#L-703 1/3/83

Second Supplement to Memorandum 83-2

Subject: Study L-703 - Delegation of Authority to Make Health Care Decisions

The attached article from the most recent issue of the California Lawyer is relevant to whether statutory authority should be provided to permit delegation of authority to make health care decisions. You will find the article interesting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

OPINION

The right to die is beyond the law

Families – not courts – should make the decisions, a physician argues

By Francis A. Healy, M.D.

Most of the medical profession believes that if a terminally ill patient cannot speak for himself, the decision to minimize – or even halt – medical treatment is best handled by the patient's family. To me, the courts and the adversary system of justice do not seem the best way to handle this sensitive problem. We need a lower key, more humane way of deciding life and death questions than calling in two competing attorneys who speak of law and precedent.

In my view, the adversary system of justice is based on a recognition of human imperfection, and it serves us well when there is a real conflict in beliefs or values between two parties. But such a method is the wrong tool when the task demands problem solving or humanity. The expertise used to solve problems in one area, such as the law, will not necessarily work in another, such as medicine. One can no more impose the template of adversarial law on the writing of poetry, composition of a symphony, or creation of a sculpture than one can on the practice of medicine. Caring for the dying is an art, not a science.

Let a lawyer, district attorney or judge imagine himself fighting vigorously in court for permission to let his parent die in peace. Whose permission does he seek? The district attorney's or the judge's? Who gives a district attorney or judge the right, knowledge or training to make such a decision? Members of the legal profession should visualize what their own reactions would be if they were forced to go through such a process on behalf of a family member. These are not abstract cases I speak of, but real-life situations in which the correct answer is often unknown. Even in the cases of newborns, or those whose mental problems have made them public wards, the issues are the same.

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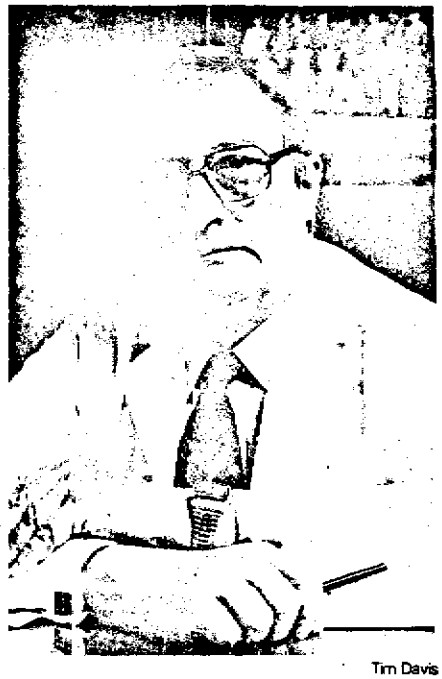
Right-to-life and right-to-die questions have of late generated as much public and press interest as Vitamin E and the Pritikin Diet. Newspapers gleefully chivvy doctors for "not caring enough anymore," then in the next day's editions lament that physicians hold patients in this world for too long with our monitors, ventilators, bypasses and pacemakers. We physicians are accused of letting financial gain or fear of malpractice suits keep us from allowing patients to find the eternal bliss that some people believe our patients seek.

But in real life, the typical problem involves a saddened family struggling to decide if and how to exercise the right of a fatally ill family member to die. Frequently the question is, at what point should one hold back on vigorous treatment and turn one's efforts toward comfort. At that time the pain lies simply in deciding what is the right thing to do, and it is never the same for any two families or physicians.

We are fortunate that in California decisions about the extent of treatment, the use of extraordinary and ordinary measures, and even "pulling the plug" (a dramatic term, but only rarely an actual issue) are being made by families rather than the courts. But in some Eastern states these decisions are being taken over by the courts and handled in the standard adversarial way, while ventilators continue to pump and costs soar.

Thank God we in California have thus far been spared the likes of the Quinlan, Brother Fox, Saikewicz or Storer cases. As yet, no aggressive district attorney here has taken it upon himself to protect a patient from his family by taking such personal, private decisions into open court. The Karen Quinlan case is all too well known. Brother Fox was an elderly monk who had a cardiac arrest during general surgery. He was supported by mechanical aids for weeks, until it became apparent to his religious superiors, his family and doctors that he would never awaken and probably could not survive without mechanical life support. When the



Tim Davis

decision was made to remove the support and let nature take its course, the local district attorney got wind of the case and threatened to charge the doctors with murder. Into court it went. Days later, while the doctors testified and the lawyers argued, the patient died on his own before a decision could be made about whether mechanical life support should continue. Meanwhile, the medical and legal costs had climbed. It is difficult for me to see whose rights were protected or extended in this situation.

Both the Storer and Saikewicz cases involve mentally defective adults, dying of malignancies. Their physicians were reluctant to administer difficult and painful treatment that the patients could not understand and that offered little, if any, hope of increased comfort. In one of the cases, the patient's mother asked that treatment be terminated. The courts in both cases, however, decided otherwise. Since it may not have been necessary for these cases to have wound up in court, it is unfair to criticize the judges. But, in light of the malpractice situation in urban areas of the United States, it is likely they would have gone to court anyway; once there, it was also likely that a

poor decision for the patient would be made.

Cannot the obvious talents, brains and drive of California's legal profession stop this legal infestation from crossing our state line? Let us continue to leave with the family the personal decisions regarding death, life support and the right to die, as an official position of the California Medical Association urges. No matter how imperfect that family may be, it understands and shares more of the patient's personal, religious, philosophic, ethnic and cultural makeup than even the most sophisticated court or expert witness. When there is disagreement among family members, or when the doctor feels the family is uncomfortable with a decision, the courts should address the issue. But only in such instances should the legal system become involved.

How a free man dies should be above and beyond the law.

The court's business, as I understand it, is the law. How a free man dies should be above, beyond and separate from the law. The law, no matter how well intentioned, gains no dignity or respect when it becomes entangled in citizens' private lives.

The bar and medical associations of Los Angeles County, along with the coroner and district attorney, are continuing their pioneering work on this perplexing problem of who decides questions of life and death, in what arena and by whose rules. The California Medical Association has gone on record favoring the family as final decision maker, even in cases that go to court. We must devise a system in which judges less often authorize extraordinary care. The comfort, privacy and dignity of the patient must remain paramount. Whether the answers in California come from physicians, nurses or bioethicists, they have no chance of working without the endorsement and support of the state's legal profession. □

Editor's note: On August 18, 1982, the Los Angeles district attorney's office brought charges of murder and conspiracy to commit murder against Neil Barber and Robert Nejdl, physicians at the Kaiser Foundation Hospital in Harbor City, near San Pedro. The two doctors had ordered the discontinuation of life-support systems for a comatose patient, with the consent of the patient's family. The cases were scheduled for arraignment in December.