

# Medical Futility: Recent Legal Developments

Thaddeus Mason Pope, J.D., Ph.D.  
Hamline University Health Law Institute

HCA webinar • May 14, 2012



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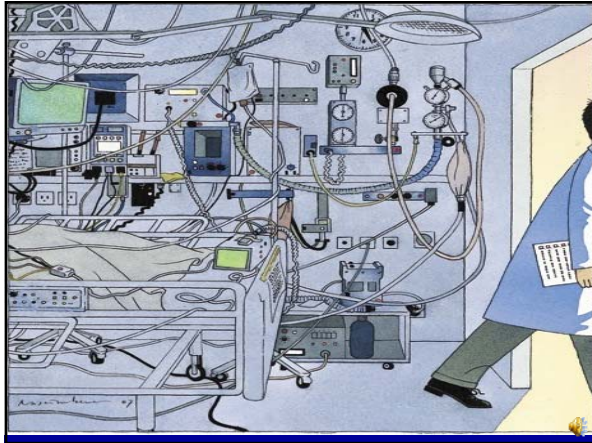
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Law is a  
**last** resort

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Typical  
dispute  
resolution  
pathway

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Consensus

Intractable

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## Prendergast (1998)

57% agree immediately  
90% agree within 5 days  
96% agree after more meetings

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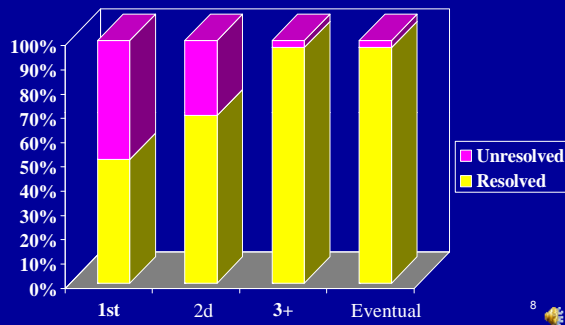
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## Garros et al. (2003)



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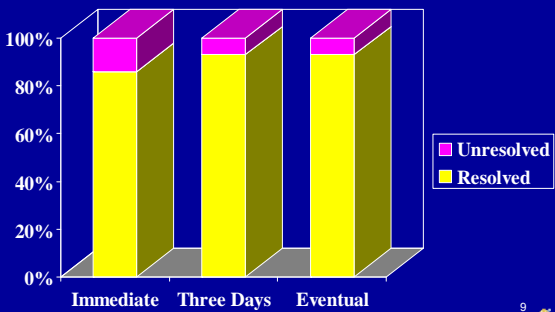
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## Fine & Mayo (2003)



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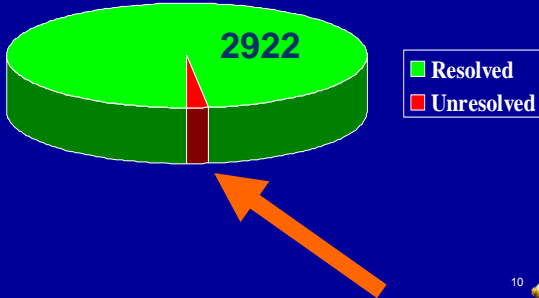
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# Hooser (2006)



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## Code of Medical Ethics

of the American Medical Association

Council on Ethical and Judicial Affairs  
Current Opinions with Annotations  
2008-2009 Edition

### section 2.037



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1. Earnest attempts . . .

**deliberate** . . .

**negotiate** . .

2. **Joint** decision-making

. . . maximum extent . .

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3. Attempts . . .  
**negotiate** . . .  
reach resolution . . .

4. Involvement . . .  
**ethics committee** . . .

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Coordinated communication

Mandatory time-triggered  
ethics consults

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5%

**BUT**

Big & growing  
population

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# Surrogate Replacement

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1. Follow directions
2. Exercise substituted judgment
3. Best interests

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Surrogate	Advance directive
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A

B

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Surrogate	Best interests
A	B

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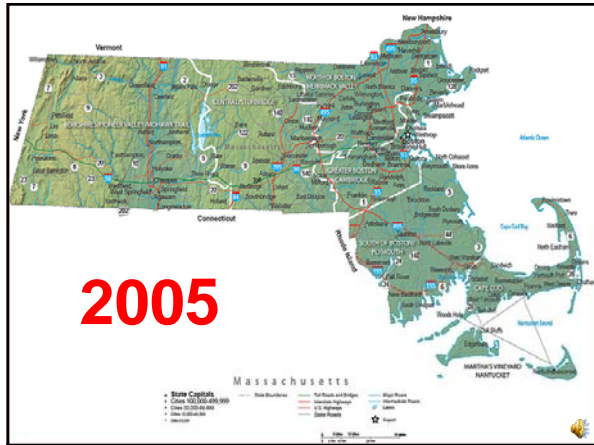
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“Your own personal issues  
are impacting your  
decisions”

“Refocus your  
assessment”

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Guardianship reform  
Surrogate accuracy studies

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Not just an  
**option** but  
sometimes a  
**duty**



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**USC University Hospital**




More than a hospital. An academic medical center.

USC University Hospital has established its place as one of the nation's preeminent academic medical centers. Part of Tenet, California, and located just minutes from downtown Los Angeles, USCUIH is a private, 411-bed research and teaching hospital staffed by the faculty of the renowned Keck School of Medicine of the University of Southern California.

**Plasencia McDonald**



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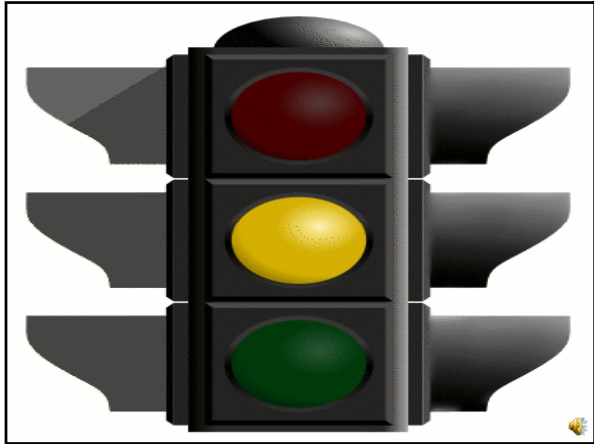
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“A . . . provider . . . may decline to comply . . . **medically inappropriate** health care or . . . contrary to **generally accepted health care standards** . . .”

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“Remove the \_\_\_, and I will **sue you.**”

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Perceptions of “futile care” among caregivers in intensive care units

Robert Sibbald MSc, James Downar MD, Laura Hawryluck MD MSc

CMAJ 2007;177(10):1201-8

“Why they follow the . . .  
SDMs instead of doing  
what they feel is  
appropriate, . . . a **lack of  
legal support.**”

43

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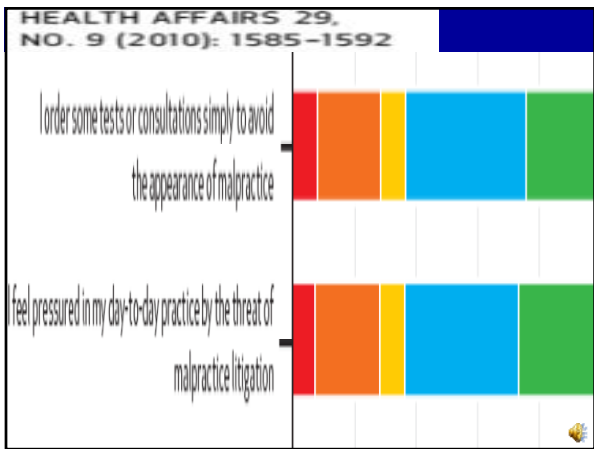
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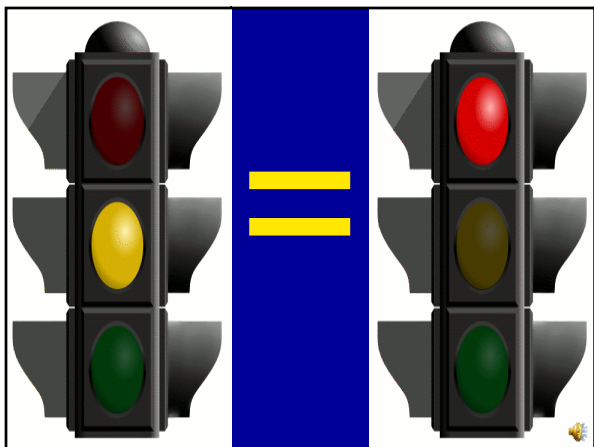
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# Provider push for right to refuse

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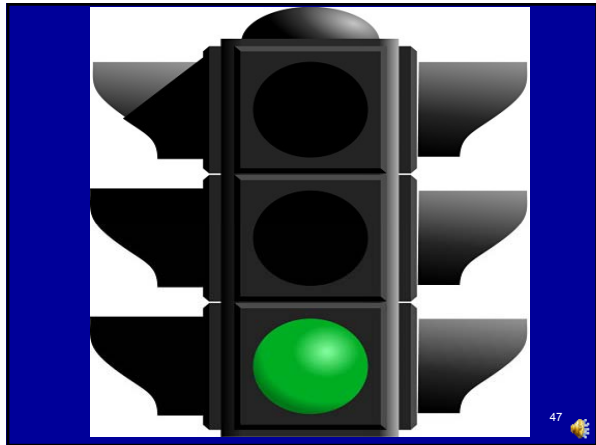
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You may stop LSMT  
for **any reason**

- with immunity
- if your HEC agrees

Tex. H&S 166.046



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Resolution 505-08	<b>TITLE:</b> LEGAL SUPPORT FOR NONBENEFICIAL TREATMENT DECISIONS
<b>Author:</b> H Hugh Vincent, MD; William Andereck, MD	
<b>Introduced by:</b> District 8 Delegation	
<b>Endorsed by:</b> District 8 Delegation	Reference Committee
	October 4-6, 2008
<i>This resolution constitutes a proposal for consideration by the California Medical Association House of Delegates and does not represent official CMA policy.</i>	
<b>WHEREAS</b> , it is still common for physicians who feel non-beneficial or futile treatments are being provided or considered to feel threatened by legal action by the patient's family or other surrogates, and thus continue to provide such care against their best medical judgment; and	

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WASHINGTON STATE MEDICAL ASSOCIATION  
HOUSE OF DELEGATES

Resolution: C-5  
(A-09)

Subject: Legal Protection for Physicians When Treatment is Considered Futile

Introduced by: King County Medical Society Delegation

Referred to: Reference Committee C

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WASHINGTON STATE MEDICAL ASSOCIATION  
HOUSE OF DELEGATES

Resolution: A-2  
(A-10)

Subject: WSMA Opinion on Medical Futility in End-of-Life Care

Introduced by: Shane Macatlay, MD, Delegate  
WSMA Board of Trustees

Referred to: Reference Committee A

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**RESOLUTION 1 - 2004**  
([read about the action taken on this resolution](#))

**Subject: Futility of Care**

Introduced by: Michael Katzoff, MD and the Medical Society of Milwaukee County

RESOLVED, That the Wisconsin Medical Society, concurrent with a recommendation of the American Medical Association, Medical Futility in End-of-Life Care policy E-2.037, supports the passage of state legislation which establishes a legally sanctioned extra-judicial process for resolving disputes regarding futile care, modeled after the Texas Advanced Directives Act of 1999.

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**Medical Futility**  
Medicine Law & Ethics

Thursday, October 21, 2010  
7:30 am - 12:45 pm  
Education & Resource Center (ERC)  
Hartford Hospital, Heublien Hall

 **HARTFORD HOSPITAL**

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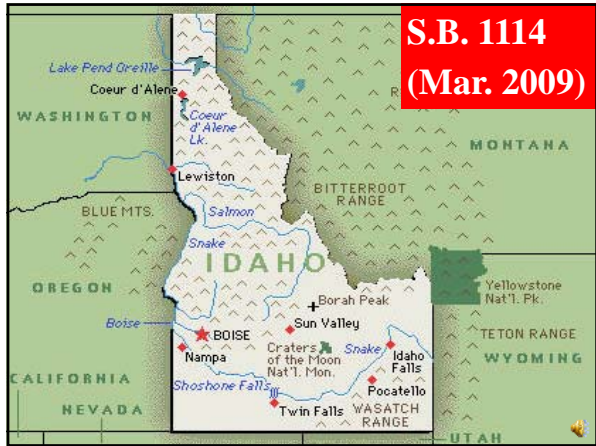
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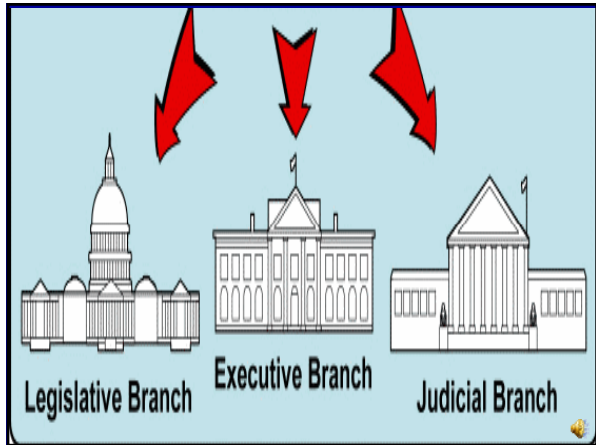
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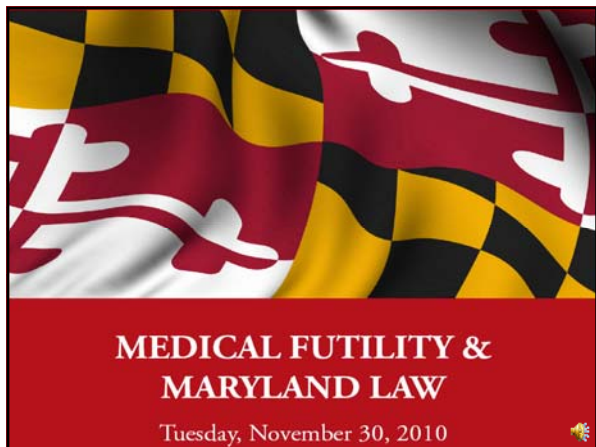
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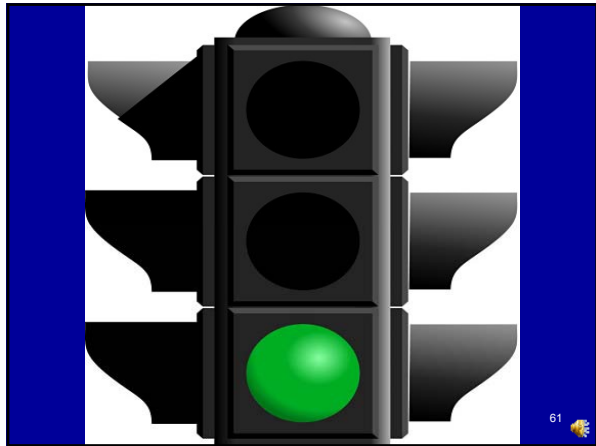
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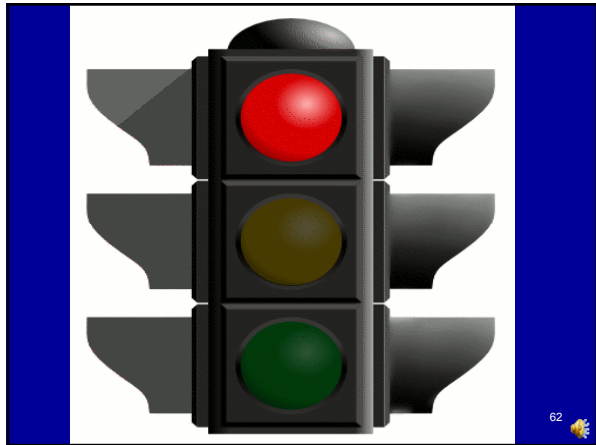
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“If a surrogate directs the provision of [LST] . . . provider that does not wish to provide . . . **shall nonetheless comply** . . . pending either the transfer . . . or judicial review”

- N.Y. Pub. Health Code 2994(f)(3)

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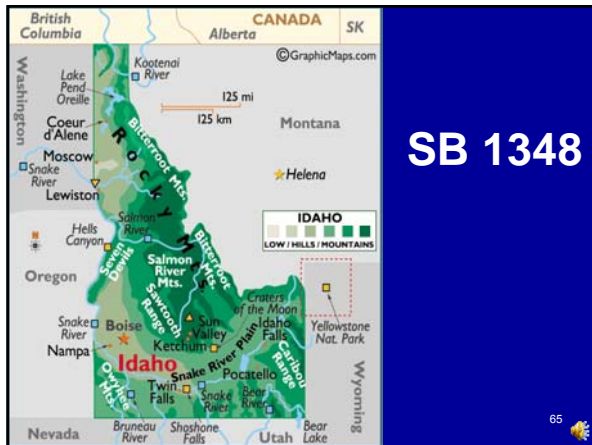
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**Discrimination  
in Denial of  
Life-Preserving  
Treatment Act**

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**April 5, 2012**

Signed by Governor

**July 1, 2012**

Effective

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“Health care . . . **may not be withdrawn or denied** if its provision is directed by . . . patient . . ., by . . . directive . . ., or by . . . surrogate”

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“Futile care”  
exception

69 

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“ . . . terminal condition . . . death is imminent within hours or at most a few days whether or not . . . treatment is provided . . . ”

**OR**

“denial . . . will not result in or hasten the patient's death.”

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## Nondiscrimination in Treatment Act

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**March 14, 2012**

Passes Senate

**April 3, 2012**

Passes House PH Comm

**May 14, 2012**

House reconvenes

73 

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“A health care provider  
**shall not deny** . . . life  
preserving health care  
. . . directed by the  
patient or [surrogate] . .  
. on the basis of . . .”

74 

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“view that treats  
extending the life of  
an elderly, disabled,  
or terminally ill  
individual as of **lower  
value**”

75 

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“disagreement with how the patient [or surrogate] **values the tradeoff** between extending the length of the patient’s life and the risk of disability”

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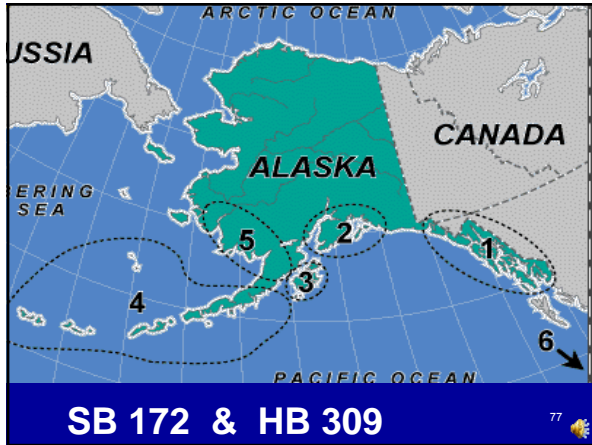
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SB 172 & HB 309

77

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“this subsection **does not . . . allow** a . . . provider . . . to decline to comply with . . . requests a [DNR] order be made ineffective”

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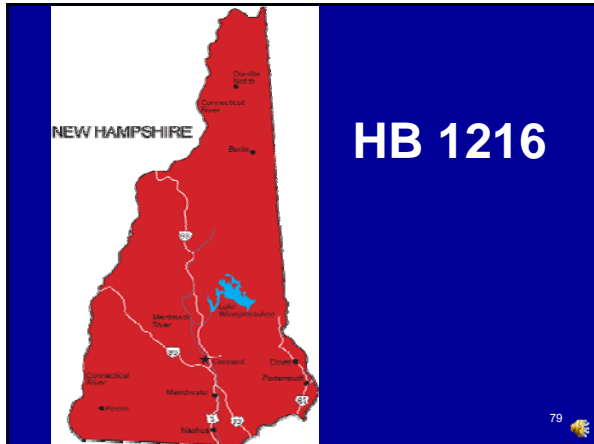
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March 14, 2012  
Passed House

May 16, 2012  
To Senate floor

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**Prohibited**

“withholding or withdrawing .  
. . life-sustaining treatment .  
. . **unless** . . . advance  
directive . . . guardianship or  
other court order . . .”

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~~“or such action is taken  
in accordance with the  
facility's standard  
protocol as applicable  
to its general patient  
population.”~~

82

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## Conscience clauses

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## Traditional limitations

Treat until transfer

Treat until transfer  
appears impossible

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**February 7, 2012**  
Referred to House  
Judiciary Comm

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“A healthcare provider has the **right not to participate** . . . in a healthcare service that violates his or her conscience.”

“No healthcare provider shall be civilly, criminally, or administratively liable for declining to participate . . .”

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**Thaddeus Mason Pope**

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B [medicalfutility.blogspot.com](http://medicalfutility.blogspot.com)

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