

ESSAY QUESTION 1

(60 minutes)

(100 points, 33% of grade)

Answer **ALL** of the following question. Please provide concise legal opinions supported by relevant case law, statutes, regulations, and examples discussed in class or in the readings.

Question 1 (100 points):

To give patients fuller control over their health care options, the State of Texahoma passed the Health Care Right to Autonomy Act in 2017. This act responded in part to its state's Supreme Court ruling that patients have a right to physician-assisted suicide under its state constitution. Specifically, the Legislature enacted the following statutory provisions:

Section 101: Short Title. This statute will be called the "Health Care Right to Autonomy Act of 2017."

Section 102: Purpose. The Legislature finds that:

- (a) the ability to control and dictate health care choices is fundamental to the quality of life and individual autonomy;
- (b) healthcare providers and persons acting pursuant to health care licenses issued by the State should take all possible measures to promote and effectuate a patient's expressed choices in their healthcare treatment;
- (c) patients have had their healthcare options improperly limited by insurance providers, healthcare system operators, and individual medical practitioners because of concerns over profitability or market advantage.

Section 103: Definitions. For purposes of this statute,

- (a) "healthcare provider" means any hospital, clinic, emergency care center, ambulatory treatment center, or other facility that provides medical care to the general public.
- (b) "medical personnel" shall mean any individual or entity that provides medical care pursuant to a license or authorization issued by the state medical licensing board.

- (c) “medical care” shall mean any procedure, administration of prescription drugs or controlled substances, diagnostic procedure or test, physical therapy, psychological or psychiatric therapy or treatment, or any other actions intended to affect the health or medical condition of another individual.
- (d) “treatment” shall mean physical therapy, palliative care, hospice care, or maintenance therapy designed to alleviate pain or symptoms of disease without attempting a cure of the underlying medical condition.

Section 104: Patient Choice.

- (a) Healthcare providers and medical personnel shall not provide medical care or treatment without first obtaining express consent for that specific care or treatment from the patient, their legal guardian, or their designated representative.
- (b) Healthcare providers and medical personnel shall continue to provide the medical care or treatment selected by the patient, their legal guardian, or their designated representative until expressly directed to discontinue the treatment.
- (c) If the healthcare provider or medical personnel wish to continue medical care without the express consent of the patient, they must file a civil action in the state district court where the patient resides to obtain a court order that the medical care is in the patient’s best interest or the patient lacks the capacity to make a competent choice.
- (d) This section shall not apply to facilities that offer solely elective surgical care or reproductive counseling services.

Section 105: Penalties. Any violations of Section 104(a) or (b) shall be punishable by a fine of not more than \$10,000 per violation per day, loss of licensure for medical personnel, and treble the costs incurred by the person denied their choice of medical care.

Thanks to recent advances in imaging of brain activity and functions, researchers have discovered that many comatose patients considered to be in a vegetative state may actually have substantial mental activity and cognitive abilities. They lack any physical capacity to express their thoughts directly, but transcranial magnetic imaging may give doctors the capacity to ask comatose patients “yes or no” questions and glean their responses. The research remains highly controversial, however, and the capacity to detect mental states through noninvasive imaging varies enormously between individual patients.

Eternity Care, Inc. operates care facilities in Texahoma to provide fixed-cost care for residents in a profound and permanent vegetative state. This care essentially seeks to maintain the physical condition of each patient, but it does not seek to cure their underlying brain damage or illness – it is dedicated to keeping the residents comfortable and uninjured by perpetual bedcare. The facilities rely on unlicensed staff to keep the patients clean and comfortable and each patient has their own individual physician who is not affiliated with Eternity Care. While most patients rely on Medicare to cover their expenses with Eternity Care, the U.S. Department of Health & Human Services has not yet determined whether federal laws require brain scans for profoundly comatose patients.

Lawrence Lazarus is a resident with Eternity Care, and has been in a profound coma for over ten years. He has not shown any signs of communicative ability or capacity for voluntary movement. His children now want Eternity Care to provide a brain scan of their father to determine whether he is aware of his condition and wishes to continue his care.

The general counsel for Eternity Care has asked you to determine whether the company must provide the scan to Lawrence Lazarus. Providing such scans for every resident in Eternity Care under its existing contracts would be extraordinarily expensive, and might bankrupt the company. She asks you to provide an objective assessment of the company's best arguments that the Healthcare Right to Autonomy Act does not require such scans, including the most likely counterarguments that she should expect from Lazarus' family.

ESSAY QUESTION 2

(60 minutes)

(100 points, 33% of grade)

Answer **ALL** of the following question. Please provide concise legal opinions supported by relevant case law, statutes, regulations, and examples discussed in class or in the readings.

Question 2 (100 points):

The international trade in conflict minerals and goods – i.e., valuable materials obtained in regions riven by civil war or insurrection which are sold to finance guerrilla or criminal activities – has fueled prolonged struggles, fomented widespread crime networks specializing in smuggling and human trafficking, and led directly to untold environmental damage, disease and misery, and loss of human life.

To tackle this problem, the Federal Importation and Trade Commission (“Commission”) proposed a rule in 2010 to forbid the importation of any mineral or natural materials from “conflict zones” unless they carried a certification from the importer that the materials originated from commercial activity that complied with all local rules and satisfied all local permitting requirements. The proposed “Blood Diamond Rule” also required the importer to certify that the production, sale, transport, and export of the materials did not violate any international laws or conventions to protect human rights and the environment. The Commission relied solely on its long-standing authority to regulate “unfair and deceptive importation trade or practices” in the U.S. economy under the Federal Import Act.

The proposed rule sparked an enormous outcry from numerous economic sectors, including importers of diamonds, petroleum, exotic woods and lumber, and rare earth minerals. The Commission received over 100,000 comments on the proposed rule, and held numerous hearings to accept additional verbal and written comments. Most of the comments complained that the rule imposed expensive and unnecessary burdens on commerce, and that U.S. companies would face foreign competition unencumbered by similar constraints. They also questioned the effectiveness and enforceability of the proposed rule. During this period, the U.S. Congress held hearings on the issue, but did not otherwise act to guide or limit the Commission’s proposal.

The Commission finalized its Blood Diamond Rule in 2016. The final rule included important changes from the proposed rule. For example, the final rule did not apply to petroleum imports, and it only applied to transactions exceeding \$500,000 in value. Otherwise, the Commission’s final rule did not vary from its proposal, and it scheduled the rule to take effect on January 1, 2017.

On January 20, 2017, the Trump Administration took office and voiced its strong opposition to the new rule. President Trump first issued an executive order that directed the Commission to suspend enforcement of the rule, and then to begin steps to revoke the new final rule. His order directs the agency to consider reinterpreting the term “unfair and deceptive trade or practices” to exclude conditions occurring in other countries prior

to importation of items into the United States. When the Commission's Administrator -- who was previously appointed after Senate confirmation and subject to dismissal only for "good cause" under Federal Import Act -- refused to comply, President Drump immediately fired her and replaced her with the U.S. Treasury Secretary. This Secretary is a former lobbyist who had previously objected to the Blood Diamond Rule proposal (as well as the existence of the Commission itself). He is now simultaneously serving as both the Treasury Secretary and the acting Administrator for the Commission, and he has already immediately halted any pending enforcement actions under the new rule.

The fired Commission administrator has hired you to provide an assessment of (1) the legality of President Drump's direction to suspend enforcement of the Blood Diamond Rule, (2) any legal requirements for a successful roll-back of the Blood Diamond Rule, and (3) the legality of her firing by President Drump and his appointment of her successor. She wants your objective assessment of her strongest and weakest claims, as well as any key counter-arguments that she can expect from the Drump Administration.