

Legal Update 2023

Top 10 Legal
Developments
in Bioethics

1



@ThaddeusPope

Thaddeus Mason Pope, JD, PhD, HEC-C
ASBH Annual Meeting
Baltimore, Maryland
October 12, 2023

2

nothing
to disclose

3



4

4 updates

5

medical futility
CBO
supported DM
brain death

6

**medical
futility**

7



8



9

4 hospital
wins

10

win 1

11



12



13

judgment: defense
no causation

14

even if LST had been continued, patient **probably** would **not** have survived

15

win 2

16



17



18

denied all
statutory, IC,
IIED claims

19

win 3

20



21



22

judgment: defense
no injunction

23

win 4

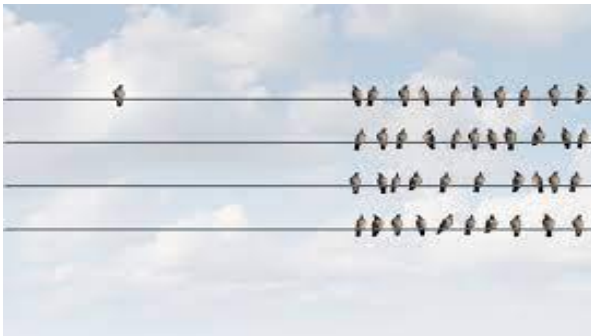
24



25



26



27

no unilateral
w/h or w/d

28

pressure
coercion

29

“**torturing** your
father”
—————
“should be
ashamed”

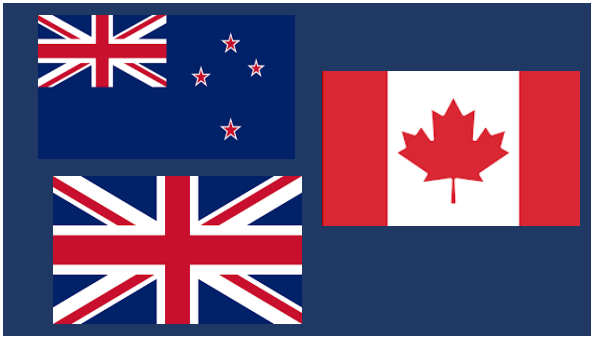
30

judgment: defense
SOL / SOR

31



32



33

3 ongoing cases

34



35



36



Finnley McCullum

37



38



Grace Schara

39



40



Henry Wyer

41



42



43



44



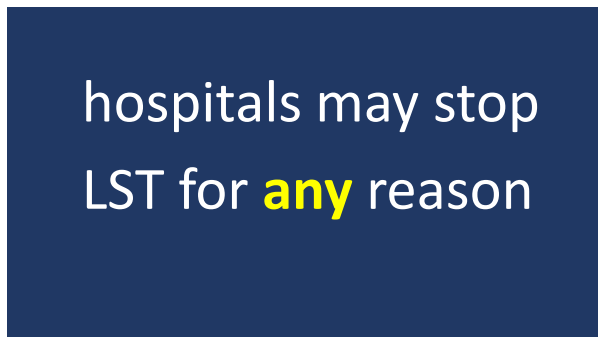
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46



47



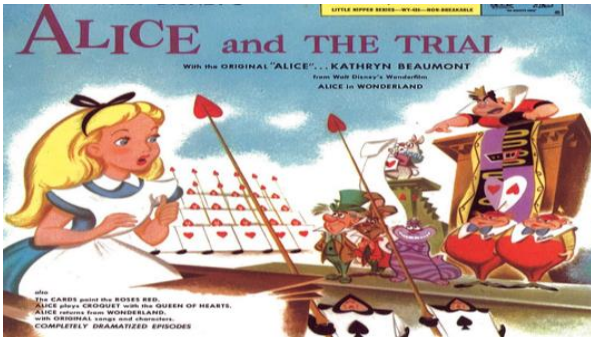
48

without patient or surrogate consent

49

so long as hospital's **own** HEC approves

50



51



52

HB 3162

53



54



55

effective
Sept. 1, 2023

56



57

4 big
changes

58

change 1

59

narrowed
grounds

60

HEC limited
to 5 **factors**

61

no patients
with capacity

62

change **2**

63

more
notice

64

48h → 7cd

65

change **3**

66

more
transfer

67

10 → 25d

68

trach/PEG

69

change 4

70

more
transparency

71



TEXAS
Health and Human
Services

Ethics/Medical Committee Reporting Form

According to Texas Health & Safety Code Section 1, Subchapter B, Chapter 166, health care facilities must report information regarding ethics or medical committee processes in instances in which an attending physician refuses to honor an advance directive or health care decision made by or on behalf of certain patients. Facilities must submit a report no later than 100th day after the written notice regarding the review process required under [Section 166.086\(d\)](#), as amended by [BB/S 160 3152](#) is provided.

Information collected in this reporting form will only be used to meet statutorily mandated reporting requirements. Any patient information collected in this form is strictly confidential and will not be used to identify the patient by any means.

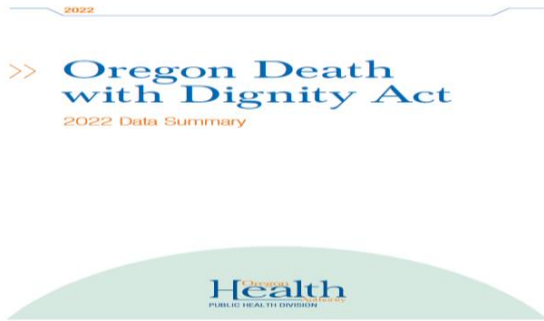
Questions within this reporting form refer to written notice required by [Health & Safety Code Section 166.046\(b\)](#), as amended by [BB/S 160 3162](#) regarding ethics or medical committee review of a physician's refusal to honor an advance directive or health care or treatment decision. Additionally, Question 1 has been included to provide a contact person for HHSIC in case any further inquiries arise on the reported information.

1. Please enter the following information *

Reporting Facility Name *

Reporting Facility ID (Please contact ethicsmedicalcommittee@hsr.texas.gov to obtain a Facility ID) *

72



73



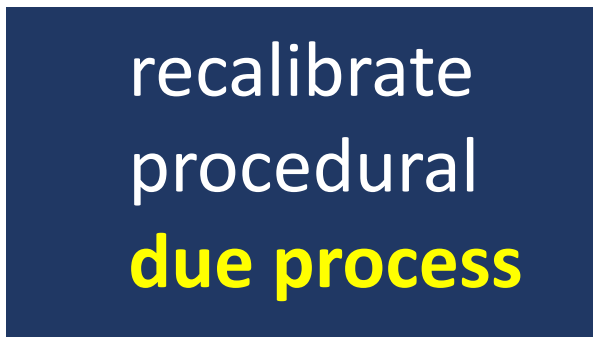
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75



76



77



78



79



80

FEDERAL REGISTER

Vol. 88 Thursday,
No. 177 September 14, 2023

Pages 62993-63512



81

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 84
RIN 0945-AA15

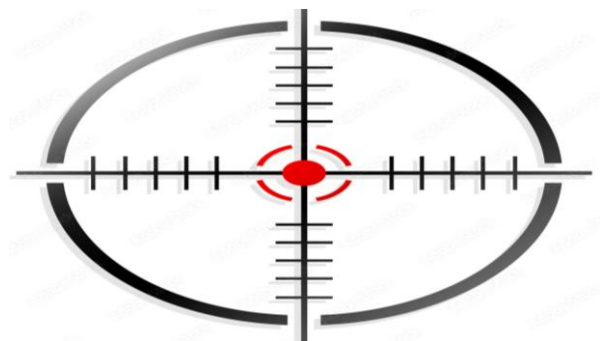
Discrimination on the Basis of Disability in Health and Human Service Programs or Activities

AGENCY: Office for Civil Rights (OCR), Office of the Secretary, HHS.
ACTION: Proposed rule.

82

“no ... individual with a **disability** shall ... be subjected to **discrimination** in medical treatment ...”

83



84

“Discrimination is particularly salient in the context of **medical futility**”

85



86

“may not deny or limit ... treatment ... based on ... belief ... **life with a disability is not worth living**”

87

but

88

NBT
PIT

89



90

“discriminatory ... deny ... treatment [because it] cannot end **dependence on intensive ... care**”

91

widely **endorsed** basis NBT / PIT

92



93



94



Model Policy on “Non-beneficial Treatment”

Lynette Cederquist, MD, [July 2009 "San Diego Physician" • Ethics in Medicine](#)

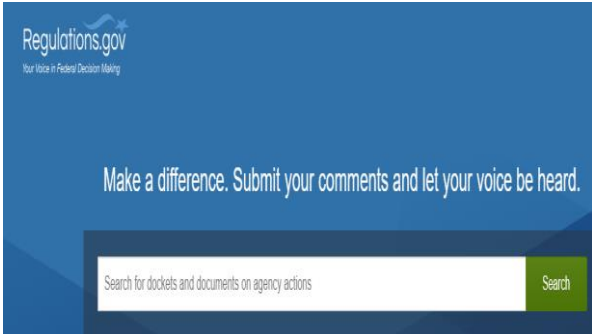
95



96

proposed
not final rule

97



98



99

that's enough on
medical futility

100

CBO

101

may **refuse** Tx
otherwise had
duty to provide

102

3 types
HC

103

reproductive

104

contraceptive devices
tubal ligations / female sterilization
vasectomies
miscarriages
ectopic pregnancies
emergency contraception
abortion

105

end-of-life

106

medical aid in dying
palliative sedation
VSED
withholding CANH

107

LGBTIQA+

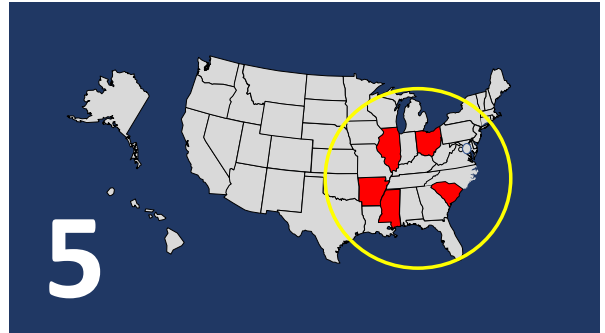
108

transgender health
 genital reconstructive surgery
 chest reconstructive surgery
 hormones

Counseling for intersexuality

HIV/AIDS treatment and counseling

109



110

2023

111

>20 bills

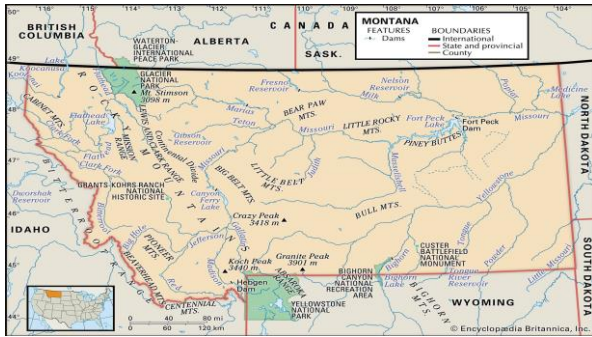
112

2 enacted

113



114



115



116

authorize
denial of care

117

elevate clinician
conscience **over**
patient health/life

118

who

119

not only direct
care providers
schedulers, janitors...

120

not only individuals
entities too

121

what

122

perform
assist
make arrangements for
refer

123

schedule
transport
prepare room

124

when

125

no matter the
effect on patients

126

but

127



128



129



130

21% **not** disclose
Catholic identity

JAMA, 2019;
321(11):1103

131

72% **not** disclose how
religious affiliation
influences care

JAMA, 2019;
321(11):1103

132

impedes patient
ability to make
informed choice

133

SO...

134

mandate
disclosure

135



136

2023

137



138

Patient Right to Know Act

H.B. 1218

139



COLORADO

Health Facilities & Emergency
Medical Services Division

Department of Public Health & Environment

140

service
availability
form

141

non-medical
denial of care

142

CDHPE website
Handed to Pt

143

that's

CBO

144

supported
decision making

145

under-recognized
in bioethics

146

decision
making
capacity

147



148

capacity

no
capacity

149

capacity →
patient makes
own HC decision

150

no capacity →
surrogate DM
makes HC decision

151

but

152

3rd

153

supported
decision
making

154

patient **cannot**
make health care
decision

155

but

156

problem is
fixable

157

patient **can** make
her own decision
with help

158

supporter

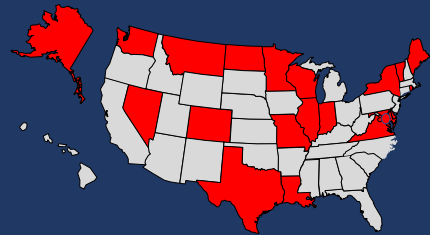
159

gather information
understand information
review options
make decisions
communicate those decisions

160

supporters do **not**
make decisions
supporters **help** the
patient make decisions

161



162

2023

163

3 more

164

AL AZ
CA


165

24

166

Nov. 2013

AMA
AMERICAN MEDICAL
ASSOCIATION



167

SO...

168

update
policies & procedures

169

old rule

170

patient cannot make
decision alone
→ get surrogate

171

new rule

172

patient cannot
make decision
by herself

173



174

can patient decide
with supporter?

175

If yes →
get a supporter

176

that's

supported
decision making

177

brain
death

178

since
2013

179

more conflict
more court cases

180

SO ...

181

2020 2022
2021 2023

182



183

UDDA →
RUDDA

184

certainty
clarity

185

5 fixes

186

1. **match** legal criteria to medical standards

187

2. clarify **which** medical standards to use

188

3. clarify **consent** is not required for BD testing

189

4. clarify when to offer reasonable **accommodation**

190

5. change “irreversible” to “permanent”

191

but

192



193



194



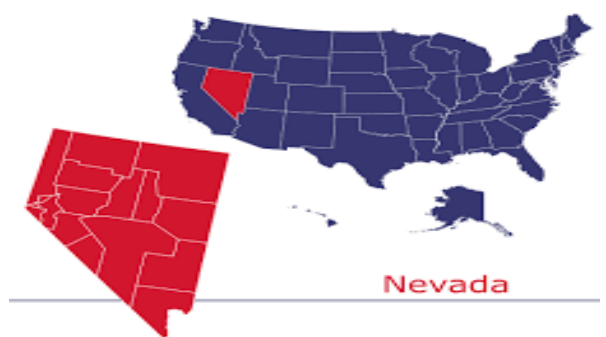
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196



197



198



199

variability
mistrust
conflict

200

that's
brain death

201

4 updates

202

medical futility
CBO
supported DM
brain death

203

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