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January 29, 1992

[REDACTED]

RE: Request for Ethics Committee Opinion Dated December 13, 1991

Dear [REDACTED]

The Ethics Committee of the State Bar Association of North Dakota considered your December 13, 1991, request for opinion at its meeting held January 28, 1992.

The Committee was of the opinion that there really is no specific rule in the Rules of Professional Conduct which would address the issues that you raise in your letter. On the other hand, there was an unanimous belief of the Committee that what you propose in your letter is troublesome and could pose many pitfalls for you. The Committee was of the opinion that the preparation of living will and/or durable powers of attorney for health care should involve more than simply filling out the standard form. We recognize that many people would probably be satisfied with the standard form, but if they are going to consult an attorney on the issue, the attorney would more than likely advise them of various things that could be added to the standard forms to more accurately express their wishes.

In addition, there is the basic question as to whether a living will versus a durable power of attorney for health care is a more appropriate document for the individual. Thus, while it is clear that many people will opt out for the standard form that is available through the statutes, the standard form is not appropriate for everyone, and individuals should be encouraged to at least speak with a lawyer to determine if something more is needed.

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An example of when something beyond the North Dakota standard form might be needed is a situation where an individual is a North Dakota resident residing along the South Dakota border. Those individuals may seek and obtain their primary health care in a South Dakota hospital. The South Dakota law on advance directives, particularly in regard to South Dakota's definition of terminal illness, is quite different than North Dakota's. Those individuals may want to assure that their advance directives take into consideration the South Dakota provisions since it is most likely that they would be treated in South Dakota. The same could be said for people living on the border next to Minnesota or Montana.

In other words, each individual may have some particular need to go beyond the standard form of either the living will or durable power of attorney for health care to take into consideration their unique situation as to where they obtain their primary health care. In those cases, the standard form probably is not appropriate nor should an attorney suggest that it is in every situation. What you propose could, at least by implication, suggest that the standard form is sufficient in all cases. Thus, the distribution of the standard form without personal consultation, might subject the attorney to legal malpractice claims or disciplinary complaints where the individual really needed a personalized advance directive.

As indicated, the Committee could not point to any specific rule which addresses the issues that you raised in your letter. The Committee, however, would direct your attention to Rule 7.1, which deals with contact with individuals in regard to the provision of legal services. While it is probably not directly applicable, it may give you some guidance. Also, any suggestion to nonlawyers that they can distribute the form to others together with a suggestion that the standard form should be sufficient for the general public needs may run afoul of Rule 5.5(b) which prohibits a lawyer from assisting other individuals from carrying out activities which constitute unauthorized practice of law.

The Committee recognizes this is a gray area, but the Committee was also of the view that the standard forms available through the statutes may not be what is needed in any given situation and that the patient or client should be individually counselled on their specific needs depending on the circumstances. Thus, the Committee could see problems arising from an attorney making the forms generally available without any suggestion to the individuals that something more may be needed to meet their specific needs.

In your letter, you indicated you had talked to at least one local clinic about distributing the standard forms. Under the Patient Self Determination Act of 1991, which became effective on

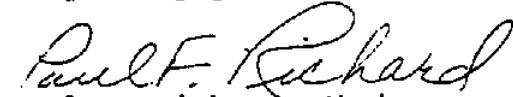
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December 1, 1991, all hospitals, skilled nursing facilities, other medical institutions and other medical organizations or facilities identified in the statute are required to notify all patients upon admission of their right to prepare advance directives. To our knowledge, the State Health Department prepared an informational brochure or sheet outlining the applicable law in regard to the preparation of advance directives in this State.

All hospitals in this state should be distributing the information to patients as they are admitted. The hospitals are also required to actively inquire with the patients whether or not they have prepared such a document and, if so, place the document in the medical record. To our knowledge, the informational packet that is being handed out clearly indicates to the patient that if they have specific questions in regard to the preparation of such a form they should consult with legal counsel of their choice. Obviously, if the patients choose to simply utilize the standard form, that is their choice, but as indicated above, it is the Committee's view that for a lawyer to suggest that the standard forms in and of themselves are sufficient could lead to serious legal pitfalls.

This letter opinion is issued to you for advisory purposes only and is not binding on you, the courts of North Dakota, disciplinary board, grievance committees, or any other member of the Bar of the State of North Dakota.

Very truly yours,



Paul F. Richard, Chairman
Ethics Committee State Bar Association
of North Dakota

PFR/skb

[REDACTED]

December 13, 1991

Paul F. Richard
Attorney at Law
P O Box 6017
Fargo, N. D. 58108

Dear Mr. Richard:

This letter is written to you in your capacity as chairman of the SPAND Ethics Committee. Our legislature has set forth a basic living will form in the adoption of 23-06.4-03(3) NDCC. In many instances I and many other lawyers have been copying the form set forth in the code.

In providing the service involved, it is necessary to have a conference to interview the client, then the living will is prepared, then another conference for the signing of the will. The will form involved serves the purpose for most people and the service rendered involves primarily secretarial service rather than the practice of law. For this reason, I have spoken to John Graham several times to suggest that the Health Department should print up probably ten thousand copies of a Living Will and distribute them free of charge to clinics and medical facilities throughout the state as well as to attorneys so that the form could be provided to people who desire to create a living will without cost to the individuals involved. John has indicated that his department would consider such action but they haven't acted on it and I suspect that he is concerned about the possible political fallout involved, and I understand that. I have suggested to at least one of the local clinics that they create such living wills and distribute them free of charge, but I believe they probably are also concerned about danger of antagonizing lawyers.

I have considered having forms printed up in a substantial quantity advertising the forms and distributing them free of charge, but I'm finding it hard to see why I should bare such a financial burden even though I could afford it. I definitely could not be accused of doing something like that to bolster business because I am semi-retired and have had all the business I can handle. Because of a heart condition I have been forced to turn away clients requesting assistance and I am limiting my practice to wills, estate planning, probate and real estate transactions.

I recently contacted Vivian Berg relevant to the possibility that I would have a substantial quantity of living will forms typed up and would advertise them and distribute them for a

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fee of \$5.00 per will per form, calling the attention of the purchasers of the form to the fact that they could reproduce the form so several people could share in the expense involved. The fee should cover all my expenses and possibly provide a little profit and the forms would be made available to many people at a very low cost.

Kindly advise as to whether such action would involve a breach of ethics.

Another possibility would be that SPAND would render such a service and in that manner bring in a little revenue. I would support such action by ESPAND or by any other organization that would be willing to print up the forms on a mass basis and make them available to the public at low cost or at no cost.

Very truly yours,





