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JOHN RADCLIFFE, CHARLES MILLER,
M.D., and COMPASSION & CHOICES

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

JOHN RADCLIFFE,
CHARLES MILLER, M.D., and
COMPASSION & CHOICES

Plaintiffs,

vs.

STATE OF HAWAI`I;
DOUGLAS CHIN, Attorney General; and
KEITH M. KANESHIRO, Prosecuting
Attorney for the City and County of Honolulu,

Defendants.

Civil No. 17-1-0053-01 KTN.

COMPLAINT; EXHIBITS 1 AND 2; SUMMONS

COMPLAINT

Plaintiffs John Radcliffe, Charles Miller, M.D., and Compassion & Choices, for their Complaint against the State of Hawai`i; Douglas Chin, Attorney General; and Keith M. Kaneshiro, Prosecuting Attorney for the City and County of Honolulu, allege as follows:

Preliminary Statement

1. This action is brought by mentally-competent patient John Radcliffe and medical professional Charles Miller, M.D. to establish the constitutional right of individuals to request and receive a prescription to end their unnecessary suffering at the end of life pursuant to the practice of medical aid in dying. Medical aid in dying is provided when a mentally-competent, terminally-ill adult patient seeks and obtains a prescription for medication from an attending physician, which the patient may choose to self-administer to avoid intolerable pain and suffering associated with a medical condition that makes death inevitable. Plaintiffs seek a declaratory judgment and injunctive relief to clarify and prevent the application of Hawai`i criminal homicide and manslaughter statutes against physicians who, through medical aid in dying, wish to honor their patients' desire to have the means to achieve a peaceful and humane death. Plaintiffs' claims are based upon the patients' fundamental rights of privacy; individual dignity; due process; equal protection of the law; and the right to seek happiness in all lawful ways, as guaranteed by the Hawai`i Constitution and the Hawai`i Revised Statutes.

The Parties

2. John Radcliffe is a resident of Honolulu, Hawai`i. He is a mentally-competent adult. Mr. Radcliffe learned in June 2014 that he had incurable colon cancer that has metastasized to his liver. He has been fortunate to successfully beat back the cancer for the last

few years, but recent tests indicate the cancer lesions have grown and he must continue chemotherapy. When originally diagnosed Mr. Radcliffe had a six to twenty-four month prognosis. As his disease progresses he wants to obtain a prescription pursuant to the practice known as medical aid in dying so that he may have an option of self-administering medication if and when his suffering at the end of his life becomes unbearable. He is barred from obtaining such a prescription because he is unable to find a doctor in Hawai`i who is willing to provide such a prescription for fear of criminal prosecution.

3. Dr. Charles Miller is a physician who is licensed to practice medicine in Hawai`i. He is an oncologist and is board certified in internal medicine, medical oncology, and hematology. Although Dr. Miller no longer keeps office hours he regularly advises patients who are suffering from cancer. If medical aid in dying were not subject to criminal prosecution he would be willing to write Mr. Radcliffe a prescription for medication pursuant to the medical standard of care for medical aid in dying.

4. Compassion & Choices is a national non-profit organization dedicated to improving care and expanding choice at the end of life. Compassion & Choices is the oldest and largest non-profit dedicated to such advocacy and has more than 4,850 active volunteers throughout the United States, including Hawai`i. It is the national leader in advocating for the rights of terminally ill patients and provides free information and education to the public through its End-of-Life Information Center and End-of-Life Consultation Service.

5. Douglas Chin is the Attorney General for the State of Hawai`i and the chief law enforcement officer of the State. *Amemiya v. Sapienza*, 63 Haw. 424, 427, 629 P.2d 1126, 1129 (1981). As such, he is responsible for exercising supervision over county attorneys throughout the State and has the power to order and direct the prosecutors in all matters

pertaining to the duties of their office. HRS §§ 26-7 and 28-2. Mr. Chin is sued here in his official capacity.

6. Keith M. Kaneshiro is the Prosecuting Attorney for the City and County of Honolulu. As the Prosecuting Attorney, Mr. Kaneshiro has "the primary authority and responsibility for initiating and conducting criminal prosecutions within his jurisdiction." *Amemiya*, 63 Haw. at 427, 629 P.2d at 1129; Revised City and County of Honolulu Charter § 8-104. Mr. Kaneshiro is sued here in his official capacity.

Jurisdiction and Venue

7. This Court has jurisdiction over this case pursuant to its general jurisdiction and Hawai`i Revised Statutes Chapters 632 and 661.

8. The events, activities, and injuries that give rise to this action all take place in the City and County of Honolulu, State of Hawai`i. Jurisdiction and Venue are appropriate in this Court.

Factual Allegations

9. Mr. Radcliffe is a mentally-competent adult who was diagnosed in 2014 with stage IV adenocarcinoma colon cancer that has metastasized to his liver. At that time physicians estimated he had six months to live if he did nothing, and twenty-four months to live if he used all medical means available to him to fight the cancer.

10. Unfortunately, Mr. Radcliffe's cancer is inoperable because of the proximity to bile ducts and it is considered incurable. However, to slow the cancer he has undergone chemotherapy. At first Mr. Radcliffe had an adverse reaction to the chemotherapy that amplified the side effects of the treatment and almost killed him. This occurs in about 1 in 10,000 individuals. Once that issue was resolved he has been able to tolerate his chemotherapy. As of the filing of this complaint, he has undergone more than 40 three-day chemotherapy

sessions. Since his diagnosis Mr. Radcliffe has had 15 visits to the emergency room and has had three extended stays in the hospital.

11. As a result of his past treatment, Mr. Radcliffe was able to keep the cancer at bay, and even saw shrinkage of the lesions in his body. Unfortunately, recent tests indicated that without chemotherapy the lesions start to grow again. His next round of chemotherapy is scheduled for the week of Tuesday, January 17, 2017.

12. As a result of Mr. Radcliffe's illness and the treatment he has received to combat it, Mr. Radcliffe has suffered varying symptoms, including anxiety, nausea, vomiting, fatigue, neuropathy of the hands and feet, dizziness, forgetfulness, constipation, diarrhea, sores inside his nose and mouth, susceptibility to bruising, and all manner of pain that one could imagine. These symptoms, as well as others, are expected to increase in frequency and intensity as the disease progresses.

13. Mr. Radcliffe very much wants to live but, as a result of his terminal illness, he is approaching the end of his life and has no reasonable prospect of recovery. As his disease takes its toll, he faces the progressive, inexorable erosion of bodily function and integrity, increasing pain and suffering, and the loss of personal dignity, which he considers the hallmark of human life.

14. At the threshold of death, in the event his suffering may become unbearable, Mr. Radcliffe wants the legal option to be able to avoid suffering through his inevitable death and die in a peaceful and dignified manner by taking medication prescribed by his doctors for that purpose. Because it will be his suffering, his life, and his death that will be involved, he seeks the right and responsibility, in consultation with his loved ones and medical providers, to make that critical choice for himself if circumstances lead him to do so. Even if

Mr. Radcliffe ultimately chooses to not self-administer the medication, having the prescription and knowing that he will not have to suffer needlessly at the end of life will give him great comfort in his last days.

15. During his practice, Dr. Miller frequently encountered terminally-ill patients who have no chance of recovery, to whom medicine cannot offer any hope other than a degree of symptomatic relief. In some cases, however, even symptomatic relief is impossible to achieve without the use of terminal sedation, a pharmacological technique that renders the patient unconscious during the period leading to his or her death. The only choice available to these patients, therefore, is prolonged and unrelieved anguish, on the one hand, or unconsciousness and total loss of control on the other. Faced with such a choice, some patients ask for the doctor's help by providing prescriptions for medication that the patients may take in quantities sufficient to bring a peaceful end to an intolerable dying process. In these types of situations, where mentally-competent adult patients have requested help to die, the doctor's professional judgment may often be that providing such a prescription is medically appropriate.

16. It is, or in light of the rights guaranteed by the Hawai`i Constitution should be declared to be, the public policy of the State of Hawai`i to allow physicians to provide medical aid in dying to their mentally-competent, terminally-ill adult patients who are experiencing severe suffering at the end of life and request such assistance.

17. Hawai`i has embraced a public policy of promoting the rights of privacy and autonomy in end-of-life care decisions, which is reflected in Hawaii's Uniform Health-Care Decisions Act (Modified), at HRS Chapter 327E. Under the Uniform Health-Care Decisions Act (Modified) a patient has the right to set forth advance health-care directives with individual instructions; "may execute a power of attorney for health care, which may authorize the agent to

make any health-care decision the principal could have made while having capacity," even when doing so will cause death; and may designate an individual to act as a surrogate who "may make health-care decisions for the patient that the patient could make on the patient's own behalf," even when doing so will cause death. HRS §§ 327E-3 and 327E-5.

18. Under the reasoning of Hawaii's Uniform Health-Care Decisions Act (Modified), there is no rational or meaningful basis to distinguish between withdrawal or refusal of treatment for a terminally ill person and a physician's provision of medical aid in dying. Both treatment options provide a terminally-ill, mentally-competent adult with the option of a peaceful and pain-free death in the face of a protracted and agonizing alternative. Both options involve affirmative medical assistance in carrying out the person's end-of-life medical care. And both options provide patients with the ability to decide for themselves whether the inevitable debilitating pain that they are suffering is worth enduring when death is imminent.

19. Hawai`i has also enshrined in its statutory definition of the "practice of medicine" citizens' rights to receive, and healthcare providers' rights to furnish, "any remedial agent or measure," provided that a duly licensed physician or osteopathic physician has pronounced that the "person [is] affected with any disease hopeless and beyond recovery." HRS § 453-1. Medical aid in dying—which involves a licensed physician providing a prescription for medication, which the patient may choose to self-administer to avoid intolerable pain and suffering associated with a medical condition that makes death inevitable—falls within the letter and spirit of Hawai`i Revised Statutes Section 453-1.

20. There is no statute that specifically prohibits medical aid in dying. However, the Attorney General has opined that medical aid in dying could be prosecuted under state criminal statutes. A person who intentionally or knowingly causes the death of another

human being in Hawai`i commits the offense of Murder in the Second Degree. HRS § 707-701.5. A person who does so "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation" is guilty of Manslaughter. HRS § 707-702(2). A person is also guilty of Manslaughter if they intentionally cause another person to commit suicide. HRS § 707-702(1)(b). Murder in the Second Degree is a felony punishable by a sentence of life imprisonment with the possibility of parole. HRS §§ 707-701.5 and 706-656. Manslaughter is a class A felony punishable by "an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation." HRS § 706-659. Past and current Attorney Generals of Hawai`i have opined that these statutes bar medical aid in dying.

21. In 2011, then Attorney General David Louie approved a letter opinion that suggested that criminal prosecutions may be brought against physicians who provide medical aid in dying. *See* Exhibit 1.

22. In 2015, Defendant Chin approved another letter opinion that also suggests that criminal prosecutions may be brought against physicians who provide medical aid in dying. *See* Exhibit 2.

23. The Attorney General's interpretation, and the potential application by the Attorney General and Prosecuting Attorney of the criminal homicide and manslaughter statutes deter Dr. Miller and others similarly situated from providing medical aid in dying to their qualifying patients, thereby preventing doctors from offering medical care that, in their professional judgment, would otherwise be appropriate under the circumstances. The homicide and manslaughter statutes are also likely to deter, in the same manner, the physicians who will treat Mr. Radcliffe during the period immediately preceding his death.

24. By stating that physicians may be prosecuted criminally if they provide medical aid in dying to competent adults and interfering in the patient-physician relationship, the criminal homicide and manslaughter statutes, as interpreted by Defendant Chin and his predecessor Attorney General, deny patients the right to make medical judgments affecting their bodily integrity and health in partnership with a chosen healthcare provider, and their ability to remain free from government interference in the process. The Attorney General's interpretation of the statutes also denies terminally-ill patients the right to the integrity of and personal autonomy over their own bodies; the right to decide for themselves the most fundamental questions about the meaning and value of their lives and the intrinsic value of life in general; the right to liberty, of which they may not be deprived without due process of law; the equal right to form and follow their own values in profoundly spiritual matters; and the inalienable right to seek safety, health, and happiness in all lawful ways.

Claims for Relief

25. The application of the criminal homicide and manslaughter statutes in the context of medical aid in dying violate the fundamental rights of Mr. Radcliffe and the fundamental rights of other mentally-competent and terminally-ill patients treated by Dr. Miller and others similarly situated, as guaranteed by the following provisions of the Hawai`i Constitution:

a. Article I, Section 6; the right of privacy;

b. Article I, Section 5; the right to due process of law;

c. Article I, Section 5; the right to equal protection of the laws; and

d. Article I, Section 2; the right to enjoy life, liberty, and the pursuit of happiness.

26. The potential application of the criminal homicide and manslaughter statutes to physicians who, in accordance with the medical standard of care, provide requested medical aid in dying to mentally-competent adults with terminal medical conditions who are confronting intractable pain and suffering near the inevitable end of life also violates the doctors' own fundamental rights of individual privacy and due process of law, as guaranteed by the provisions of the Hawai`i Constitution cited above.

27. The application of the criminal homicide and manslaughter statutes in the context of medical aid in dying violate the fundamental rights of Mr. Radcliffe and the fundamental rights of other mentally-competent, terminally-ill patients treated by Dr. Miller and others similarly situated, as guaranteed by Hawai`i Revised Statutes Section 453-1.

28. The potential application of the criminal homicide and manslaughter statutes to physicians who, in accordance with the medical standard of care, provide requested medical aid in dying to mentally-competent adults with terminal medical conditions who are confronting intractable pain and suffering near the inevitable end of life also violates Hawai`i Revised Statutes Section 453-1.

Prayer for Relief

WHEREFORE, Plaintiffs pray for relief as follows:

1. For declaratory judgment determining that HRS §§ 707-701.5 and 707-702 are unconstitutional as applied to the acts of a physician who provides medical aid in dying to a mentally-competent, terminally-ill adult patient facing a dying process that the patient finds intolerable.

2. For declaratory judgment determining that HRS § 453-1 permits medical aid in dying.

3. For declaratory judgment determining that no Hawai`i statute bars the acts of a physician who provides medical aid in dying to a mentally-competent, terminally-ill adult patient facing a dying process that the patient finds intolerable.

4. For an order permanently enjoining defendants and all who act in concert with them or under their direction and control from charging, threatening to charge, or otherwise seeking to enforce HRS §§ 707-701.5 and 707-702 against physicians in Hawai`i who provide medical aid in dying to mentally-competent, terminally-ill patients who request such assistance.

5. For an award of Plaintiffs' reasonable attorneys' fees and costs incurred herein, pursuant to HRS § 632-3 and the private attorney general doctrine.

6. For such other and further relief as the Court deems just and proper.

DATED: Honolulu, Hawai`i, January 11, 2017.

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December 8, 2011

CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

The Honorable Joshua Booth Green, M.D.
Senator, Third District
Twenty-Sixth Legislature
State Capitol
415 S. Beretania Street, Room 222
Honolulu, Hawaii 96813

Dear Senator Green:

Re: Hawaii law on assistance with dying

You have asked (1) whether §453-1, Hawaii Revised Statutes (HRS), authorizes a physician to assist a terminally ill patient with dying when requested by or on behalf of the patient, and (2) whether any criminal laws prohibit aid in dying.

We are assuming that a physician's assistance with dying would consist of prescribing a lethal dose of medication that a terminally ill patient could take to bring on a swifter and possibly more peaceful death than would otherwise ensue. Our analysis addresses only this method of assistance. Briefly, (1) we do not believe that §453-1 provides authority for a physician to assist with dying, and (2) a physician who provided such assistance could be charged under Hawaii's manslaughter statute.

1. **Section 453-1, HRS, does not authorize physicians to assist terminally ill patients with dying.**

Section 453-1, HRS, which defines the practice of medicine, reads in part:

§453-1 **Practice of medicine defined.** For the purposes of this chapter the practice of medicine by a physician or an osteopathic physician includes the use of drugs and medicines, water, electricity, hypnotism, osteopathic medicine, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject; **provided that when a duly licensed physician or osteopathic physician pronounces a person affected with any disease hopeless and beyond recovery and**

Exhibit "1"

> **gives a written certificate to that effect to the person affected or the person's attendant nothing herein shall forbid any person from giving or furnishing any remedial agent or measure when so requested by or on behalf of the affected person.**
>
> . . .

We understand from media reports that some advocates of aid in dying read the language in bold type in this section, the "proviso," as protecting physicians who provide terminally ill patients with prescriptions for lethal dosages of medication to aid in dying. This is not the case.

The effect of that language is to allow not only licensed doctors but also other people to provide a patient who has been pronounced "hopeless and beyond recovery" with "any remedial agent or measure" if the patient requests it. There is no definition of the term "remedial agent or measure" in chapter 453 but neither normal usage nor the legislative history of this section supports a conclusion that the term includes lethal dosages of medication.

In Hawaii statutes, words carry their usual meanings. Section 1-14, HRS. The Merriam-Webster dictionary defines "remedial" as "intended as a remedy." http://www.merriam-webster.com/dictionary/remedial. A "remedy," in turn, is "1: a medicine, application, or treatment that ***relieves or cures disease***; 2: something that corrects or counteracts; 3: the legal means to recover a right or to prevent or obtain redress for a wrong." http://www.merriam-webster.com/dictionary/remedy (emphasis added). Would a lethal dose of medication "relieve or cure" a disease?

One can argue that it would. "Relief" can mean "removal or lightening of something oppressive, painful, or distressing." http://www.merriam-webster.com/dictionary/relief. Death would certainly remove the pain and distress of the dying process or "relieve" the patient of the disease. But the legislative history of this section indicates that this is not what the legislature had in mind. The legislature was focused on novel treatment intended to cure.

The proviso was added to the then-existing statute in 1909. Act 141, S.L.T.H. 1909. According to the report of the Committee on Public Health,

> The object of the Bill being, to give those afflicted with leprosy, asthma, consumption or tuberculosis the opportunity of availing themselves of any hope of relief which might be offered without subjecting those willing to render them aid to the indignities of prosecution and persecution.
>
> Your Committee is inclined to believe that the restrictions imposed by law have prevented proper tests being made in the past by those who believed in the efficacy of their treatment of the diseases named in the Bill. We know many instances where the professional medico had given up hope, and **the insignificant and apparently ignorant herb man saves the abandoned patient.**

Report No. 97 of the Committee on Public Health, Senate Journal 1909 at 417 (emphasis added).

The "herb man" would be someone whose untested techniques or materials may be able to ***save*** the patient whom traditional medical practice could not. This history argues against an interpretation that § 453-1 gives physicians discretion to provide patients with the means to hasten death.

2. A physician who provided assistance with death could be charged under Hawaii's manslaughter statute.

The pertinent portion of §707-702, HRS, Hawaii's manslaughter statute, reads:

> **§707-702 Manslaughter.** (1) A person commits the offense of manslaughter if:
> (a) The person recklessly causes the death of another person; or
> (b) The person intentionally causes another person to commit suicide.[1]

a. causation

The first question is whether a physician's role in assistance with death would "cause" the patient to commit suicide. Section 702-214, HRS, describes the causal relationship between conduct and result: "Conduct is the cause of a result when it is an antecedent **but for which** the result in question would not have occurred." (Emphasis added.) In this case "the result in question" -- a hastened death brought on when the patient ingested the prescribed medication -- would not have occurred without the prescription. In other words, but for the prescription the patient would not have died at that time. One could argue that death was imminent and therefore the prescription did not cause the death; the underlying disease did. With no Hawaii case law on this point we cannot predict how a Hawaii court might rule, but it seems only common sense that "if a patient ingests lethal medication prescribed by a physician, he is killed by that medication." Vacco v. Quill, 521 U.S. 723, 802 (1997).

Chapter 327H, HRS, the Hawaii Pain Patient's Bill of Rights, does allow a physician to prescribe appropriate dosages of medications, including opiates, to relieve severe pain in a patient for whom other modes of treatment have not been effective. But this chapter does not go so far as to permit prescribing medications for the purpose of assisting in causing death.

Chapter 327H includes a legislative finding that "[o]piates may be part of an overall treatment plan for a patient in severe acute pain or severe chronic pain who has not obtained relief from any other means of treatment." §327H-1(6), HRS. It allows "[a] patient who suffers from severe acute pain or severe chronic pain . . . to choose from appropriate pharmacologic treatment options to relieve severe acute pain or severe chronic pain, including opiate

[1] There is no published Hawaii case on the application of §707-702(1)(b), and the legislative history sheds no light on how it should be interpreted. In a 9th Circuit Court of Appeals decision that was later reversed on other grounds, the court commented that "forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide" and included Hawaii in the list, citing §707-702(1)(b). Compassion in Dying v. Washington, 79 F.3d 790 (1996), rev'd sub nom. Washington v. Glucksberg, 521 U.S. 702 (1997). Because the court did not provide an analysis of §707-702(1)(b) we do not rely on that comment here, although our independent analysis reaches the same conclusion.

medications . . . ." §327H-2(a)(2). A physician who prescribes opiates to relieve this type of pain "may prescribe a dosage ***deemed medically necessary to relieve the pain***." §327H-2(a)(4) (emphasis added).

The implication here that the purpose of the opiates is only to relieve pain is supported later in this same section. Under §327H-2(b)(3)(E), a licensed physician who prescribes "medical treatment" for pain is protected from discipline or prosecution "as long as the medication is not also furnished for the purpose of causing, or the purpose of assisting in causing, death . . . ." The relevant language reads:

> (b) Nothing in this section shall be construed to:
>
> . . .
>
> (3) Prohibit the discipline or prosecution of a licensed physician for:
>
> . . .
>
> (E) Causing, or assisting in causing, the suicide, euthanasia, or mercy killing of any individual; provided that it is not "causing, or assisting in causing, the suicide, euthanasia, or mercy killing of any individual" to prescribe, dispense, or administer medical treatment for the purpose of treating severe acute pain or severe chronic pain, even if the medical treatment may increase the risk of death, ***so long as the medical treatment is not also furnished for the purpose of causing, or the purpose of assisting in causing, death for any reason.***

(Emphasis added.)

Quite clearly, chapter 327H would not exempt from discipline or prosecution a physician who prescribed medication not only for the purpose of pain relief but also (or solely) for the purpose of assisting in causing another person's death.

Hawaii's advance health care directive law, chapter 327E, HRS, does allow patients to refuse or withdraw life-sustaining treatment, but the chapter does not sanction assistance with dying. It allows individuals to give an "individual instruction," §327E-3, which is defined as "an individual's direction concerning a health-care decision for the individual." §327E-2. A "health-care decision" is a decision regarding one's health care, a term defined as

> any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition, including:
> (1) Selection and discharge of health-care providers and institutions;
> (2) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and
> (3) ***Direction to provide, withhold, or withdraw artificial nutrition and hydration;*** provided that withholding or withdrawing artificial nutrition or hydration is in accord with generally accepted health care standards applicable to health-care providers or institutions.

§327E-2 (emphasis added.)

Acknowledging in statute the right to make a health-care decision to withhold or withdraw treatment is not the same as allowing or supporting assistance with dying. There is a significant distinction between withholding or withdrawing artificial nutrition and hydration or other health care on the one hand, and furnishing medication meant to lead to death on the other. Hawaii has no case law on this subject, but the United States Supreme Court has addressed it. In Vacco v. Quill, 521 U.S. 793 (1997), three physicians had sued New York State officials, contending that "because New York permits a competent person to refuse life-sustaining medical treatment, and because the refusal of such treatment is 'essentially the same thing' as physician-assisted suicide, New York's assisted-suicide ban violates the Equal Protection Clause." 521 U.S. at 798. The district court disagreed, Quill v. Koppell, 870 F. Supp. 78 (S.D.N.Y. 1994); and the Court of Appeals for the Second Circuit reversed the district court, Quill v. Vacco, 80 F.3d 716 (2nd Cir. 1996). The Supreme Court reversed the Court of Appeals, finding that the distinction is important and rational, and that it does not violate equal protection:

> Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational. (Citation omitted.) . . . The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. (Citations omitted.) Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 368 (1996) (testimony of Dr. Leon R. Kass). The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." Id., at 367. Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. (Citations omitted.)

521 U.S. at 801-02.

b. intent

The second question under §707- 702 is whether the physician would have "intentionally" caused the death. Reading §707-702(1)(b) in conjunction with §327H-2(b)(3)(E), we believe it is likely that as a general matter a court would find the requisite intent. Under §327H-2(b)(3)(E), a physician who furnishes palliative care to a patient is protected from discipline or prosecution for "causing, or assisting in causing, the suicide . . . of any individual"

only if the palliative treatment is not also furnished for the purpose of "causing, ***or the purpose of assisting in causing***, death for any reason." (Emphasis added.) When issuing the prescription, the physician assisting with death would know and intend that the medication was for the purpose of assisting in causing death.

In any given case the physician's subjective intent could be at issue, and depending on the facts there may be other defenses as well. But the existence of possible defenses does not preclude bringing charges under the manslaughter statute in the first place.

We hope we have addressed your concerns. If you need further analysis or would like to discuss these matters, please feel free to contact me.

Very truly yours,

Heidi M. Rian

Heidi M. Rian
Deputy Attorney General

APPROVED:

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Attorney General

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DAVID Y. IGE
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RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

December 16, 2015

CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

The Honorable Karl Rhoads
Representative, District 29
State Capitol
415 S. Beretania Street, Room 302
Honolulu, Hawaii 96813

Dear Representative Rhoads:

Re: Hawaii Law on Physician Assistance to a Terminally Ill Patient

You have asked whether, if a terminally ill patient voluntarily takes a lethal dose of medication prescribed by a physician at the patient's request, the physician would be criminally or civilly liable under Hawaii law.

Briefly, we believe that a physician who provided such assistance could be charged under Hawaii's existing manslaughter statute. That physician could also be subject to professional discipline and sued for medical malpractice. The outcome of either a professional discipline action or a malpractice suit would likely depend on the standard of medical care as established by the appropriate professional boards or by expert medical testimony. Finally, if a physician is convicted of manslaughter or the physician's medical license is revoked or suspended, that physician would also be subject to mandatory or permissive exclusion from Medicare and Medicaid.

1. **A physician who provided assistance with dying could be charged under Hawaii's manslaughter statute.**

The pertinent portion of §707-702, HRS, Hawaii's manslaughter statute, reads:

§707-702 Manslaughter. (1) A person commits the offense of manslaughter if:
(a) The person recklessly causes the death of another person; or

Exhibit "2"

(b) The person intentionally causes another person to commit suicide.[1]

a. causation

The first question is whether a physician's role in assistance with death would "cause" the patient to commit suicide. Section 702-214, HRS, describes the causal relationship between conduct and result: "Conduct is the cause of a result when it is an antecedent **but for which** the result in question would not have occurred." (Emphasis added.) In this case "the result in question" -- a hastened death brought on when the patient ingested the prescribed medication -- would not have occurred without the prescription. In other words, but for the prescription the patient would not have died at that time. One could argue that death was imminent and therefore the prescription did not cause the death; the underlying disease did. With no Hawaii case law on this point we cannot predict how a Hawaii court might rule, but it seems only common sense that "if a patient ingests lethal medication prescribed by a physician, he is killed by that medication." Vacco v. Quill, 521 U.S. 723, 802 (1997).

Chapter 327H, HRS, the Hawaii Pain Patient's Bill of Rights, does allow a physician to prescribe appropriate dosages of medications, including opiates, to relieve severe pain in a patient for whom other modes of treatment have not been effective. But this chapter does not go so far as to permit prescribing medications for the purpose of assisting in causing death.

Chapter 327H includes a legislative finding that "[o]piates may be part of an overall treatment plan for a patient in severe acute pain or severe chronic pain who has not obtained relief from any other means of treatment." §327H-1(6), HRS. It allows "[a] patient who suffers from severe acute pain or severe chronic pain . . . to choose from appropriate pharmacologic treatment options to relieve severe acute pain or severe chronic pain, including opiate medications . . . ." §327H-2(a)(2). A physician who prescribes opiates to relieve this type of pain "may prescribe a dosage ***deemed medically necessary to relieve the pain***." §327H-2(a)(4) (emphasis added).

The implication here that the purpose of the opiates is only to relieve pain is supported later in this same section. Under §327H-2(b)(3)(E), a licensed physician who prescribes "medical treatment" for pain is protected from discipline or prosecution "as long as the medication is not also furnished for the purpose of causing, or the purpose of assisting in causing, death . . . . " The relevant language reads:

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[1] There is no published Hawaii case on the application of §707-702(1)(b), and the legislative history sheds no light on how it should be interpreted. In a 9th Circuit Court of Appeals decision that was later reversed on other grounds, the court commented that "forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide" and included Hawaii in the list, citing §707-702(1)(b). Compassion in Dying v. Washington, 79 F.3d 790 (1996), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997). Because the court did not provide an analysis of §707-702(1)(b) we do not rely on that comment here, although our independent analysis reaches the same conclusion.

(b) Nothing in this section shall be construed to:

. . .

(3) Prohibit the discipline or prosecution of a licensed physician for:

. . .

(E) Causing, or assisting in causing, the suicide, euthanasia, or mercy killing of any individual; provided that it is not "causing, or assisting in causing, the suicide, euthanasia, or mercy killing of any individual" to prescribe, dispense, or administer medical treatment for the purpose of treating severe acute pain or severe chronic pain, even if the medical treatment may increase the risk of death, ***so long as the medical treatment is not also furnished for the purpose of causing, or the purpose of assisting in causing, death for any reason.***

(Emphasis added.)

Quite clearly, chapter 327H would not exempt from discipline or prosecution a physician who prescribed medication not only for the purpose of pain relief but also (or solely) for the purpose of assisting in causing another person's death.

Hawaii's advance health care directive law, chapter 327E, HRS, does allow patients to refuse or withdraw life-sustaining treatment, but the chapter does not sanction assistance with dying. It allows individuals to give an "individual instruction," §327E-3, which is defined as "an individual's direction concerning a health-care decision for the individual." §327E-2. A "health-care decision" is a decision regarding one's health care, a term defined as

any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition, including:

(1) Selection and discharge of health-care providers and institutions;

(2) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and

(3) ***Direction to provide, withhold, or withdraw artificial nutrition and hydration;*** provided that withholding or withdrawing artificial nutrition or hydration is in accord with generally accepted health care standards applicable to health-care providers or institutions.

§327E-2 (emphasis added.)

There is a significant distinction between withholding or withdrawing artificial nutrition and hydration or other health care on the one hand, and furnishing medication meant to lead to death on the other. Hawaii has no case law on this subject, but the United States Supreme Court has addressed it. In Vacco v. Quill, 521 U.S. 793 (1997), three physicians had sued New York State officials, contending that "because New York permits a competent person to refuse life-sustaining medical treatment, and because the refusal of such treatment is 'essentially the same thing' as physician-assisted suicide, New York's assisted-suicide ban violates the Equal Protection Clause." 521 U.S. at 798. The district court disagreed, Quill v. Koppell, 870 F. Supp. 78 (S.D.N.Y. 1994); and the Court of Appeals for the Second Circuit reversed the district court,

Quill v. Vacco, 80 F.3d 716 (2nd Cir. 1996). The Supreme Court reversed the Court of Appeals, finding that the distinction is important and rational, and that it does not violate equal protection:

> Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational. (Citation omitted.) . . . The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. (Citations omitted.) Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 368 (1996) (testimony of Dr. Leon R. Kass). The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." *Id.*, at 367. Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. (Citations omitted.)

521 U.S. at 801-02.

b. intent

The second question is whether the physician would have "intentionally" caused the death. Reading §707-702(1)(b) in conjunction with §327H-2(b)(3)(E), we believe it is likely that as a general matter a court would find the requisite intent. Under §327H-2(b)(3)(E), a physician who furnishes palliative care to a patient is protected from discipline or prosecution for "causing, or assisting in causing, the suicide . . . of any individual" only if the palliative treatment is not also furnished for the purpose of "causing, ***or the purpose of assisting in causing***, death for any reason." (Emphasis added.) When issuing the prescription, the physician assisting with death would know and intend that the medication was for the purpose of assisting in causing death.[2]

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[2] The Centers for Medicare and Medicaid Services (CMS) guidelines are consistent with this interpretation. *See* CMS, Medicare Benefits Policy Manual, Chapter 16 – General Exclusions From Coverage, (revised Nov. 6, 2014), *available at* https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c16.pdf. In its manual, CMS expressly excludes services for the "purpose of causing, or assisting to cause, the death of any individual (assisted suicide)". *Id.* CMS explains that this "prohibition does not apply" when service is provided "for

In any given criminal case, proof beyond a reasonable doubt of the physician's subjective intent could be at issue, and depending on the facts there may be other defenses as well. Factors influencing a decision to prosecute or not prosecute a physician for causing a suicide may be evidentiary or a matter of the public interest. For example, evidence that a physician was motivated by malice, self-interest or personal gain, that the physician exerted undue influence, manipulation or coercion on the decedent, or did not take steps to ensure that another person did not influence or manipulate the decedent, might lead a prosecutor and eventually a jury to find the requisite criminal intent. Conversely, the absence of such evidence might cause a prosecution to fail. But the existence of possible defenses does not preclude bringing charges under the manslaughter statute in the first place. The prosecutor in each county would have discretion over whether to bring those charges, and we cannot predict what each prosecutor would do.

2. Civil liability

a. disciplinary action

We mentioned above that under §327H-2(b)(3)(E) a licensed physician who prescribes "medical treatment" for pain is protected from discipline or prosecution "as long as the medication is not also furnished for the purpose of causing, or the purpose of assisting in causing, death . . . . " But if the prescription is for the purpose of causing or assisting in causing a death, this section provides no protection against disciplinary action. The Hawaii medical board could take disciplinary action against a licensed physician for "[c]onduct or practice contrary to recognized standards of ethics of the medical profession as adopted by the Hawaii Medical Association, the American Medical Association, the Hawaii Association of Osteopathic Physicians and Surgeons, or the American Osteopathic Association," §453-8(a)(9), HRS, if it finds that such a prescription is contrary to these standards; or, if the physician had been convicted under §707-702, for "[c]onviction, . . . of a penal offense substantially related to the qualifications, functions, or duties of a physician or osteopathic physician, ..." The board could find other reasons for discipline in §453-8 as well.

b. medical malpractice

A patient's family member or other person with standing may have a cause of action for medical malpractice against a physician who prescribed a lethal dose of medication at the patient's request. We have found no Hawaii case law on this specific issue, but generally in a medical malpractice action, which is a type of negligence action, "the question of negligence must be decided by reference to relevant medical standards of care for which the plaintiff carries the burden of proving through expert medical testimony." Craft v. Peebles, 78 Hawai'i 287, 298, 893 P.2d 138, 149 (1995). Thus the success of a medical malpractice action in this situation

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the purpose of alleviating pain or discomfort, even if such use may increase the risk of death, so long as the item or service is not furnished for the specific purpose of causing death." *Id.*

would depend on the standards of care in the medical community as well as on the facts of the case.

3. Exclusion from Medicare and Medicaid

A physician who assists in a terminally ill patient's death may be subject to exclusion from all federal health care programs, including Medicare and Medicaid.

42 U.S.C. §1320a-7(a) requires the exclusion of any provider who, in part, has been convicted (1) of "a criminal offense related to the delivery of an item or service" under the federal health insurance program for the aged and disabled or under any state health care program, or (2) "under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service."

42 U.S.C. §1320a-7(b)(4) allows for the discretionary exclusion from all federal health care programs of a provider whose medical license has been revoked or suspended or who surrenders the license during formal disciplinary proceedings.

Accordingly, a physician who prescribes a lethal dose of medication, at a patient's request, who is convicted of manslaughter, whose medical license has been revoked or suspended, or who surrenders the license during a formal disciplinary proceeding would be subject to mandatory or permissive exclusion from all federal health care programs, including Medicare and Medicaid.

We hope we have addressed your concerns. If you need further analysis or would like to discuss these matters, please feel free to contact me.

Very truly yours,

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