



## Recent Developments in Physician-Assisted Suicide

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### LITIGATION

1. Cooley v. Granholm No. 99-CV-75484 (E.D. Mich.), judgment vacated, 291 F.3d 880 (6th Cir. 2002), On 11/12/99, Professor Robert Sedler filed a federal lawsuit against Attorney General Jennifer Granholm and the Michigan Board of Medicine on behalf of two Michigan physicians, Roy Cooley and M.W. El-Nachef. The plaintiffs claimed that Michigan's ban on assisted suicide violates the Fourteenth Amendment right to be relieved from unbearable pain and suffering. On 12/20/00, Judge Nancy G. Edmunds granted the defendants' motion for summary judgment and dismissed the complaint. Plaintiffs appealed to the Sixth Circuit Court of Appeals and argued the case on 5/2/02 before Judges Merritt, Suhrheinrich, and Gilman. On 5/29/02, the court vacated the district court's judgment, concluding that the issues presented were not justiciable on grounds of mootness and lack of ripeness.
2. Oregon v. Ashcroft, 192 F.Supp.2d 1077 (D.Or. 2002), appeal pending, No. 02-35587 (9th Cir.).
  - a. Case Filed. On 11/7/01, in response to Attorney General John Ashcroft's directive that prescribing lethal medication was not a legitimate medical purpose under the Controlled Substances Act, the State of Oregon filed a complaint in the U.S. District Court for the District of Oregon seeking a declaratory judgment and injunctive relief. The court allowed several individual patient plaintiffs, a physician, and a pharmacist to intervene as plaintiffs supporting the position of the state of Oregon. Named defendants included Attorney General John Ashcroft, Asa Hutchinson (Administrator of the Drug Enforcement Administration), Kenneth W. Magee (Director of the Portland DEA office), the United States of America, the U.S. Department of Justice, and the U.S. Drug Enforcement Administration. The court allowed several organizations to file amicus briefs.
  - b. U.S. District Court decision. On 4/17/02, Judge Jones issued his written decision in favor of plaintiff and plaintiff-intervenors. Oregon v. Ashcroft, 192 F.Supp.2d 1077 (D.Or. 2002). Judge Jones permanently enjoined defendants from enforcing, applying, or otherwise giving any legal effect to Ashcroft's directive and ordered that health care providers in Oregon shall not be subject to criminal prosecution, professional disciplinary action or other administrative proceedings for any actions taken in compliance with the Oregon Death with Dignity Act. Although plaintiff and plaintiff-intervenors had made statutory, administrative, and constitutional arguments, Judge Jones based his decision on statutory grounds exclusively, holding that neither the plain language of the Controlled Substances Act, its legislative history, nor the cases cited supported defendants' argument that Congress intended to delegate to the Attorney General the authority to override a state's determination as to the legitimacy of a medical practice. On 6/10/02, Judge Jones granted defendants' unopposed motion to stay plaintiff-intervenors' application for attorney fees and costs until defendants' appeal to the Ninth Circuit is decided.
  - c. Appeal to Ninth Circuit. On 5/24/02, defendants filed a notice of appeal to the Ninth Circuit Court of Appeals. Defendants' brief on appeal was filed on 9/23/02; an amicus brief supporting defendants' position also was filed on 9/23/02 by Physicians for Compassionate Care. The briefs of plaintiff and plaintiff-intervenors are due on 10/23/02, and defendants' reply brief is due 14 days later. The appeal process is likely to take at least 16 months, and the losing side is expected to seek review by the United States Supreme Court.

## LEGISLATION

1. Ohio. On 5/21/02, the Ohio House passed HB 474 by a vote of 83-7. The bill would declare that assisting suicide is against the public policy of Ohio and create the Compassionate Care Task Force to study and make recommendations on pain and symptom control treatment for patients with terminal illness or severe chronic pain. The Senate is now considering the bill.
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## OTHER NATIONAL DEVELOPMENTS

1. Dr. Jack Kevorkian
    - a. Criminal conviction affirmed. On 3/26/99, Dr. Jack Kevorkian was convicted by a jury of second-degree murder and illegal delivery of a controlled substance in connection with the death of Thomas Youk by lethal injection. Kevorkian will not be eligible for parole until May 2007. On 11/12/99, Kevorkian filed an appeal with the Michigan Court of Appeals to reverse his conviction and dismiss the case or order a new trial. On 11/20/01, a three-judge panel of the Michigan Court of Appeals unanimously affirmed Kevorkian's conviction, rejecting his claims that euthanasia is legal, that a prosecutor improperly referred to Kevorkian's failure to testify, that he received ineffective assistance of counsel, and that the court improperly excluded the testimony of Youk's brother and sister-in-law. *People v. Kevorkian*, 248 Mich.App. 373, 639 N.W.2d 291 (2001). On 4/9/02, the Michigan Supreme Court declined to review the case by a 6-1 vote. *People v. Kevorkian*, 642 N.W.2d 681 (2002), petition for cert. filed, 71 U.S.L.W. 3093 (U.S. Jul. 3, 2002) (No. 02-48).
    - b. Request for release pending appeal. On 12/27/00, Jack Kevorkian's attorney Mayer Morganroth filed a petition for writ of habeas corpus in U.S. District Court contending that Kevorkian should be released from prison while his murder conviction is appealed, because he is at risk of a stroke, he poses no threat to the public, and the issues on appeal have strong merit. On 6/22/01, U.S. District Judge Paul Borman denied Kevorkian's request, finding that delay in hearing the appeal did not of itself require the federal courts to intervene. *Kevorkian v. Ludwick*, No. 00-CV-75557 (E.D. Mich.), appeal pending, No. 01-2010 (6th Cir.). Briefing on the appeal was completed on 2/8/02, and oral argument is set for 12/9/02.
    - c. Petition for writ of habeas corpus. On 7/17/02, Jack Kevorkian's attorney Mayer Morganroth filed a new petition for writ of habeas corpus in U.S. District Court. *Kevorkian v. Grayson*, No. 02-CV-72927 (E.D. Mich.).
  2. Illinois physician's license ordered reinstated. In November 1999, the Illinois medical board suspended indefinitely the medical license of Chicago cardiologist Dr. Lance Wilson. Wilson was charged with causing the death of Henry Taylor on 9/28/98 at Olympia Fields Osteopathic Hospital and Medical Center by an injection of potassium chloride, which Wilson claimed was intended merely to slow Taylor's heart so he would fall unconscious and not suffer through his own painful suffocation after his trachea collapsed. In April 2002, Cook County Judge Bernetta Bush ordered the reinstatement of Wilson's license, but Judge Bush stayed the ruling pending an appeal filed by the Illinois Department of Professional Regulation.
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## MEDICAL DEVELOPMENTS

1. Lawsuit for undertreatment of pain. On 6/13/01, a jury in Alameda County Superior Court awarded \$1.5 million in damages to the family of William Bergman, who claimed that Dr. Wing Chin violated California's Elder Abuse and Dependent Adult Civil Protection Act by failing to prescribe adequate pain medication for Bergman as he battled lung cancer. On 8/20/01, Alameda County Judge David Hunter reduced the jury's award to \$250,000 after finding that the California cap on medical malpractice awards applied to elder abuse cases. The trial judge later denied defense motions for a new trial and ordered Dr. Chin to pay 150% of the attorney fees incurred by the Bergman family, saying that the fee enhancement is to encourage attorneys to take up the cause of abused elderly persons.
2. Education about end-of-life care. The End-of-Life Nursing Education Consortium, founded in 2000 to provide a comprehensive national effort to improve nursing care at the end of life, has provided training for nearly 1,000 nursing school educators, representing one of every three nursing schools in the nation. A second program

launched in June 2002, Disseminating End-of-Life Education to Cancer Centers, will train interdisciplinary teams from the nation's top cancer centers.

3. Treatment of cancer patients' pain. In July 2002, a 13-member panel released a report concluding that many cancer patients suffer needlessly because the medical system does a poor job of treating pain and other symptoms. The panel, which analyzed cancer patient studies over a two-day period during a National Institutes of Health conference on Symptom Management in Cancer: Pain, Depression and Fatigue, concluded that the education of physicians needs to be changed and barriers to proper symptom management need to be removed.
  4. End-of-life care for children. On 7/25/02, the Institute of Medicine issued a report concluding that many dying children suffer needless pain and anxiety. The report's recommendations included better training for physicians and changes in health care benefits.
  5. Oregon physician charged again with undertreatment of pain. On 8/12/02, the Oregon Board of Medical Examiners charged Dr. Paul Bilder, a 57-year-old pulmonary disease specialist from Roseburg, with failing to properly treat the pain of two dying patients in 1999 and 2000. The charges include unprofessional conduct, gross or repeated acts of negligence, and inappropriately prescribing controlled substances. In 1999, Bilder became the first physician in the nation to be disciplined by a state medical board primarily for undertreating pain.
  6. Recent articles
    - a. William J. McClean & Nick H. Higginbotham, *Prevalence of Pain Among Nursing Home Residents in Rural New South Wales*, 177 Med. J. Australia 17 (2002) [survey of 917 nursing home residents in 15 nursing homes in northern New South Wales during 1998-99 revealed that 27.8% of residents capable of communicating were experiencing pain, but 22% of residents reporting pain had no record of analgesic medication and 16% had received no treatment at all for pain].
    - b. Paul B. Bascom & Susan W. Tolle, *Responding to Requests for Physician-Assisted Suicide—These Are Uncharted Waters for Both of Us*, 288 JAMA 91 (2002) [using the case of a 47-year-old Oregon man with amyotrophic lateral sclerosis, the authors suggest that physicians should respond to a patient's request for physician-assisted suicide by talking with the patient about the motivation for the request and then attempting to relieve the patient's suffering by other means].
    - c. Larry McClaugherty, *Chronic Pain: We're Undertreating the Elderly*, 51 Nursing Homes 58 (Aug. 2002) [study of 889 residents in nine nursing homes in the Greater Houston area revealed that only 34% had routine medication orders to manage chronic pain and almost 80% had orders for pain medication only as needed (PRN), which clearly did not meet the residents' needs].
    - d. Laura A. Hawryluck et al., *Consensus Guidelines on Analgesia and Sedation in Dying Intensive Care Unit Patients*, 3:3 BMC Med. Ethics (2002) [national panel of Canadian intensive care physicians and coroners/medical examiners reached consensus on 16 guidelines on administration of analgesics and sedatives to dying intensive care unit patients and distinguishing palliative care from euthanasia].
    - e. Linda Ganzini et al., *Experiences of Oregon Nurses and Social Workers with Hospice Patients Who Requested Assistance with Suicide*, 347 New Eng. J. Med. 582 (2002) [questionnaire mailed in 2001 and completed by 397 Oregon hospice nurses and social workers revealed that 45% had cared for a patient who requested assisted suicide and 30% for a patient who had received a prescription for lethal medication; the most common reason for a patient's request was a desire to control the circumstances of death, while the least important reasons were depression, lack of social support, and concern about being a financial drain on family members; 59% of respondents supported the Oregon Death with Dignity Act, 26% opposed it, and 14% neither opposed nor supported it].
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## INTERNATIONAL DEVELOPMENTS

1. Australia
  - a. Nancy Crick. Nancy Crick, a 69-year-old resident of Queensland, ended her life on 5/22/02 in the presence of 21 family, friends, and supporters of voluntary euthanasia with the intent of challenging laws against assisting a suicide. Police investigating the case for possible criminal prosecution raided the home of John Edge, Crick's media adviser and a witness to her suicide, as well as property belonging to Dr. Philip Nitschke, and seized computers, e-mails, files, and other evidence. On 9/3/02, Nitschke announced that he had filed suit in the Darwin Supreme

- Court, seeking to recover seized items including the medical records of about 200 of his own patients and information on the members of the pro-euthanasia group Exit Australia.
- b. Other public suicides. Following Nancy Crick's death, other terminally ill patients (including Shirley Nolan, Sandy Williamson, and Jo Shearer) committed or attempted suicide to keep up pressure over euthanasia reform.
  - c. Exit bag. On 8/20/02, Dr. Philip Nitschke held a press conference to introduce the "Aussie bag," a plastic bag developed for patients who wish to take their own lives. Nitschke indicated that 500 bags were being manufactured for members of Exit Australia and 150 orders had already been placed. The bag will come marked with warnings, and instructions will be available only through an offshore website. Police attended the news conference, but a police spokesperson said that the bag did not appear to breach any laws.
  - d. Queensland. On 6/20/02, Independent Queensland MP Peter Wellington introduced in the state parliament a private member's bill to protect physicians prescribing pain medication that has a secondary effect of hastening a patient's death.
  - e. South Australia. On 5/8/02, Sandra Kanck, deputy leader of the South Australian Democrats, introduced voluntary euthanasia legislation in the South Australian parliament. In August 2002, the Dignity in Dying Bill went through the second reading in the Upper House. The bill, which is essentially the same as a bill Kanck introduced without success the prior year, would allow the terminally ill to choose to end their lives but only under the strict guidance of a monitoring committee.
  - f. West Australia. In September 2002, Greens MP Robin Chapple introduced a voluntary euthanasia bill in the state parliament.
  - g. Public opinion poll. In an independent poll of 1,300 people in Victoria, New South Wales, and South Australia conducted during June 2002, 73% of those surveyed thought that physicians should be allowed to give a lethal dose to hopelessly ill patients who were without hope of recovery, 70% thought that the law should allow a hopelessly ill patient to seek assistance from a physician to commit suicide, and 78% thought that the law should be changed so it was no longer an offense to be present at a suicide.
2. Belgium. On 10/25/01, the national parliament approved a bill legalizing euthanasia for competent adults with an incurable illness causing unbearable and constant suffering. The final step in implementing the new law occurred in September 2002, when the government set up a national evaluation committee of physicians and lawyers that will ensure that the law is followed.
  3. Canada. On 6/26/02, Vancouver Island police arrested 71-year-old Evelyn Martens of Langford, British Columbia, on charges of counseling suicide and aiding and abetting suicide in the deaths of Monique Charest on 1/7/02 in Duncan and Leyanne Burchell on 6/26/02 in Vancouver. On 6/27/02, police seized from Martens's home a computer and publications, videos, "exit bags," and other supplies belonging to the Right to Die Network of Canada and Last Rights Publications. Police are looking for other suspicious deaths in British Columbia during the last five years. Martens has requested a jury trial, and a preliminary hearing has been set in Duncan for three days beginning 11/13/02. The maximum penalty on each charge is 14 years imprisonment. Hemlock Society USA has declared its support for Martens and contributed funds for her legal representation.
  4. Great Britain
    - a. Diane Pretty. Diane Pretty, who had motor neurone disease, died on 5/11/02, after unsuccessfully asking the English courts and the European Court of Human Rights to find that the law should allow a family member to help a loved one to die. On 9/23/02, her husband Brian presented to the Prime Minister a petition from 50,000 people supporting the right to assisted suicide.
    - b. Phil Such. In February 2002, Phil Such, a 37-year-old man from Somerset who suffered from motor neurone disease, began a hunger strike in an effort to change the law banning voluntary euthanasia. However, Such abandoned his hunger strike in June 2002 due to his resulting pain and inability to speak. He died on 9/19/02.
    - c. Medical ethics expert supports legalizing euthanasia. Following the death of Diane Pretty, Baroness Warnock, a leading British authority on medical ethics, wrote an article in the legal journal Counsel saying that two physicians should be able to apply for court approval of euthanasia in cases where a terminally ill patient's life could not be made tolerable by palliative care.
    - d. Survey of Church of England clergy. A poll of nearly 2,000 Church of England clergy reported in

September 2002 showed that 24% of ordained clergy and 43% of lay clergy supported some form of legalized euthanasia.

5. Japan. On 4/19/02, officials at Kawasaki Kyodo Hospital, south of Tokyo, said that a female physician killed a 58-year-old man on 11/16/98 by injecting a muscle relaxant after the patient suffered a cardiac arrest and lapsed into a coma following an asthma attack. The hospital reported the case to the Kanagawa prefectural police after concluding that the physician had not complied with the requirements set out in a 1995 ruling of the Yokohama District Court involving a hospital affiliated with the School of Medicine at Tokai University. In particular, the patient had not expressed his clear approval of the euthanasia. A panel of physicians at the hospital later concluded that the physician did not provide sufficient information about the patient's condition to family members. Kanagawa police, who are continuing to investigate the case, have obtained an expert's opinion concluding that the muscle relaxant "caused" the patient to die.
  6. Switzerland. Dignitas, a Swiss charity, was founded in 1998 to enable its members to participate in assisted suicide in Switzerland, which does not criminalize assisted suicide if drugs are self-administered and the person involved is making a rational decision to die. Applicants for assisted suicide must provide a letter giving their reasons and medical records proving that they are suffering from a terminal illness, great pain, severe disability, or a long history of mental illness that makes their lives unbearable. As of August 2002, Dignitas had 1,620 members and had helped 109 people to take their own lives. According to Swiss prosecutor Andreas Brunner, Zurich justice authorities are investigating the deaths of several mentally ill people, although it is unlikely any charges will be brought. Critics of Dignitas say that allowing "suicide tourists" from other countries is giving Switzerland a bad name and is costly for Swiss taxpayers.
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\* Some information obtained from media reports has not been independently verified.