WHAT A TEXAS DOCTOR SHOULD DO IF KATRINA STRIKES AGAIN

By José R. Guerrero, Jr.

José R. Guerrero, Jr., is a law clerk for Robert "Bob" Bennett, The Bennett Law Firm, P.C., 515 Louisiana, Ste. 200, Houston, Texas, 77002, (713) 225-6000, f (713) 225-6001, www.bennettlawfirm.com.

Bennett is a former prosecutor who represents doctors and other health professional before the State Board of Medical Examiners. He also helps doctors with privileged hearings, recertification, managed care exclusions, and investigation by state and federal law enforcement agencies.

On July 17, 2006, Anna M. Pou, M.D., and nurses Lori L. Budo and Cheri A. Landry were arrested on suspicion of administering drug injections in "lethal" doses to four DNR, or "Do Not Resuscitate," patients. These injections were allegedly given after Hurricane Katrina at Memorial Medical Center in Louisiana on Sept. 1, 2005. Upon arrest, the case was turned over to the Orleans Parish District Attorney to decide whether criminal charges will be presented to a grand jury for indictment.

The Attorney General for the State of Louisiana, Charles C. Foti, claimed that it was his duty to have the trio arrested. Pursuant thereto, Foti filed an affidavit in which he alleged that four supervisors for LifeCare Hospitals who ran the acute-care ward on the seventh floor at MMC claimed that patients were euthanized after Hurricane Katrina struck. All LifeCare patients on the seventh floor of MMC had DNR orders.

A DNR order is a request not to have CPR performed if a patient's heart stops or if the patient stops breathing. In cases where no DNR order is in place, medical personnel would ordinarily perform CPR or take other appropriate actions to enable the patient's heart to continue beating or to allow the patient to continue breathing.

According to the attorney general's affidavit, the third day after Katrina severely flooded the city, and as hope for rescue faded, Pou told the supervisors that she was going to give a "lethal" drug dose to those DNR patients who could not be evacuated and would not likely survive. Foti's affidavit duly stated that the toxicology reports from autopsies performed two weeks after the storm on the four DNR patients whose bodies were in advanced stages of decomposition showed lethal amounts of morphine and Versed (Midazolam hydrochloride).

TEXAS LAW AND PHYSICIANS' LIABILITY IN EXIGENT CIRCUMSTANCES

Under Texas law, a physician may personally administer drugs to patients that are, in the physician's medical judgment, therapeutically beneficial or necessary for the patient's treatment. Similarly, when providing end-of-life care, a physician may administer palliative drugs to improve a patient's quality of life even if the treatment hastens the patient's death. If, however, a Texas physician decides during the course of unsuccessful treatment that a patient should no longer be kept alive, Texas law provides a clear protocol that must be followed. The Texas Advance Directives Act (1999), also known as the Texas Futile Care Law, codified under Chapter 166 of the Texas Health and Safety Code, describes certain provisions for physicians to follow in this situation.

The Texas Futile Care Law was designed to balance patients' rights with the ethical and medical judgment of hospital staff. In addition, the law was founded on the premise that forcing a hospital or physician to continue to treat a permanently unconscious, hopelessly impaired patient wastes valuable resources and medical talent. The controversial Section 166.046(e) of the Texas Health and Safety Code allows a health care facility to discontinue life-sustaining treatment against the wishes of the patient or guardian ten days after providing written notice.

For hospital personnel to be immune from liability for this action, the following protocol must be followed: (1) the patient's family must be given written information concerning hospital policy on the ethics consultation process; and (2) the family must be given 48 hours notice and be invited to participate in the ethics consultation process. While §166.046 permits a hospital ethics board to bypass an advanced directive or a health care treatment decision made by or on behalf of a patient, the hospital must adhere to the requirements set forth by the code to avoid complications.

This was not, however, the situation in Pou's case; the events that unfolded at MMC after Katrina do not fit neatly within any provision of the Texas Health and Safety Code. Pou was one of few physicians at MMC during Katrina and the days that followed. The unexpected and immediate devastation that befell the hospital created conditions that hindered the administration of effective health care to patients: medicines were running low, overheated patients were dying, electricity was out and patients living on machines were running out of battery power. The substandard conditions prompted a mass evacuation of the entire hospital. Medical staff soon realized that the DNR patients were unfit for evacuation as many were dying either in preparation for or during the evacuation process.

While the acts described in the attorney general's affidavit seem egregious and inconsistent with sound medical principles, Pou was confronted with a "catch-22" deci-

sion in light of the deplorable conditions created by Katrina's flooding. Pou could either abandon living patients who could not be evacuated from the hospital and would eventually die or she could facilitate the ease of their inevitable death via the administration of palliative drugs. Due to the severity and urgency of the circumstances, an immediate decision had to be made.

According to the allegations, after a brief meeting with other hospital staff, Pou decided to administer "lethal" drug doses as a means of intentionally hastening patient death. Under Texas Penal Code Section 19.02 (b) (2), a person commits murder if they intend to cause serious bodily injury and commit an act clearly dangerous to human life that causes the death of an individual. In Texas, Pou's conduct, if true as alleged in the affidavit, would not have been in accordance with provisions of §166.046 and may arguably give rise to a murder charge.

On the other hand, if Pou had chosen to abandon patients (the path many of her fellow physicians chose), she still would have faced repercussions for this alternative conduct. Abandonment is defined in most jurisdictions as the unilateral severance by a physician of the patient-physician relationship while a patient still requires medical attention without providing reasonable notice under the circumstances of the physician's intent to terminate said relationship. In Texas, choosing to abandon patients would have subjected Pou to civil liability in a medical malpractice action for damages caused as a result of the abandonment. Many would argue that this is not any better than facing criminal charges.

DIFFERENCE BETWEEN DOUBLE EFFECT AND INTENTIONAL CONDUCT

The doctrine of "double effect" is often invoked to explain the permissibility of an action that causes a serious harm, such as the death of a human being, and as a side effect of promoting some positive end. It is claimed that sometimes it is permissible to cause such a harm as a side effect (or "double effect") of bringing about a good result even though it would be impermissible to cause such a harm intentionally. That is, when faced with exigent circumstances, a physician's course of treatment may be justified by their intent to achieve a "good" result even if the treatment causes the patient harm as a byproduct.

Similarly, Texas law recognizes that a crime such as murder requires that the death of a human being be caused by an intentional act of another and not as the mere "double effect" of some other act. Essentially, the Louisiana attorney general's affidavit alleges that Pou and the two nurses filled syringes and administered morphine and/or Versed (Midazolam hydrochloride) to the four DNR patients to intentionally expedite their deaths. The affidavit also characterizes these drugs as a "lethal" drug combination, but an anesthesiologist in a recent article published in response to the affidavit claimed that this combination of morphine and Versed is routinely used by physicians to alleviate pain and anxiety. Moreover, this drug combination is not considered by pharmacologist and forensic pathologists to be an ideal mixture to cause patient death; rather, it is used simply to relax agitated patients and to relieve severe pain.

Relieving pain as a remedy when a patient is dying, even if the protocol hastens death, is not illegal or unethical according to the U.S. Supreme Court. Therefore, if Pou's administration of the drug doses were in an effort to alleviate pain or to relax agitated patients and not to intentionally cause their deaths, patient death (i.e., the "double effect") would be a mere consequence of the treatment and would not be considered an intentional act as required to be guilty of murder.

RECOMMENDED COURSE OF ACTION FOR TEXAS PHYSICIANS

Surprisingly, Texas law provides no clear protocol for physicians to follow when dealing with terminally-ill/DNR patients in times of exigency or crisis of catastrophic proportions. Absent such protocol, physicians must always be cognizant of the legal implications of their conduct and must carefully consider all options before pursuing a course of action. For instance, a physician may need to discontinue life-sustaining treatment for terminally-ill or DNR patients in an effort to prevent pain or inevitable death, but the sudden onset of exigent circumstances may hinder adherence to §166.046, thus, exposing a physician to liability under this section. Moreover, if a physician decides to abandon patients for his own safety or to avoid euthanizing patients, he may still be liable in a malpractice action for damages. There are, however, reasonable alternatives that can minimize a physician's exposure to liability in times of exigency or crisis.

A Texas physician should attempt to evacuate patients even if they may be unfit to evacuate. The evacuation may hasten a patient's death, but an attempt must be made. Absent any unlawful negligent handling during the evacuation process, a physician may successfully avoid criminal and civil liability for this course of action. In addition, a Texas physician may administer appropriate levels of palliative drugs to patients in an effort to sedate them during the strenuous evacuation process, if necessary. If a patient subsequently perishes either as a result of the sedatives or the evacuation process, a physician will not likely be held liable for this course of action as it was an effort to alleviate or prevent suffering, not to intentionally cause patient death. As a general rule, if a Texas physician is faced with similar exigent circumstances, he should make every attempt to act in a manner consistent with provisions of the Texas Code; however, if doing so is impracticable, a physician should avoid any course of action that intentionally causes the death of a patient. ✚

Pou could either abandon living patients who could not be evacuated from the hospital and would eventually die or she could facilitate the ease of their inevitable death via the administration of palliative drugs. Due to the severity and urgency of the circumstances, an immediate decision had to be made.

EDITOR'S NOTE: This article is intended for informational and educational purposes only and should not be taken as legal advice.