

# JACKSON & CARTER Legal Update

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*An Electronic Newsletter from*

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### Complying with the new Do Not Resuscitate Statute

Senate Bill 11, also known as the DNR Statute, was passed by the Texas Legislature during the 2017 legislative special session and signed into law by Governor Abbot on August 16, 2017. It takes effect on April 1, 2018.

SB11 was filed by Senator Charles Perry (R-Lubbock) as an attempt to narrow the circumstances in which a DNR Order is valid. Senator Perry was concerned about whether patients and their families were fully informed and notified when a DNR Order was issued and proposed this legislation to remedy that perceived problem. This issue was a priority for Governor Abbot.

The original senate bill contained no liability protections for healthcare providers who attempted to comply with the new law. Our priority, as advocates for healthcare providers, was to amend the bill with as many protections as possible. Although the bill passed through the Senate without those protections, Representative Greg Bonnen (R-Friendswood) incorporated many of the proposed liability protections into the House version. The following contains a summary of the bill's new requirements. Please have specific fact scenarios reviewed by our law firm or your compliance officer.

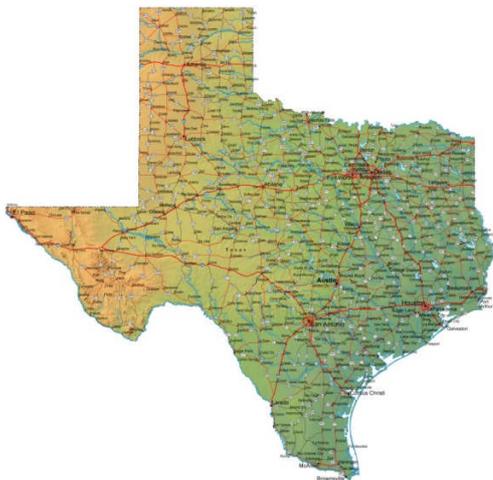
## Articles

Complying with the new Do Not Resuscitate Statute by Brian G. Jackson

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The new law defines DNR as an Order instructing health care professionals not to attempt cardiopulmonary resuscitation (CPR) on a patient whose circulatory or respiratory function ceased. The new requirements for a valid DNR only apply to Orders issued in a health care facility or hospital and do not apply to an out-of-hospital DNR.

In order for a DNR to be valid in a hospital setting, it must be dated and issued by the patient's attending physician. It must also:

- a. comply with a competent patient's written and dated directions; or
- b. comply with a competent patient's oral directions delivered to or observed by two competent adult witnesses (at least one of whom cannot be an employee of the attending physician or the facility); or
- c. be issued pursuant to the patient's directions set forth in a properly executed advance directive; or
- d. be issued pursuant to the directions of a patient's legal guardian or an agent who has been given medical power of attorney over the patient; or
- e. be issued pursuant to a treatment decision that follows the procedures under state law for when a person has not executed or issued a directive and is incompetent or incapable of communication; or
- f. be medically appropriate and not contrary to the directions given by a competent patient whose death is imminent, regardless of CPR.

The DNR Order can take effect immediately as long as the Order is placed in the patient's chart as soon as practicable. However, the DNR cannot be placed in the chart under scenario (f) above until a competent patient is notified of the Order. In the case of an incompetent patient, there must be a "reasonably diligent" effort to notify a person known to be the incompetent patient's healthcare agent, the patient's guardian, spouse, adult children or parents (in that order) of the existence of a DNR. Since the DNR may not be placed in the chart until the above takes place, there is some question as to when it is valid. It seems that the DNR is effective "immediately" as set forth above but failure to perform the tasks necessary for it to be legally placed in the patient's chart may invalidate it. Any DNR, or the underlying consent for an Order, may be verbally revoked by a patient, their healthcare agent or their guardian.

Although this new law contains detailed requirements for healthcare providers to follow when issuing a DNR, it also contains some liability protections for healthcare providers who attempt, in good faith, to comply with the statute.

The first section providing liability protection relates to those who attempt to comply with the notice requirements regarding the existence of a DNR. As long as the healthcare provider attempts, in good faith, to notify the patient or their healthcare agent, guardian, spouse, adult child, or parents, no civil, criminal, or board action can be taken against them. However, it is very important to note that this protection is ONLY available if the healthcare provider documents his/her attempts to comply with the notice provision in the patient's medical record. Failure to document eliminates their immunity from civil, criminal and board actions.

The other provisions giving liability protection relate to incorrectly following a DNR Order or failing to follow a DNR Order. As long as either of these scenarios occur while the provider is acting in good faith, they are immune from liability. Similarly, there must be actual knowledge of a DNR Order for liability to extend to a provider, facility, or hospital.

This new law creates additional protections for patients to make sure that their end of life choices are implemented. It also results in more red tape for healthcare providers to memorize and implement while doing an already difficult job. Make sure that your facility, its employees, and its Medical Staff are trained and ready to comply with the new requirements.

### **CMS Issues Clarifying Guidance Regarding Texting of Patient Information among Healthcare Providers**

On December 28, 2017, CMS issued new guidance clarifying its position regarding texting of protected health information. Earlier in the month it had been reported that CMS was notifying individual hospitals that texting of patient information was completely prohibited. In its December 28 memo, CMS clarified that texting of PHI between providers can be permissible if providers utilize and maintain systems/platforms that are secure, encrypted, and minimize the risks to patient privacy and confidentiality as per HIPAA regulations and the Medicare Conditions of Participation and Conditions for Coverage. However, CMS reaffirmed its earlier position that the CoPs and CfCs do not permit the texting of orders by physicians or other health care providers and that Computerized Provider Order Entry (CPOE) is the preferred method of order entry by a provider.

Jackson & Carter  
represents hospitals  
and other health care  
providers across the  
State of Texas.



This recent memo from CMS means that using standard SMS or MMS text messaging to send PHI between healthcare providers is a violation of the Medicare CoPs and CfCs, as well as a likely HIPAA violation. Providers that do utilize a secure, encrypted method of texting of health information should ensure that they address this form of using and disclosing PHI in their HIPAA Security Rule Risk Analysis.

### **Whitepaper on Guns in Hospitals**

At the request of the Texas Hospital Insurance Exchange, Jackson & Carter has recently prepared a whitepaper addressing legal issues related to guns in hospitals which can serve as a resource for THIE member hospitals as well as other hospitals around the state. A link to the whitepaper can be found on the THIE website here: <http://thie.com/>

### **Jackson & Carter 2017 Update**

2017 was a great year at Jackson & Carter. We are thankful for our clients and the opportunity to advocate for them as they continue to make Texas a healthier place for its citizens.

January of 2017 was busy for both Brian and Craig. Brian spent many days at the State Capital as several health care bills were on the front burner at the Texas Legislature. Our firm proudly serves as General Counsel for the Texas Alliance for Patient Access (TAPA). TAPA works relentlessly to preserve the Tort Reforms which have fueled the expansion of medical services in Texas. TAPA's focus in January was to file a bill that created a more effective and user friendly medical authorization. Brian testified as an expert witness on that bill before the Texas House Committee on Legal Affairs.

Craig headlined a presentation last January at the Texas Hospital Association Annual Meeting on the status of the discrimination provisions contained in Section 1557 of the Affordable Care Act. This presentation was well received as the newly elected President Trump was in the process of revising many of the enforcement provisions in this Obama era legislation. Definitive analysis of what was and what was to come highlighted Craig's message.

February brought more legislative work to the Firm and an important opportunity to kill a potential bill that would have resulted in individual nurses and other healthcare providers losing their personal immunity from lawsuits under the Texas Tort Claims Act. THA and TAPA arranged for our firm to address the potential bill with key State Legislators and keep it from being filed. Brian also worked on the Federal Healthcare bill as we represented the interests of TAPA Members to insure that if Federal Tort Reform was enacted it would not replace the Texas provisions. Federal Legislation often pre-empts State Legislation and it was important to keep the Texas Reforms intact regardless of what happens in Washington.

March roared in like a lion as Craig and Brian both spoke at the THIE Hot Topics Seminar in Lubbock. Employment law, gun laws, and governance issues were included on the agenda. The Legislature kept rolling along and the Firm testified as a resource witness on several more bills. The Firm also met with Washington Lobbyists as we continued to work for preservation of all Texas Tort Reform Statutes.

April was one of the busiest months of the year with testimony at the State Capital in front of

three different legislative committees. We also worked on changing the enabling legislation of a Hospital District Client in need of a different governance structure. This was in addition to a busy litigation schedule and several Hospital District Board training sessions.

May saw the regular session of the Legislature close and the preservation of every Tort Reform Statute in Texas. It also saw us at the Texas Medical Board and the Texas Nursing Board representing healthcare providers in quality of care investigations. This is an area of our practice where we excel even though many of our clients are unaware of our work there.

June was a great month as we worked with an insurance client on strategic planning with their Board. We also filed a Supreme Court brief in a health care liability case and a brief with the Fort Worth Court of Appeals on an insurance claim case. Our work with the Supreme Court and the Courts of Appeals is vital to our clients' interest.

July brought the Legislature back into special session and we once again testified at the Texas House Calendars Committee on the new Do Not Resuscitate Bill. We also attended the THT Conference in San Antonio and saw many of you there.

August found time for a little R&R with our families and us hitting the road to attend numerous Hospital District Board Meetings. If we do not regularly attend your Hospital Board Meeting, please ask us for names of those that have us attend and visit with them to learn the benefits of having us there.

September had us back at the Texas Medical Board to successfully defend a mid-level and then present an oral argument in front of the Fort Worth Court of Appeals. It also kicked-off the Jackson & Carter Fantasy Football League. Ted Shaw, President of the Texas Hospital Association, was ready to defend his championship from the previous year. We greatly enjoy this league with our clients and encourage you to join us as a client and play along as well.

In October our firm spoke at the THIE Hot Topics event in Kerrville presenting on employment law, the DNR statute, and a legislative update.

In November, our firm spoke at the TAPA General Meeting and the American Tort Reform Association Meeting. ATRA is a National organization and other speakers included the American Hospital Association, Ford Motor Company, and Pfizer.

In December, Tess Frazier, THIE President, won the Jackson & Carter Fantasy Football League Championship. We enjoyed time with many of you at year end Board meetings and Christmas Parties. We also began to gear up for what we know will be an exciting 2018!

## Firm Events

Jackson & Carter attorneys Craig Carter and Brian Jackson are scheduled to speak on legal topics of interest to hospitals at the Texas Hospital Association Annual Conference in Houston on February 6, 2018. Information regarding the THA conference can be found at the following link: <https://www.tha.org/conference>. Brian and Craig will also present on various legal topics at the upcoming THIE Hot Topics Conference in Lubbock on March 2, 2018. Information on the THIE Hot Topics Conference can be found at the following link: <http://thie.com/hottopics/spring2018>

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