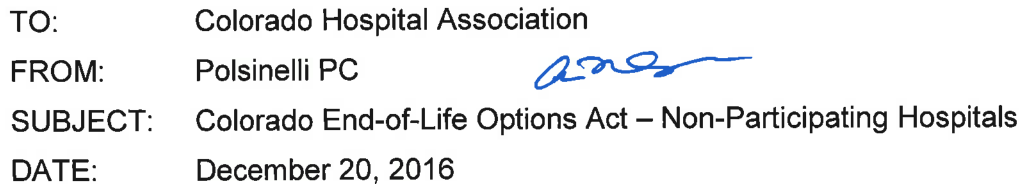

Memorandum

TO: Colorado Hospital Association

FROM: Polsinelli PC

SUBJECT: Colorado End-of-Life Options Act – Non-Participating Hospitals

DATE: December 20, 2016

As requested by CHA, we address questions under the Colorado End-of-Life Options Act, C.R.S. § 25-48-101, *et seq.*, Proposition 106 (the "Act") for hospitals that choose not to participate under the Act ("Non-Participating Hospitals," also referred to by CHA as "Opt-Out" hospitals).

This memo is provided to CHA for informational purposes and is not intended to be legal advice. CHA members are encouraged to consult with their legal counsel.

Question 1: What can a Non-Participating Hospital prohibit under the Act?

Question 2: What elements of the Act can a Non-Participating Hospital prohibit employed and contracted physicians, and other staff (employed and contracted) from performing?

As background, the Act defines "health care provider" to include a "health care facility." C.R.S. § 25-48-102(4). Health care facility is not defined under the Act, but under relevant Colorado Department of Public Health and Environment statutes and regulations, a hospital is a "health care entity," which is synonymous with "health care facility." *See*, 6 CCR 1011-1, Ch. II, Sec. 2.2.8; and C.R.S. §§ 25-3-101, *et seq.* and 25-1.5-103(1).[1]

A Non-Participating Hospital can prohibit a range of activities under the Act, from a minimal prohibition of medical aid-in-dying medications on the facility's premises, to potentially include a broader scope of prohibited activities under the Act. In light of the ambiguities under the Act, Non-Participating Hospitals should consult with their legal counsel, particularly if the hospital wishes to enforce a broader scope of prohibited activities.

General Prohibition. Under the Act, a health care provider, including individuals and hospitals, "may choose whether to participate in providing medical aid-in-dying medication to an individual." C.R.S. § 25-48-117(1). Patients have the right to request, but not the right to receive, medical aid-in-dying medications from any health care provider. Each hospital must notify its patients in writing of its policy with regard to medical aid-in-dying. C.R.S. § 25-48-118(3). Another obligation of a health care provider that is "unable or unwilling" to carry out a patient's request under the Act is to transfer upon request the patient's relevant medical records when the patient transfers his or her care to a new health care provider.

[1] Other types of unlicensed providers and clinics arguably fit within the definitions of "health care facility."

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C.R.S. § 25-48-117(2); see also C.R.S. § 25-48-113 (requires coordination of the transfer of the patient's medical records).

The Act does not define what it means for a hospital to choose not to "participate in providing" medical aid-in-dying medications. Minimal non-participation would likely include the following: (i) prohibit employed and contracted physicians from writing a prescription for medical aid-in-dying medication for a patient who intends to self-administer on the hospital's premises (discussed below), (ii) prohibit hospital personnel from following a physician order for medical aid-in-dying medications intended to be self-administered on the hospital premises, in conflict with hospital policy, (iii) prohibit dispensing medical aid-in-dying medications through the hospital's pharmacy or on the hospital's premises, (iv) prohibit storing medical aid-in-dying medications on the hospital's premises or in the hospital's pharmacy under the hospital's self-administered medication protocols, and (v) prohibit hospital personnel from enabling or participating in patient's act of self-administration of medical aid-in-dying medications on the hospital's premises. As discussed below, a Non-Participating Hospital that wants to prohibit broader participation under the Act, such as a faith-based facility, should consult with legal counsel to define the scope of prohibited activities.

Employed and Contracted Physicians. A Non-Participating Hospital is expressly allowed to "prohibit a physician employed or under contract from writing a prescription for medical aid-in-dying medication for a [patient] who intends to use the medical aid-in-dying medication on the facility's premises." The hospital must notify the physician in writing of its policy, and cannot enforce its policy against a physician if the hospital fails to provide advance notice. C.R.S. § 25-48-118(1). Prohibiting prescriptions for medical aid-in-dying medications for use on the hospital's premises is an element of a minimum non-participation approach under C.R.S. § 25-48-117 of the Act.

Hospital Employees and Contracted Staff. The Act does not expressly state what elements of the medical aid-in-dying process a Non-Participating Hospital can prohibit its employees or contracted staff from performing. The Act provides that a health care facility "shall not subject a physician, nurse, pharmacist, or other person to discipline, suspension, loss of license or privileges, or other penalty or sanction for actions taken in good-faith reliance under [the Act] . . .". C.R.S. § 25-48-118(2).

A hospital "participates" and "provides" medical aid-in-dying medications to its patients through the actions of its physicians, nurses, pharmacists and other employees. Since a hospital has the right under the Act to choose not to participate in providing medical aid-in-dying medications, it follows that the hospital can require its employees and contracted staff to abide by this prohibition when acting in the course and scope of their employment or contractual duties for the hospital. Otherwise a Non-Participating Hospital's employees and staff could cause the hospital to participate – involuntarily - in providing medical aid-in-dying medications, contrary to the hospital's lawful choice not to participate under the Act.

Since the Act does not define what it means to "participate in providing medical aid-in-dying medications" under the Act, a Non-Participating Hospital, such as a faith-based facility, that wants to prohibit a broader scope of participation under the Act, should consult with legal counsel. For example, a physician's role in discussing (but not fulfilling) a patient's request for medical aid-in-dying medications or referring a patient to another provider may or may not be

considered "participating in providing medical aid-in-dying medications." A Non-Participating Hospital, may conclude that some or all of the following steps constitute participating in providing medical aid-in-dying medications under the Act, and should be prohibited by hospital policy:

- Implementing the steps required of the "attending physician" under C.R.S. §§ 25-48-106, 110 and 111.
- Implementing the steps required of the "consulting physician" under C.R.S. § 25-48-107.
- Serving as "mental health professional" under C.R.S. § 25-48-108.
- Serving as a witness to a patient's written request for medical aid-in-dying medications under C.R.S. § 25-48-112.
- Filling a prescription for or dispensing medical aid-in-dying medication.

One of the areas of ambiguity under the Act is whether a Non-Participating Hospital (that is, a hospital that does not participate in providing medical aid-in-dying medications - in any location - under C.R.S. § 25-48-117(1)) can prevent its employed physicians (within the course and scope of employment) or its contracted physicians (within the scope of services performed on behalf of the hospital) from participating in providing medical aid-in-dying medications off-premises. Again, hospitals should consult their legal counsel if these matters are under consideration.

A Non-Participating Hospital likely cannot prohibit its employees from participating in providing medical aid-in-dying medications outside the course and scope of their employment with the hospital, as this conduct would be considered lawful off-duty conduct under Colorado law. *See* C.R.S. § 24-34-402. For example, if an employed physician moonlights at another facility, outside the course and scope of the physician's employment, the Non-Participating Hospital cannot prohibit the physician from participating in lawful off-duty participation under the Act while the physician is moonlighting.

For contracted staff, of course, a Non-Participating Hospital cannot prohibit a contracted physician or other staff from participating under the Act when they are not performing services on behalf of the hospital.

We hope this is helpful to CHA.

ACM:lld