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Basics on . . . Ballot Measure 51

Ballot Title: **REPEALS LAW ALLOWING TERMINALLY ILL ADULTS TO OBTAIN LETHAL PRESCRIPTION**

Background:

The 69th Legislative Assembly referred House Bill 2954 (Ballot Measure 51) to the voters for their approval or rejection at a special election on November 4, 1997.

What does Ballot Measure 51 do?

Passage of Measure 51 would repeal The Oregon Death with Dignity Act passed by voters as Ballot Measure 16 (1994 general election).

What is the Oregon Death with Dignity Act?

The Oregon Death with Dignity Act (Act) permits a capable adult patient to request a life-ending prescription from their physician if the patient has been diagnosed with a terminal illness and has a life expectancy of six months or less. The patient who makes such a request must be an Oregon resident and be acting voluntarily. In addition, the Act allows physicians licensed to practice medicine in Oregon to write prescriptions for life-ending medication pursuant to the Act. The requirement that a patient have a prognosis of six months or less to live mirrors the hospice guideline that patients who wish to receive hospice care have a terminal illness diagnosis with a similar prognosis as determined by their primary care physician.

Measure 51 History:

- *The Oregon Death with Dignity Act began as a citizen initiative petition in 1994.*
- *Ballot Measure 16 was approved by voters by a 51 to 49 percent margin in November 1994.*
- *The effective date of the Act would have been 30 days after the election (December 8, 1994).*

The attending physician must make the initial diagnosis and determination of whether or not the patient is capable and acting voluntarily. An appropriate consulting physician must confirm the diagnosis and determine that the patient is capable and acting voluntarily. If either the attending or consulting physician determines that the patient is suffering from a psychiatric or psychological disorder, or depression that causes impaired judgment, the patient must be referred for counseling. No medication may be prescribed until the patient referred to counseling is determined not to be suffering from such a disorder.

The attending physician is responsible for assuring the patient is

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- *The U.S. District Court of Oregon issued a temporary restraining order against the Act on December 7, 1994.*
- *On August 3, 1995 the U.S. District Court of Oregon issued a permanent injunction against the Act.¹*
- *In Lee v. State of Oregon the Ninth Circuit Court of Appeals determined that the plaintiffs lacked standing and ordered the U.S. District Court of Oregon to lift its injunction on the Act.²*
- *The Ninth Circuit's order was appealed to the U.S. Supreme Court, and on October 14, 1997 the U.S. Supreme Court declined to consider the appeal.³*
- *Oregon is the only state to have*

making an informed decision. In doing so, the attending physician must discuss with the patient their diagnosis and prognosis, the potential risks associated with taking the medication to be prescribed and its probable result, and the feasible alternatives (i.e., hospice care, comfort care, pain management, etc.). This informed decision must be verified immediately prior to writing the prescription and noted in the medical record.

A total of three requests for the life-ending prescription must be made to the attending physician by the patient. Two requests must be oral, the second of which must be made no less than fifteen days after the first. When the patient makes the second oral request, the attending physician must ask if they wish to rescind their request. The patient may rescind the request at any time. The final request must be in writing, in a form specified by the Act, and be witnessed by two individuals who attest that the patient is capable and acting under their own volition. Forty-eight hours after the written request has been submitted, the attending physician may write the prescription for life-ending medication.

Pursuant to the Act, the attending physician is required to ask the patient to notify their next of kin about their request for life-ending medication. The patient is not required to do so.

The Act requires that the following information be documented in the patient's medical record:

1. All oral requests by the patient for a life-ending prescription;
2. All written requests by the patient for a life-ending prescription;
3. The attending physician's diagnosis, prognosis, and determination that the patient is capable, acting voluntarily, and making an informed decision;
4. The consulting physician's diagnosis, prognosis, and determination that the patient is capable, acting voluntarily, and making an informed decision;
5. If the patient was referred to counseling, a report of the outcome and determinations made during counseling;
6. Evidence that the attending physician offered to rescind the request at the time the patient made their second oral request for life-ending medication; and
7. An indication from the attending physician that all requirements under the Act have been met, as well as the type and dosage of medication prescribed.

The Oregon Health Division is required to annually review a sample of medical records of patients who requested a life-ending

¹ *Lee v. State of Or.*, 819 F Supp 1429 (D Or 1995).

² *Lee v. State of Or.*, 107 F3d 1382 (9th Cir 1997).

³ *Lee v. Harclerod* No. 96-1824 (*cert. denied*).

legalized physician-assisted suicide.

- *36 states have statutorily criminalized assisted suicide.*
- *Common law of 7 states criminalizes assisted suicide.*

prescription pursuant to the Act. The Health Division has prepared administrative rules to be implemented on an emergency basis if the Act takes effect. The emergency rules will be in place only until a formal rule-making process is completed. These emergency administrative rules include definitions, reporting requirements for attending physicians, and requirements regarding confidentiality and liability. At the time the prescription for medication to end life is written, the draft rules require the attending physician to submit the following to the State Registrar at the Center for Health Statistics: 1) a copy of the patient's written request for medication to end life; and 2) the original signed and dated form developed by the Health Division. After the death of the patient, the Health Division may send a confidential form to verify the circumstances of the death. The Health Division will generate and make available to the public an annual statistical report of information collected under the Act.

In addition, the Health Division has developed standards regarding completion of death certificates for patients who request life-ending medication and will suggest the cause of death be noted as "drug overdose, legally prescribed" or the equivalent.

The Act grants immunity from civil and criminal liability, including professional discipline for individuals, physicians, and others who participate in compliance with the Act. The Act also specifies that no health care provider is required to respond to requests for life-ending prescriptions.

Wills, contracts, insurance, or annuities are not affected by the patient's request for a life-ending prescription pursuant to the Act. Furthermore, death resulting from medication prescribed pursuant to the Act does not affect insurance or annuity payments.

The Act creates Class A felonies, including the altering or forging of a request and the coercing or exerting of undue influence on a individual to make a request.

THE DEBATE

Proponents' Arguments Include:

- **Pills don't work**

A Netherlands study found that out of 75 patients ingesting oral barbiturates to end life, 3 patients (4 percent) lingered longer than 5 hours.⁴ In addition, in 15 of the 75 cases (20 percent) the physician administered an injection to end life (an act not permitted under the Oregon law) due to complications that arose from ingesting the oral barbiturates.⁵ Proponents define failure as "failure to provide an easy, dignified, and timely death".⁶ Combining the two percentages, proponents of Measure 51 assert that ingesting oral barbiturates to end life has a 24 percent failure rate.

⁴ *The Administration of and Preparation for Euthanasia*, Royal Dutch Society for the Advancement of Pharmacology, The Hague, 1994.

⁵ *Id.*

⁶ Letter from Toffler and Petty, Physicians for Compassionate Care, to Colleague, 9/11/97.

- **It is difficult to determine whether or not the patient has six months or less to live**

Under the Act, the only patients able to request a prescription for life-ending medication are those who have been diagnosed with a terminal illness and have a life expectancy of six months or less. Proponents of Measure 51 argue that physicians cannot predict with certainty how long the patient may survive.

- **Diagnosis of depression in medically ill patients can be difficult**

The Act specifies that in order for a terminally ill patient to request a prescription for life-ending medication, the attending and consulting physicians must determine the patient is capable of making such a request. If neither physician determines the patient to be incapable, then no mental health counseling is required. Proponents of Measure 51 argue that it is common for terminally ill patients to have some degree of depression, and that it is often difficult for health care providers to detect. In addition, proponents assert, it is especially difficult for medical professionals who do not receive specialized training in mental health to make determinations regarding capability. Therefore, proponents assert, terminally ill patients who suffer from depression may go undetected and be prescribed life-ending medication.

- **Patients could be pressured into requesting physician-assisted suicide**

Proponents of Measure 51 argue that the terminally ill may feel they are a burden to those who care for them, potentially pressuring them into making a request for life-ending medication.

- **Discrimination**

Proponents of Measure 51 assert that individuals disabled by a terminal illness would be discriminated against because Oregon law would no longer protect their lives in the same way it protects the lives of healthy Oregonians. In addition, proponents argue, the Act discriminates against terminally ill patients who are unable to ingest life-ending medication by any other means other than injection (i.e. the patient can not swallow oral medication).

- **State law does not prohibit state funds from being used for life-ending prescriptions**

Proponents of Measure 51 argue that state funds could be used to cover prescriptions for life-ending medication that may be requested, for example, by Oregon Health Plan enrollees.

- **"Residency" is not defined in the Act**

Proponents of Measure 51 argue that since the law lacks a clear definition of "Oregon resident", it is likely that terminally ill individuals from other states will come to Oregon to request a life-ending prescription if the Act takes effect.

- **No real reporting requirements**

Proponents of Measure 51 argue that the Act does not require physicians to report their role in assisted suicides to the Oregon Health Division. Although not extensively discussed within the Act itself, the Act does give the Health Division rule-making authority regarding reporting requirements to the Health Division.

Opponents' Arguments Include

- **Oregon voters have already demonstrated their support of the Act**

Opponents of Measure 51 argue that the success of Ballot Measure 16 in 1994 confirmed public support of the Act. Ballot Measure 16 was approved by a 51 to 49 percent margin. Opponents argue that the Oregon Legislative Assembly had a duty to implement the will of the people as expressed by their support for

Measure 16 in 1994. Opponents assert that this is the first time in Oregon's history that the Legislative Assembly has asked voters to reconsider a measure identical to one already approved by voters.

- **Oral Medications are effective**

Opponents of Measure 51 assert that there is no available evidence of patients suffering convulsions, vomiting or other symptoms when the proper dose of medication is taken by a terminally ill patient who seeks to hasten their death. In addition, opponents cite a study conducted in the state of Washington of 24 patients who received aid-in-dying, all of whom died within ten hours.⁷

- **Many Oregon physicians have supported the concept of legalized physician-assisted suicide when surveyed**

Out of 2,671 Oregon physicians who responded to a 1995 survey, 60 percent responded that physician-assisted suicide is ethical and should be legal in some cases.⁸

- **A number of Oregon psychiatrists support physicians having the authority, under certain circumstances, to write a prescription for medication for the sole purpose of aiding the patient to end his or her life**

Opponents of Measure 51 cite a 1996 survey of 321 Oregon psychiatrists in which two-thirds of the respondents supported a physician being permitted, under certain circumstances, to write a prescription for life-ending medication.⁹ Fifty-six percent of the psychiatrists surveyed favored implementation of the Act and 74 percent responded that if they, themselves, had a terminal illness, there might be conditions under which they would consider physician-assisted suicide.¹⁰

- **Physician aid-in-dying is ethical and appropriate medical care in strictly limited circumstances**

Opponents of Measure 51 assert that the Act has numerous safeguards including the requirements of a second physician's opinion, three separate requests by the patient, and adequate waiting periods. Opponents assert such safeguards limit circumstances in which aid-in-dying may be requested and ensure only those eligible may participate. In addition, opponents assert that safeguards in the Act require physicians to ensure the patient's request is voluntary, rational and informed, and the physician can only do so by consulting legally and openly with all health care providers who might assist in such a determination. Furthermore, opponents argue the option to hasten death and the establishment of standards of care by the medical profession will give patients the assurance that all treatment options will be made available.

- **A terminally ill patient should be allowed to discuss all of his or her medical concerns with his or her physician**

Opponents of Measure 51 argue that attending physicians who receive voluntary requests for aid-in-dying from competent, terminally ill patients should have the legal right to openly explore the patient's motivation and the appropriateness of the request, based on the patient's clinical status. In addition, opponents of Measure 51 maintain the Act raises the fundamental issue of patient choice and autonomy and ultimately allows

⁷ Ralph Mero and Thomas A. Preston, M.D., *Observing Cancer Terminally Ill Patients Who Choose Suicide* Journal of Pharmaceutical Care In Pain and Symptom Control, Vol. 4, pp. 183-192, 1996.

⁸ Melinda A. Lee, M.D. et al, *Legalizing Assisted Suicide -- Views of Physicians in Oregon*, The New England Journal of Medicine, Vol. 334, No. 5, pp. 310-315, 2/1/96.

⁹ Linda Ganzini, M.D. et al, *Attitudes of Oregon Psychiatrists Toward Physician-Assisted Suicide*, The American Journal of Psychiatry, Vol. 153, pp. 1469-1475, 1996.

¹⁰ *Id.*

patient control of the process by self-administering the medication prescribed.

- **The passage of the Oregon Death with Dignity Act spurred improved end-of-life care**
Opponents of Measure 51 assert that Oregon's per-capita distribution of morphine (50 percent higher than the U.S. average in early 1996¹¹) demonstrates that the state has made a greater commitment to comfort care since the Act was approved by voters in 1994. Moreover, opponents argue, raising end-of-life concerns will lead to continued advances in pain control, palliative care, and hospice care that will reduce the number of patients who choose to hasten their deaths.

CONTACTS

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¹¹ Drug Enforcement Administration Internal Records, *see Oregon Use of Morphine Tops That of Nation*, The Oregonian, 9/26/97, at B1.