103 dispense the medications to either the patient, the attending physician or an expressly identified agent  
104 of the patient.

105 (2) Notwithstanding any other provision of law, the attending physician may sign the  
106 patient's death certificate.

107  
108 §7196.1

109 Before a patient is qualified under this Chapter, a consulting physician shall examine the  
110 patient and his or her relevant medical records and confirm, in writing, the attending physician's  
111 diagnosis that the patient is suffering from a terminal disease, and verify that the patient is capable, is  
112 acting voluntarily and has made an informed decision.

113  
114 §7196.2

115 If in the opinion of the attending physician or the consulting physician a patient may be  
116 suffering from a psychiatric or psychological disorder or depression causing impaired judgment,  
117 either physician shall refer the patient for counseling. No medication to end a patient's life in a  
118 humane and dignified manner shall be prescribed until the person performing the counseling  
119 determines that the patient is not suffering from a psychiatric or psychological disorder or depression  
120 causing impaired judgment.

121  
122 §7196.3

123 No person shall receive a prescription for medication to end his or her life in a humane and  
124 dignified manner unless he or she has made an informed decision as defined in section 7195.1(7).  
125 Immediately prior to writing a prescription for medication, the attending physician shall verify that  
126 the patient is making an informed decision.

127  
128 §7196.4

129 The attending physician shall recommend that the patient notify the next of kin of his or her  
130 request for medication pursuant to section 7196(e). A patient who declines or is unable to notify next  
131 of kin shall not have his or her request denied for that reason.

132  
133 §7196.5

134 In order to receive a prescription for medication to end his or her life in a humane and  
135 dignified manner, a qualified patient shall have made an oral request and a written request, and  
136 reiterate the oral request to his or her attending physician no less than fifteen (15) days after making  
137 the initial oral request. At the time the qualified patient makes his or her second oral request, the  
138 attending physician shall offer the patient an opportunity to rescind the request.

139  
140 §7196.6

141 A patient may rescind his or her request at any time and in any manner without regard to his  
142 or her mental state. No prescription for medication under this Chapter may be written without the  
143 attending physician offering the qualified patient an opportunity to rescind the request.

144  
145 §7196.7

146 No less than fifteen (15) days shall elapse between the patient's initial oral request and the  
147 writing of a prescription by a physician. No less than 48 hours shall elapse between the patient's  
148 written request and the writing of a prescription under this Chapter.

149  
150 §7196.8

151 The following shall be documented or filed in the patient's medical record:

- 152 (1) All oral requests by a patient for medication to end his or her life in a humane and  
153 dignified manner;  
154 (2) All written requests by a patient for medication to end his or her life in a humane and  
155 dignified manner;  
156 (3) The attending physician's diagnosis and prognosis, determination that the patient is  
157 capable, acting voluntarily and has made an informed decision;  
158 (4) The consulting physician's diagnosis and prognosis, and verification that the patient is  
159 capable, acting voluntarily and has made an informed decision;  
160 (5) A report of the outcome and determinations made during counseling, if performed;  
161 (6) The attending physician's offer to the patient to rescind his or her request at the time of  
162 the patient's second oral request; and  
163 (7) A note by the attending physician indicating that all requirements under this Chapter  
164 have been met and indicating the steps taken to carry out the request, including a notation of the  
165 medication prescribed.

166  
167 §7196.9

168 Only requests made by California residents under this Chapter shall be granted. Factors  
169 demonstrating California residency include but are not limited to:

- 170 (1) Possession of a California driver license;  
171 (2) Registration to vote in California;  
172 (3) Evidence that the person owns or leases property in California; or  
173 (4) Filing of a California tax return for the most recent tax year.

174  
175 §7197.1

- 176 (1)(a) The California Medical Board shall annually review a sample of records maintained  
177 pursuant to this Chapter.  
178 (b) The Board shall require any health care provider upon dispensing medication pursuant to  
179 this Chapter to file a copy of the dispensing record with the division.  
180 (2) The Board shall make rules to facilitate the collection of information regarding  
181 compliance with this Chapter. Except as otherwise required by law, the information collected shall  
182 not be a public record and may not be made available for inspection by the public.  
183 (3) The Board shall generate and make available to the public an annual statistical report of  
184 information collected under subsection (2) of this section.

185  
186 §7197.3

- 187 (1) No provision in a contract, will or other agreement, whether written or oral, to the extent  
188 the provision would affect whether a person may make or rescind a request for medication to end his  
189 or her life in a humane and dignified manner, shall be valid.  
190 (2) No obligation owing under any currently existing contract shall be conditioned or  
191 affected by the making or rescinding of a request, by a person, for medication to end his or her life in  
192 a humane and dignified manner.

193  
194 §7197.5

195 The sale, procurement, or issuance of any life, health, or accident insurance or annuity policy  
196 or the rate charged for any policy shall not be conditioned upon or affected by the making or  
197 rescinding of a request, by a person, for medication to end his or her life in a humane and dignified  
198 manner. Neither shall a qualified patient's act of ingesting medication to end his or her life in a  
199 humane and dignified manner have an effect upon a life, health, or accident insurance or annuity  
200 policy.

201  
202 §7197.7

203 Nothing in this Chapter shall be construed to authorize a physician or any other person to  
204 end a patient's life by lethal injection, mercy killing or active euthanasia. Actions taken in  
205 accordance with this Chapter shall not, for any purpose, constitute suicide, assisted suicide, mercy  
206 killing or homicide, under the law.

207  
208 §7198

209 Except as provided in section 7198.5:

210 (1) No person shall be subject to civil or criminal liability or professional disciplinary action  
211 for participating in good faith compliance with this Chapter. Participating includes being present  
212 when a qualified patient takes the prescribed medication to end his or her life in a humane and  
213 dignified manner.

214 (2) No professional organization or association, or health care provider, may subject a person  
215 to censure, discipline, suspension, loss of license, loss of privileges, loss of membership or other  
216 penalty for participating or refusing to participate in good faith compliance with this Chapter.

217 (3) No request by a patient for or provision by an attending physician of medication in good  
218 faith compliance with the provisions of this Chapter shall constitute neglect for any purpose of law  
219 or provide the sole basis for the appointment of a guardian or conservator.

220 (4) No health care provider shall be under any duty, whether by contract, by statute or by any  
221 other legal requirement to participate in the provision to a qualified patient of medication to end his  
222 or her life in a humane and dignified manner. If a health care provider is unable or unwilling to carry  
223 out a patient's request under this Chapter, and the patient transfers his or her care to a new health care  
224 provider, the prior health care provider shall transfer, upon request, a copy of the patient's relevant  
225 medical records to the new health care provider.

226 (5)(a) Notwithstanding any other provision of law, a health care provider may prohibit  
227 another health care provider from participating in this Chapter on the premises of the prohibiting  
228 provider if the prohibiting provider has notified the health care provider of the prohibiting provider's  
229 policy regarding participating in this Chapter. Nothing in this paragraph prevents a health care  
230 provider from providing health care services to a patient that do not constitute participation in  
231 hastening the death of a qualified patient.

232 (b) Notwithstanding the provisions of subsections (1) to (4) of this section, a health care  
233 provider may subject another health care provider to the sanctions stated in this paragraph if the  
234 sanctioning health care provider has notified the sanctioned provider prior to participation in  
235 hastening the death of a qualified patient that it prohibits participation in this Chapter:

236 (A) Loss of privileges, loss of membership or other sanction provided pursuant to the  
237 medical staff bylaws, policies and procedures of the sanctioning health care provider if the  
238 sanctioned provider is a member of the sanctioning provider's medical staff and participates in  
239 hastening the death of a qualified patient while on the health care facility premises of the sanctioning  
240 health care provider, but not including the private medical office of a physician or other provider;

241 (B) Termination of lease or other property contract or other nonmonetary remedies provided  
242 by lease contract, not including loss or restriction of medical staff privileges or exclusion from a  
243 provider panel, if the sanctioned provider participates in hastening the death of qualified patient  
244 while on the premises of the sanctioning health care provider or on property that is owned by or  
245 under the direct control of the sanctioning health care provider; or

246 (C) Termination of contract or other nonmonetary remedies provided by contract if the  
247 sanctioned provider participates in hastening the death of a qualified patient while acting in the  
248 course and scope of the sanctioned provider's capacity as an employee or independent contractor of  
249 the sanctioning health care provider. Nothing in this subparagraph shall be construed to prevent:

250 (i) A health care provider from participating in hastening the death of qualified patient  
251 pursuant to this Chapter while acting outside the course and scope of the provider's capacity as an  
252 employee or independent contractor; or

253 (ii) A patient from contracting with his or her attending physician and consulting physician  
254 to act outside the course and scope of the provider's capacity as an employee or independent  
255 contractor of the sanctioning health care provider.

256 (c) A health care provider that imposes sanctions pursuant to paragraph (b) of this subsection  
257 must follow all due process and other procedures the sanctioning health care provider may have that  
258 are related to the imposition of sanctions on another health care provider.

259 (d) For purposes of this subsection:

260 (A) "Notify" means a separate statement in writing to the health care provider specifically  
261 informing the health care provider prior to the provider's participation in hastening the death of a  
262 qualified patient pursuant to this Chapter of the sanctioning health care provider's policy about  
263 participation in activities covered by this Chapter.

264 (B) "Participate in hastening the death of a qualified patient pursuant to this Chapter" means  
265 to perform the duties of an attending physician pursuant to section 7196, the consulting physician  
266 function pursuant to section 7196.1 or the counseling function pursuant to section 7196.2.

267 "Participate in hastening the death of a qualified patient" does not include:

268 (i) Making an initial determination that a patient has a terminal disease and informing the  
269 patient of the medical prognosis;

270 (ii) Providing information about the California Death with Dignity Act to a patient upon the  
271 request of the patient;

272 (iii) Providing a patient, upon the request of the patient, with a referral to another physician;

273 or

274 (iv) A patient contracting with his or her attending physician and consulting physician to act  
275 outside of the course and scope of the provider's capacity as an employee or independent contractor  
276 of the sanctioning health care provider.

277 (6) Suspension or termination of staff membership or privileges under subsection (5) of this  
278 section shall not be the sole basis for a report of unprofessional or dishonorable conduct under the  
279 Business and Professions Code.

280 (7) No provision of this Chapter shall be construed to allow a lower standard of care for  
281 patients in the community where the patient is treated or a similar community.

#### 283 §7198.5

284 (1) A person who without authorization of the patient willfully alters or forges a request for  
285 medication or conceals or destroys a rescission of that request with the intent or effect of causing the  
286 patient's death shall be guilty of a felony.

287 (2) A person who coerces or exerts undue influence on a patient to request medication for  
288 the purpose of ending the patient's life, or to destroy a rescission of such a request, shall be guilty of  
289 a felony.

290 (3) Nothing in this Chapter limits further liability for civil damages resulting from other  
291 negligent conduct or intentional misconduct by any person.

292 (4) The penalties in this Chapter do not preclude criminal penalties applicable under other  
293 law for conduct which is inconsistent with the provisions of this Chapter.

#### 295 §7198.7

296 Any governmental entity that incurs costs resulting from a person terminating his or her life  
297 pursuant to the provisions of this Chapter in a public place shall have a claim against the estate of the  
298 person to recover such costs and reasonable attorney fees related to enforcing the claim.

#### 300 §7198.9

301 Any section of this Chapter held invalid as to any person or circumstance shall not affect the  
302 application of any other section of this Chapter which can be given full effect without the invalid  
303 section or application.

304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354

§7199

A request for a medication as authorized by this Chapter shall be in substantially the following form:

---

REQUEST FOR MEDICATION  
TO END MY LIFE IN A HUMANE  
AND DIGNIFIED MANNER

I, \_\_\_\_\_, am an adult of sound mind.  
I am suffering from \_\_\_\_\_, which my attending physician has determined is a terminal disease and which has been medically confirmed by a consulting physician.  
I have been fully informed of my diagnosis, prognosis, the nature of medication to be prescribed and potential associated risks, the expected result, and the feasible alternatives, including comfort care, hospice care and pain control.  
I request that my attending physician prescribe medication that will end my life in a humane and dignified manner.

INITIAL ONE:

\_\_\_\_\_ I have informed my family of my decision and taken their opinions into consideration.  
\_\_\_\_\_ I have decided not to inform my family of my decision.  
\_\_\_\_\_ I have no family to inform of my decision.

I understand that I have the right to rescind this request at any time.  
I understand the full import of this request and I expect to die when I take the medication to be prescribed. I further understand that although most deaths occur within three hours, my death may take longer and my physician has counseled me about this possibility.  
I make this request voluntarily and without reservation, and I accept full moral responsibility for my actions.

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_

DECLARATION OF WITNESSES

We declare that the person signing this request:  
(a) Is personally known to us or has provided proof of identity;  
(b) Signed this request in our presence;  
(c) Appears to be of sound mind and not under duress, fraud or undue influence;  
(d) Is not a patient for whom either of us is attending physician.

\_\_\_\_\_ Witness 1/Date

\_\_\_\_\_ Witness 2/Date

NOTE: One witness shall not be a relative (by blood, marriage or adoption) of the person signing this request, shall not be entitled to any portion of the person's estate upon death and shall not own, operate or be employed at a health care facility where the person is a patient or resident. If the patient is an inpatient at a health care facility, one of the witnesses shall be an individual designated by the State Ombudsman.

---

§7199.1

(1) It shall be a felony for a person without authorization of the principal to willfully alter, forge, conceal or destroy an instrument, the reinstatement or revocation of an instrument or any other evidence or document reflecting the principal's desires and interests, with the intent and effect of causing a withholding or withdrawal of life-sustaining procedures or of artificially administered nutrition and hydration which hastens the death of the principal.

(2) Except as provided in subsection (1) of this section, it shall be a misdemeanor for a person without authorization of the principal to willfully alter, forge, conceal or destroy an

355 instrument, the reinstatement or revocation of an instrument, or any other evidence or document  
356 reflecting the principal's desires and interests with the intent or effect of affecting a health care  
357 decision.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Beverly Hills Bar Association

#### STATEMENT OF REASONS

Existing Law: Assisting a person to commit suicide is a felony as provided by Penal Code section 401.

This Resolution: Permits a physician to prescribe life-ending medications to a capable, terminally ill patient who requests such medications for the purpose of ending his/her life by self-administration of such medications, and, so long as the procedural safeguards of the statute are followed, to be free of the fear of prosecution for a criminal act. This resolution does not repeal the assisted suicide statute, nor does it permit a person who is not a licensed physician to aid or assist in the ending of a life. This resolution would require a person who requests such assistance to be a qualified patient, who, as defined in the Act, is a capable, terminally ill person, diagnosed by two physicians as terminally ill, free of depression which would impair informed consent, and who has requested such assistance over at least a 15 day period of time, both orally and in writing. Provision is made for psychiatric/psychological consulting if necessary and recommends informing the patient's family.

The Problem: When a similar resolution was previously considered by the Conference of Delegates and passed in 1987, there was substantial anxiety by opponents about abuses that might arise, a slippery slope that might be initiated and the moral questions associated with assisting a person to die. Litigation has proceeded to the United States Supreme Court in which the court has refused to declare a constitutional right to assistance in dying or, as commonly phrased, "death with dignity." However, the Supreme Court also said that this issue is one that is ripe for experimentation in the States (*Washington v. Glucksberg* (1997) 521 U.S. 702; *Quill v. Vacco* (1997) 521 U.S. 721.) That experimentation began with the passage of a statute by initiative process in Oregon in 1995 upon which this resolution is modeled. The statute was implemented in Oregon in 1997 following litigation attacking its validity. (Further litigation is presently pending as the current attorney general of the United States attempts to impose Federal drug legislation in criminal prosecutions against Oregon physicians who administer medications to terminally ill patients pursuant to the Oregon Death With Dignity Act.) A report of the five year history of the Oregon statute reflects neither the feared abuses nor a slippery slope. The statute has been used by 70 individuals to end their lives at the time that they chose and in accordance with the safeguards provided. Patients were able to receive the support and caring concern of their physicians, families and friends as they chose, rather than to die under less favorable circumstances.

#### IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Barry E. Shanley, Potter, Potter and Shanley, P. O Box 305, Montrose, California 91020 (818) 249-5852, fax: (818) 906-7184  
e-mail: shanley1@ix.netcom.com; Michael H. White, Law Offices of Michael H. White, 11024 Balboa Blvd., #615, Granada Hills, California 91344; phone/fax: (818) 368-0444; e-mail:

RESPONSIBLE FLOOR DELEGATE: Barry E. Shanley and Michael H. White

## COUNTERARGUMENT

### ORANGE COUNTY BAR ASSOCIATION

Regardless of any moral position that may be taken on this resolution, there are several problems with the text of the resolution itself. §7195.1(3) defines “Capable”, in part, as “a patient (who) has the ability to make and communicate health care decisions” without any requirement that the decision be informed, nor is it clear if “capable” is to be synonymous with “competent”. §7195.1(11) defines a “qualified” patient as one who is capable, is a resident of California and has satisfied the requirements of the Chapter. One of those requirements is for the physician to determine if the patient is qualified after they have given “informed consent”. However, as the Chapter is written, the physician is only required to give what amounts to an “informed advisement” and there is no requirement that they obtain “informed consent”, either in the physician duties, pursuant to §7196, nor in the actual definition of “informed consent”, pursuant to §7195.1(7). For true “informed consent” the patient must be advised of all treatments available, whether or not the physician deems them “feasible”, and of their potential risks and benefits. Merely informing the patient of the risks and benefits of the medication they are seeking is not true “informed consent”.

§7196.2 requires the attending or consulting physician to refer the patient for counseling when, *in their opinion*, the patient may be suffering from a condition that impairs their judgment. All patients seeking relief under this Act should be required to undergo counseling, regardless of the opinion of their attending or consulting physician. The ability to determine if a patient has impaired judgment should rest with the mental health professionals.

§’s 7196(h), 7196.5 and 7196.7 contradict themselves. They seem to require a fifteen day waiting period after the initial oral request for medication before the prescription may be written. However, there must also be a written request and the medication may be prescribed within 48 hours after the written request. Clarification of the waiting periods is necessary and all requests should be in writing and placed in the patient’s medical file as part of their records.

Further, as written, if a patient is diagnosed, the physician deems them qualified and determines that the patient is not suffering from any form of impaired judgment and the patient promptly makes a written request for medication to end their life, presumably that prescription could be written less than a week after the diagnosis. However, the patient undergoes a process when faced with a terminal diagnosis. They go through denial, anger, depression and, finally, acceptance. To say, with confidence, that they have given informed consent at any time during that process is problematic. The time periods should be increased to ensure the patient is acting voluntarily and is not making a decision when their judgment is impaired.