The Legal Labyrinth to End-of-Life Healthcare in Oklahoma

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What is Palliative Care?

Palliative care (pronounced pal-lee-uh-tiv) is specialized medical care that focuses on providing patients with relief from symptoms, pain, and stress, whatever the diagnosis. The goal is to improve quality of life for both the patient and the family.

It is appropriate at any age and at any stage in a serious illness and can be provided along with curative treatment.
Palliative care focuses on symptoms such as pain, shortness of breath, fatigue, constipation, nausea, loss of appetite, difficulty sleeping and depression. It also helps provide the strength to carry on with daily life. It improves the patient’s ability to tolerate medical treatments. And it allows more control over care by improving communication so that patients can better understand choices for treatment.
There is a **legal labyrinth** for patients and health providers who travel in pursuit of **dying well** in Oklahoma.
The goal is in plain sight.

avoid needless pain

Honor Patient Wishes

avoid futile care

palliative care

prolong life, not death
A “Good” Death?

The technology that allowed prolonging of biological life brought a perspective of death as failure.

Physicians forgot how to treat suffering.

Palliative care and hospice are treatment options that patients must be informed of and understand in order to provide informed consent.
What patients don’t know about the law in Oklahoma can hurt them.

Family members in Oklahoma have no “statutory” legal authority to make medical decisions.

No Surrogacy law?
The key to honoring patient wishes is for every Oklahoman 18 years of age and older to appoint a healthcare proxy who knows their underlying values, to advocate to make their wishes known and honored.

Health providers and family/friends should not have to roll the dice.
Artificial administration of nutrition and hydration was originally developed to provide short-term support to patients who were acutely ill.

These temporary measures became long-term treatment and present ethical dilemmas.
Hydration and Nutrition for Incompetent Patients Act as Amended 2006

Title 63 O.S. Section 3080.3: It shall be presumed that every incompetent patient has directed his health care providers to provide him with hydration and nutrition to a degree that is sufficient to sustain life.

"Incompetent patient" means any person who:

a. is a minor, or

b. has been declared legally incompetent to make decisions affecting medical treatment or care, or

c. in the reasonable judgment of the attending physician, is unable to make decisions affecting medical treatment or other health care services;
Exceptions to Presumption

1. The attending physician of the incompetent patient knows that the patient, when competent, decided on the basis of information sufficient to constitute informed consent that artificially administered hydration or artificially administered nutrition should be withheld or withdrawn from him;

2. An advance directive for health care has been executed pursuant to the Oklahoma Advance Directive Act specifically authorizing the withholding or withdrawal of nutrition and/or hydration;

3. In the reasonable medical judgment of the incompetent patient's attending physician and a second consulting physician, artificially administered hydration or artificially administered nutrition will itself cause severe, intractable, and long-lasting pain to the incompetent patient or such nutrition or hydration is not medically possible; or

4. In the reasonable medical judgment of the incompetent patient's attending physician and a second consulting physician:

   a. the incompetent patient is chronically and irreversibly incompetent, b. the incompetent patient is in the final stage of a terminal illness or injury, and c. the death of the incompetent patient is imminent.
Exception to the Exception

Hydration or nutrition may not be withheld or withdrawn pursuant to exception #4 if this would result in death from dehydration or starvation rather than from the underlying terminal illness or injury.
Nondiscrimination in Healthcare Act

“A health care provider shall not deny to a patient a life-preserving health care service the provider provides to other patients, and the provision of which is directed by the patient or [surrogate] . . . on the basis of a view that treats extending the life of an elderly, disabled, or terminally ill individual as of lower value than extending the life of an individual who is younger, nondisabled, or not terminally ill.”
While Title 63 O.S. 3090.1, et seq., which will be effective November 1, 2013, seems innocuous, the result is a mandate to provide life-preserving treatment even when that treatment is non-beneficial or even harmful to the patient.

The law also creates a cause of action for injunction against any health provider who is “reasonably believed to be about to violate, who is in the course of violating, or who has violated” the act.

Warning: Don’t talk about palliative care. Don’t be honest with patients and families when there is no cure.
Ancient Medical Ethics

- Hippocrates:
  - Three major goals of medicine:
    - Cure
    - Relief of suffering
    - "Refusal to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless."
Plato:

“To attempt **futile** treatment is to display an **ignorance** that is allied to **madness**.”
Medical Ethics on Futile Care

- Contemporary physicians’ ethics:
  - Tell patients/families when cure is no longer possible.
  - Listen to concerns about end of life.
  - Assist in planning for palliative care.
  - Provide information on hospice care.
Breaking bad news . . .

We’re pulling the plug
AMA Guidelines

• AMA guidelines on medical futility:

• Process based approach to futility disputes.

• If dispute cannot be resolved, physician should facilitate transfer to alternate provider.

• If no transfer can be arranged, halting futile treatment is ethically acceptable.
Shared Determination

- The physician, patient or surrogate should balance:
  - Effectiveness of treatment: expertise lies with the physician.
  - Benefit of treatment to the patient: subjective determination of goals of treatment made by patient.
  - Emotional, financial or social burden to the patient: shared by physician and patient based on medical facts and subjective, personal goals.
Attorneys Can Advocate for the Vulnerable.
When a patient is your client ...
Recognize the ethical issues.
Ethics isn’t easy.
Rule 1.14: The Client with Diminished Capacity

If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm the lawyer may take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client and the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.
Rule 2.1: Advisor

It is proper for a lawyer to refer to *relevant moral and ethical considerations in giving advice*. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. *A client is entitled to straightforward advice* expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, *a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client*. When a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of *dispute resolution* that might constitute reasonable alternatives to litigation.
Standards of Professionalism

Section 2: Responsibilities to Clients

We will be loyal and committed to our client's lawful objectives, but will not permit our loyalty to interfere with giving the client objective and independent advice.

We will advise our client against pursuing litigation (or any other course of action) that does not have merit.

We will always look for opportunities to de-escalate a controversy and bring the parties together.

We will consider whether the client's interests can be adequately served and the controversy more expeditiously and economically resolved by arbitration, mediation or some other form of alternative dispute resolution, or by expedited trial; we will raise the issue of settlement and alternative dispute resolution as soon as a case can be evaluated and meaningful compromise negotiations can be undertaken.
Ethics Consult
In re Quinlan, the United States Supreme Court suggests that a hospital ethics committee could provide an appropriate setting for competing ethical issues to be explored and, in many cases, resolved by consensus. (1976)

The courts would rather not be involved in the complex dilemmas encountered by health professionals and patients near the end of life.
Health care ethics consultation is a service provided by an individual or group to help patients, families, surrogates, health care providers, or other involved parties address uncertainty or conflict regarding value-laden concerns that emerge in health care.
Medical Futility

Medical Futility Procedures

Assess Futility

Communication

Ethics Consult

Transfer of Care

Bioethics Mediation

Treatment Plan

Legal Options

- no consensus
- consensus
Ethics is the key to unlocking...

...the legal labyrinth that is Oklahoma law.

The law without ethical lawyers is a life and death matter for the terminally ill in Oklahoma.
For more information on palliative care, go to the Oklahoma Palliative Care Resource Center website, www.okpalliative-care.com.

Or email Annette Prince at annette-prince@ouhsc.edu.