



**Testimony of Kari M. Hershey, J.D.
Concerning Corrections to CRS §15-18-104
Before the Interim Task Force on Hospice and Palliative Care
September 24, 2009**

Good afternoon, Chair and members of the Committee. My name is Kari Hershey. I am an attorney and I represent the Colorado Medical Society. I also regularly represent all types of licensed health care professionals, facilities, and health care practices in malpractice, licensing, and peer review actions. I testify today in support of certain corrections to CRS §15-18-104.

Changes were made to CRS §15-18-104 as part of HB08-1061. That bill sought to allow Advanced Practice Nurses to sign certain health related documents that were a part of routine nursing practice. The Medical Society worked closely with the Colorado Nurses' Association on the bill. In fact, Medical Society staff compiled and provided the Nurses' Association with a comprehensive list of Colorado statutes that required physician signatures. This list became the working document from which the two professional associations, working together, identified statutes that required change. For example, HB08-1061 changed requirements that only physicians could verify impairment for the purposes of obtaining disability license plates or applications for public assistance for a needy disabled person.¹ The Medical Society agreed that nurses should be able to assist patients with these routine matters that were already a part of nursing practice. When the Medical Society and the Nurses Association disagreed, we got providers together to work through the issues.

One area of easy agreement was that nurses did not want to be involved in determining or certifying death or terminal illnesses. Accordingly, we did not seek to change any statute that related to determinations of death or terminal illness.² While there were many examples of such statutes, one in particular is relevant to this discussion. CRS §15-18-107 requires two physicians to certify that a

¹ CRS §26-2-106 and CRS §42-3-204.

² See for example CRS §12-34-108, CRS §18-6-101, CRS §25-2-110, CRS §15-18-107, CRS §18-1.3-1207, CRS §18-1.3-1204, CRS §30-10-606, which were not modified.

patient has a terminal condition in order to withhold life-sustaining procedures. The Medical Society and Nurses Association agreed that certifying terminal illness for such purposes was not part of nursing practice.

Another area of easy agreement between the groups was that advanced practice nurses should be able to enter a patient's advance directives into the patient's medical record. Accordingly, the Medical Society supported a change to CRS §15-18-104. For ease of reference, I have included the statute, with the additions made as part of HB08-1061 capitalized and our current area of concern with strikethroughs:

SECTION 7. 15-18-104 (1), (2), (2.6), and (3), Colorado Revised Statutes, are amended to read:

15-18-104. Declaration as to medical treatment. (1) Any competent adult may execute a declaration directing that life-sustaining procedures be withheld or withdrawn if, at some future time, he OR SHE is in a terminal condition and either unconscious or otherwise incompetent to decide whether any medical procedure or intervention should be accepted or rejected. It shall be the responsibility of the declarant or someone acting for him OR HER to submit the declaration to the attending physician OR ~~ADVANCED PRACTICE NURSE~~ for entry in the declarant's medical record.

(2) In the case of a declaration of a qualified patient known to the attending physician OR ~~ADVANCED PRACTICE NURSE~~ to be pregnant, a medical evaluation shall be made as to whether the fetus is viable and could with a reasonable degree of medical certainty develop to live birth with continued application of life-sustaining procedures. If such is the case, the declaration shall be given no force or effect.

(2.6) Notwithstanding the provisions of subsection (2.5) of this section and section 15-18-103 (7), when an attending physician OR ~~ADVANCED PRACTICE NURSE~~ has determined that pain results from a discontinuance of artificial nourishment, he OR SHE may order that such nourishment be provided but only to the extent necessary to provide comfort and alleviate such pain.

(3) A declaration executed before two witnesses by any competent adult shall be legally effective for the purposes of this article and may, but need not, be in the following form:

**DECLARATION AS TO MEDICAL OR SURGICAL
TREATMENT**

I, (name of declarant), being of sound mind and at least eighteen years of age, direct that my life shall not be artificially prolonged under the circumstances set forth below and hereby declare that:

1. If at any time my attending physician ~~OR ADVANCED PRACTICE NURSE~~ and one other qualified physician ~~OR ADVANCED PRACTICE NURSE~~ certify in writing that:

- a. I have an injury, disease, or illness which is not curable or reversible and which, in their judgment, is a terminal condition, and
- b. For a period of seven consecutive days or more, I have been unconscious, comatose, or otherwise incompetent so as to be unable to make or communicate responsible decisions concerning my person, then

I direct that, in accordance with Colorado law, life-sustaining procedures shall be withdrawn and withheld pursuant to the terms of this declaration, it being understood that life-sustaining procedures shall not include any medical procedure or intervention for nourishment considered necessary by the attending physician OR ADVANCED PRACTICE NURSE to provide comfort or alleviate pain. However, I may specifically direct, in accordance with Colorado law, that artificial nourishment be withdrawn or withheld pursuant to the terms of this declaration.

2. In the event that the only procedure I am being provided is artificial nourishment, I direct that one of the following actions be taken:

(initials of declarant) a. Artificial nourishment shall not be continued when it is the only procedure being provided; or

(initials of declarant) b. Artificial nourishment shall be continued for _____ days when it is the only procedure being provided; or

(initials of declarant) c. Artificial nourishment shall be continued when it is the only procedure being provided.

3. I execute this declaration, as my free and voluntary act, this _____ day of _____, 20____.

By _____
Declarant

The foregoing instrument was signed and declared by _____ to be his declaration, in the presence of us, who, in his presence, in the presence of each other, and at his request, have signed our names below as

witnesses, and we declare that, at the time of the execution of this instrument, the declarant, according to our best knowledge and belief, was of sound mind and under no constraint or undue influence.

Dated at _____, Colorado, this _____ day of _____, 20____.

Name and Address

Name and Address

STATE OF COLORADO)
) ss.
County of _____)

SUBSCRIBED and sworn to before me by _____, the declarant, and _____ and _____, witnesses, as the voluntary act and deed of the declarant this _____ day of _____, 20____.
My commission expires:

Notary Public

The problem raised by the changes to this statute is that the statute not only allows entry of advanced directives in a patient's chart, but contains a sample advanced directive. Accordingly, when the statute was updated, addition of "advanced practice nurse" was carried throughout – even though it should not have been added in the sample advanced directed that related to the need for a physician to certify terminal illnesses. Unfortunately, because of the timing, this mistake made it into the final bill.

Because this conflicts with the law in other areas and was not an agreed to part of the bill, the Colorado Medical society requests correction of this error. Specifically, as I noted earlier CRS §15-18-107 requires two physicians to certify that a patient has a terminal condition in order to withhold life-sustaining procedures. Nonetheless, estate planners and others come to CRS §15-18-104 to draft advance directives, using the sample language written in the law as a model, without realizing that they are crafting documents that conflict with the other statute.

The question of who may certify a terminal illness for the purpose of withdrawing life support is a very serious issue. APNs are trained to diagnose in many settings, but they do not have the advanced education and training necessary to make this most important diagnosis and the law reflects that.

It was CMS' understanding that we had agreement with CNA that they did not want APNs to certify terminal illness but only to be able to sign and certify advance directives. Accordingly, we seek correction of the error by removing the two references identified above in the sample statute.

Thank you for the opportunity to speak to you today. I welcome your questions.

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