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DEPARTMENT OF JUSTICE

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Mr. Jeffrey J. Siewert
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Dear Mr. Siewert:

¶ 1. You ask whether forms called Physician Orders for Life-Sustaining Treatment (“POLST”) are legal and valid in Wisconsin. You have included a sample of this form, on which a person may communicate wishes about medical care in the event of incapacitation.

¶ 2. Because the legality and validity of a POLST form in a particular context would depend on the facts and circumstances presented, this opinion does not address the legality of POLST forms as a general matter. Instead, this opinion addresses two specific questions: (1) whether the civil and criminal immunity for healthcare providers who rely on certain statutory instruments (including declarations to physicians, do-not-resuscitate orders, or healthcare power-of-attorney instruments) applies to providers who rely on POLST forms; and (2) whether POLST forms may be considered for any other purpose, such as evidence of an individual’s medical wishes in a judicial proceeding. I conclude that a POLST form would not confer the immunity provided by Wisconsin’s statutory instruments, but that, depending on the circumstances, such a form might be evidence of an individual’s healthcare wishes.

¶ 3. The POLST form you attach provides checkboxes where a person may indicate whether he or she wishes to receive artificially administered fluids and nutrition, whether to resuscitate when without a pulse and not breathing, and whether antibiotics should be withheld and to what extent. It also contains treatment options for when a patient has a pulse or is breathing, but is incapacitated: “comfort measures only,” “limited additional interventions,” or “aggressive treatment,” which are defined to a certain extent on the form. The form requires the signature of a

physician or a nurse practitioner, but requires no patient's signature or witnessing for a patient's signature. The form also states no prerequisites to using the form, such as having a terminal condition.

¶ 4. Wisconsin statutes provide three instruments through which an individual may state his healthcare wishes in the event of incapacitation: a "declaration to physicians," "do-not-resuscitate order," and "health care power of attorney." Wis. Stat. §§ 154.03, 154.19, 155.10. These statutory instruments apply under specific circumstances, have their own signature requirements, and may be limited in the extent of authorization they afford.

¶ 5. A declaration to physicians addresses the withholding or withdrawal of life-sustaining procedures and feeding tubes for persons in a terminal condition or persistent vegetative state, as verified by two physicians who have personally examined the individual. Wis. Stat. §§ 154.02(3), 154.03(1). It must be signed by the declarant when of sound mind, or by a proxy if the declarant is physically unable to sign. Wis. Stat. § 154.03(1). It also must be witnessed by two disinterested, non-relative witnesses who are not the individual's healthcare provider. Wis. Stat. § 154.03(1)(a)-(d). The declarant may not authorize withholding life-sustaining procedures that an attending physician advises will cause pain or reduce comfort that cannot be alleviated through pain relief measures. Wis. Stat. § 154.03(1).

¶ 6. A do-not-resuscitate order applies to persons with a terminal condition or a medical condition under which cardiac or pulmonary resuscitation would either fail to prevent death or would cause significant physical harm or pain that would outweigh the possible benefits of resuscitation. Wis. Stat. § 154.17(4). It must be signed by the patient unless a qualified individual is incapacitated and the individual's guardian or healthcare agent consents and signs the order on the individual's behalf. Wis. Stat. §§ 154.19(1)(d), 154.225(2). Written information about the resuscitation procedures must be disclosed to the patient, and a do-not-resuscitate bracelet must be provided and worn. Wis. Stat. §§ 154.17(1), 154.19(2).

¶ 7. The third mechanism, healthcare power of attorney, may be bestowed on a healthcare agent in the event of incapacitation. It is not specifically limited to particular medical conditions. *See* Wis. Stat. § 155.05. However, it must be signed by the patient, or at the patient's direction, when he or she is of sound mind and must be witnessed by two disinterested, non-relative witnesses who are not the individual's healthcare provider. Wis. Stat. §§ 155.05(1), 155.10. The agent may not consent to withhold or withdraw feeding tubes if it will cause pain or reduce comfort, and may

consent to the withholding of orally ingested nutrition or hydration only if provision of the nutrition or hydration is medically contraindicated. Wis. Stat. § 155.20(4).

¶ 8. Where a healthcare provider relies on one of these types of instruments in withholding or withdrawing treatment, the statutes provide criminal and civil immunity. Each statutory instrument provides for its own specific immunity. The declaration-to-physicians law provides:

No physician, inpatient health care facility or health care professional acting under the direction of a physician may be held criminally or civilly liable, or charged with unprofessional conduct, for any of the following:

1. Participating in the withholding or withdrawal of life-sustaining procedures or feeding tubes *under this subchapter*.

Wis. Stat. § 154.07(1)(a). Similarly, the do-not-resuscitate law states that “[n]o physician, emergency medical technician, first responder, health care professional or emergency health care facility may be held criminally or civilly liable” when, “[u]nder the directive of a do-not-resuscitate order, withholding or withdrawing, or causing to be withheld or withdrawn, resuscitation from a patient.” Wis. Stat. § 154.23. A “do-not-resuscitate order” is defined as “a written order issued under the requirements of *this subchapter*.” Wis. Stat. § 154.17(2). Finally, the health care power-of-attorney law provides that “[n]o health care facility or health care provider may be charged with a crime, held civilly liable or charged with unprofessional conduct for . . . [c]omplying . . . with the terms of a power of attorney for health care instrument *that is in compliance with this chapter*.” Wis. Stat. § 155.50(1)(c).

¶ 9. The POLST form you have provided does not satisfy the statutory criteria for any of these instruments. It is unlike a declaration to physicians because it is not preconditioned on a terminal condition or persistent vegetative state, does not require verification of those conditions by two physicians, lacks the requirement for witnessing of the principal’s (or a proxy’s) signature, and would allow withholding of procedures even if it would lead to pain or discomfort. It is unlike a do-not-resuscitate order because it is not preconditioned on a terminal condition or finding about the inadequacy of cardiac or pulmonary resuscitation, lacks the signing requirement by a qualified patient or by a guardian or healthcare agent, and does not require a bracelet or that information about resuscitation be disclosed. And the POLST is unlike the healthcare power of attorney because it lacks the requirement for witnessing of the principal’s, or a proxy’s, signature and does not

prohibit withholding feeding tubes if it would cause pain or discomfort or withholding orally ingested nutrition or hydration if medically indicated.

¶ 10. Accordingly, because the statutes mandate that an instrument comply with the statutory requirements before immunity will apply, and in the absence of any other statutory or judicially created immunity, I conclude that reliance on a POLST form would not trigger immunity for a healthcare provider.

¶ 11. You also ask whether a POLST form is automatically invalid for all other purposes, such as evincing consent to a treatment. You ask what effect, if any, a POLST form may be given in court proceedings. I conclude that there is no absolute bar to a court considering a POLST form as evidence of a person's wishes about medical care. Rather, whether a form is properly considered will depend on the circumstances.

¶ 12. There are two main considerations. First, the statutes do not expressly forbid considering a POLST form as evidence of a person's wishes. Second, the Wisconsin Supreme Court has left open the possibility that evidence other than the statutory instruments may be considered.

¶ 13. First, a failure to execute a statutory instrument creates no presumption about the person's wishes. For example, the absence of a declaration "creates no presumption that the person consents to the use or withholding of life-sustaining procedures or feeding tubes in the event that the person suffers from a terminal condition or is in a persistent vegetative state." Wis. Stat. § 154.11(5). Similar language also appears with the other laws. *See* Wis. Stat. § 154.25(5) (no presumption in the absence of a do-not-resuscitate order); Wis. Stat. § 155.70(8) (no presumption in the absence of a healthcare power-of-attorney instrument). In addition, the declaration to physicians and do-not-resuscitate laws state that the statutory mechanisms do not impair "other rights" a person has "to withhold or withdraw life-sustaining procedures or feeding tubes" or "to withhold or withdraw resuscitation." Wis. Stat. §§ 154.11(4), 154.25(4). Accordingly, the statutes leave open the possibility that, in the absence of a statutory instrument, other evidence of a person's intent might be considered.

¶ 14. Second, Wisconsin Supreme Court cases also leave open the possibility of other evidence. *In the Matter of Guardianship of L.W.*, 167 Wis. 2d 53, 482 N.W.2d 60 (1992), addressed whether an incompetent individual in a persistent vegetative state had the right to refuse life-sustaining medical treatment, such as artificial nutrition and hydration. *See id.* at 63. The court addressed whether a

guardian may exercise that right on the incompetent person's behalf. *See id.* The court concluded that an incompetent person in a persistent vegetative state has a constitutionally protected right to refuse that treatment, and that a guardian may consent to withdrawal, where it is determined that it is in the "best interests" of the ward. *Id.*

¶ 15. The ward in *L.W.* had not executed any statutory instrument, but the court recognized that a failure to take advantage of the statutes does not create a presumption regarding intent. *Id.* at 69-70, 75. The court went on to indicate that it would have considered whether *L.W.* had "expressed his wishes" in other ways, "as far as they can be discerned." *See id.* at 78-79. It turned out, however, that *L.W.* had not expressed his wishes in any manner. *See id.* at 78-80.

¶ 16. *In the Matter of the Guardianship and Protective Placement of Edna M.F.*, 210 Wis. 2d 557, 563 N.W.2d 485 (1997), addressed the problem of discerning intent in determining whether a court-appointed guardian could withdraw artificial nutrition and hydration. In the course of that discussion, the court described ways to glean intent more broadly than by reference to statutory documents: "it is not in the best interests of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advanced directive *or other statement clearly indicating his or her desires.*" *Id.* at 567-68 (emphasis added). Along similar lines, the court went on to conclude that, "if her guardian can demonstrate by a preponderance of the evidence a clear statement of Edna's desires in these circumstances, then it is in the best interests of Edna to honor those wishes." *Id.* at 569 (footnote omitted).

¶ 17. Accordingly, the statutes and cases do not prohibit other evidence of intent. Whether a particular expression is sufficiently clear, addresses the correct circumstances, and is not otherwise objectionable under the law or rules of evidence, would depend on the circumstances of a particular case. Depending on all the facts and circumstances, a court might determine that a POLST form provided evidence of the person's intent.

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¶ 18. In sum, I conclude that a POLST form will trigger no statutory immunities for healthcare providers where it lacks the features of statutory documents such as a declaration to physicians, do-not-resuscitate order, or healthcare power of attorney. A court might conclude, however, that a POLST form is relevant in discerning a person's intent.

Sincerely,

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