NEIL ABERCROMBIE
GOVERNOR

DAVID M. LOUIE
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

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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**

> **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

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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.

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:

David M. Louie
Attorney General