Robert L. Galloway
Tournament Director

To: Participants and Coaches

From: Rob Galloway

Date: February 13, 2017

Re: **Bulletin 2**

(Problem Release Delayed, Trial Brief Assignment, Trial Brief Ballot, Sample Trial Brief, Hotel Reservations)

The tournament problem will not be released this Friday as planned. In the meantime, however, I am releasing the trial brief topic to allow teams to start working now. I anticipate the problem will be sent out toward the middle of next week.

Each team will write a trial brief for the plaintiffs related to the collateral source rule. The information you need to get started in described below.

In this year's problem, the plaintiffs were covered by a private health insurance policy, which was paid directly by an employer. Insurers often pay less than the total medical bills incurred by a tort victim. At the same time, insurers have contractually bound healthcare providers to accept pre-negotiated compensation at rates less than those ordinarily billed. Together, the plaintiffs and the insurance company paid $116,876.13 of the $540,153.62 in medical expenses incurred. The remainder of the medical bills was discharged as a result of contractual discounts negotiated between the insurance company and the healthcare providers.

The defendants filed a motion in limine seeking a preliminary ruling that the proper amount of medical expenses should be regarded as the amount paid, not the amount billed. The plaintiffs contend that the proper amount should be regarded as the amount billed. The court must decide whether the difference between the amount billed and the amount accepted as full payment for the plaintiffs' medical expenses—sometimes called the "written-off amount," a "negotiated discount," or a "contractual discount"—is a "benefit" for purposes of the collateral source rule.

The case is pending in South Texas state court, and this is an issue of first impression. The trial court has asked for briefing on the issue.

Please refer to the local rules for the specific requirements related to the preparation and submission of the trial brief. I will e-mail your team designation. I have attached a copy of the trial brief ballot and a sample trial brief based on last year's problem.

We will honor the team submitting the best trial brief. But the trial brief will have a significant impact on the competition as well. The trial brief ranking will be the competition's third tie-breaker (after win-loss and number of ballots).

If you have not already done so, please make your hotel reservations. You may find this information under the "Hotel" tab on the website.

Let me know if you have any questions or need anything.

Official Trial Brief Ballot

Team Designation _____

Criteria	*Possible*	*Given*
Issue Spotting ***Has the trial brief identified all relevant issues?***	20	
Analysis and appropriate use of authority ***Are the evidentiary arguments developed logically, compelling a conclusion in the writer's favor? Are there citations where needed, regardless of the technical accuracy of the citation form? Are the leading cases used? Do the authorities support a sound legal analysis? Does the brief distinguish cases and important authorities that are unfavorable to its position?***	40	
Writing Style ***Is the brief clear and unambiguous? Does the brief use proper grammar and punctuation?***	20	
Citation Form ***Do citations follow proper Blue Book format?***	10	
Overall Appearance ***Does the trial brief look polished and professional? Does it look like a pleading you would be proud to file with a trial court?***	10	
TOTAL SCORE	100	

No. 12-0064-CV

	§	In the 144th District Court
	§	
In re: Charles James Alastor	§	in and for
	§	
	§	Capitol County, South Texas

Plaintiff's Trial Brief on the Admissibility of the Living Will

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In response to Defendant Carson Alastor's motion in limine and this Court's request for briefing on the admissibility of the Living Will Charlie Alastor executed on February 11, 2007, Plaintiff Campbell Alastor submits this trial brief to support the admission of Exhibit B into evidence.

Background

Charlie executed a Living Will when he was admitted to a rehabilitation facility. *See* K–5; Ex. J. Though the Living Will is technically void because Charlie's aunt was one of the witnesses,[1] South Texas law allows removal of the

[1]Susan Grady is Charlie Alastor's aunt. Ex. O–2. South Texas law and the face of the document specifically state that witnesses may not be related by blood, marriage or adoption. S. Tex. Civil Code § 41.006(4)(B)(1); Ex. B–3.

feeding tube under four separate circumstances:

(a) when removal is not medically possible;

(b) when a person executes a valid living will;

(c) when clear and convincing evidence indicates a person gave informed consent to remove the feeding tube; and

(d) when clear and convincing evidence indicates removal is in the patient's best interests.

S. Tex. Civil Code §§ 41.006(4)(C), (D). Because the pleadings only seek to withdraw nutrition and hydration based on (c) and (d) above, the Living Will is not being introduced as evidence to invoke a Living Will. *See* Ex. C–3. It is simply being introduced as evidence of informed consent.

The Living Will is Admissible

Exhibit B—the Living Will—should be admitted because it is relevant, and a foundation can be laid that it is, in fact, the document Charlie signed in 2007. Campbell can testify that he was present when it was signed and that he kept a copy of the original—laying a foundation for the identity of the document and for the accuracy of its content. The statements made in the Living Will tend to prove that Charlie was informed about the nature of his condition and that he gave consent to the withholding of artificial nutrition. The mere existence of the

document also tends to prove that Charlie never revoked his consent, because the document was never defaced or destroyed. Further, the document's relevance is not diminished by the fact that it is not a valid legal instrument, because it still tends to prove that Charlie gave informed consent.

This Court should admit the Living Will as evidence of Charlie Alastor's intent to be allowed to die with dignity. The Living Will is factually and legally relevant. It is more probative than prejudicial. It is either not hearsay or exempted from the hearsay ban by Federal Rule of Evidence 803(3), 803(4) and 807.

I. The Living Will is relevant because it indicates Charlie's intent to have life support measures withdrawn.

Under the Federal Rules of Evidence, relevant evidence is admissible and irrelevant evidence is not. Fed. R. Evid. 402. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence," and "the fact is of consequence in determining the action." Fed. R. Evid. 401. At the heart of this case is whether Charlie gave informed consent to withdraw artificial nutrition and hydration. Regardless of whether Charlie is in a persistent vegetative state or a minimally conscious state, this exhibit tends to show Charlie's intent not to be kept alive via artificial nutrition and hydration.

The Living Will's relevance is not affected by arguments that could

potentially undermine its credibility. For example, Charlie crossed out his initials in two places on the document. Though Charlie did cross out his initials in two places, he subsequently initialed other parts of the document. Carson Alastor may argue this shows a lack of intent on Charlie's part, but this is insufficient to revoke the Living Will. Likewise, the possibility of substance abuse by Charlie on the day he executed the Living Will is also not a reason for finding the Living Will irrelevant. If Carson wants to challenge Charlie's capacity to execute the Living Will, the jury is entitled to consider that evidence.

Questions as to the reliability of Charlie's Living Will do not affect its admissibility, but are instead matters of weight for the jury to decide. "Sorting truth from fiction, of course, is for the jury. [A] judge in our system does not have the right to prevent evidence from getting to the jury merely because he does not think it deserves to be given much weight." *United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000).

II. The Living Will's probative value is not substantially outweighed by the danger of unfair prejudice.

Federal Rule of Evidence 403 gives the Court discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The exclusion of

relevant evidence under Rule 403 is "an extraordinary remedy to be used sparingly." *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985).

The Living Will derives its significant probative value from its tendency to show Charlie's intent not to be kept alive with artificial nutrition and hydration. The Living Will is the clearest statement that Charlie gave about his desires regarding life sustaining treatments and the conditions that might require them. Because the Living Will is highly probative of issues at trial, the benefits of its admission greatly outweigh any possible risk of unfair prejudice or confusion.

Moreover, the possible risks are minimal. The Living Will carries no risk of unfairly prejudicing the jury on an emotional basis. *See* Fed. R. Evid. 403 advisory committee's note (recognizing that "undue prejudice" typically evokes an emotional response). The only risk the Living Will presents is that a jury may confuse "persistent vegetative state" with "minimally conscious state." But expert testimony—the contours of which can be further explored through cross-examination by the Defendant—will make this distinction clear to the jury. *See, e.g., Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613, 624 (8th Cir. 1983) (finding expert could compare differences in two bodily conditions where testimony explained the differences). More importantly, however, an instruction

could be requested to "restrict the evidence to its proper scope" if Carson Alastor believes confusion could result from the admission of the Living Will. Fed. R. Evid. 105; *see also* Fed. R. Evid. 105, comm. note (recognizing availability of limiting instruction should be considered in deciding prejudice under Rule 403).

III. The Living Will is not hearsay because it is a medical directive that contains no facts being asserted as true.

Charlie's Living Will states that if he is ever in a terminal condition, coma, or persistent vegetative state, "all treatments other than those needed to keep [him] comfortable [must] be discontinued or withheld and [his] physicians [must] allow [him] to die with dignity." Ex. B–1. Like a property-devising will, such a statement is not offered to prove the truth of the matter, and the trier of fact need not decide the truth of the matter. It is offered simply to show that a formal directive has been made, and what that directive is. Therefore, signed writings, such as wills and contracts, have "independent legal significance, and [are] nonhearsay." *U.S. for Use and Benefit of Carlson v. Continental Cas. Co.*, 414 F.2d 431, 434 (5th Cir. 1969) ("The inquiry is not the truth of the words said, merely whether they were said," and "the verbal act, as any other act, may be proved by one who heard it, saw it, or felt it.").

Federal Rule of Evidence 801(c)(2) defines hearsay as "a statement, other

than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." For a statement to be hearsay, it must contain a fact, the truth of which is being asserted in the statement. If, however, the statement does not contain an assertion of the truth of a fact, then the statement is not hearsay. Statements in a living will are commands—not an assertion of fact. *United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999) ("Statements offered as evidence of commands . . . rather than for the truth of the matter asserted therein, are not hearsay.").

Exhibit B states:

> I, Charlie Alastor, being of sound mind, voluntarily state my desire that my dying not be prolonged under the circumstances identified in this document. Under those circumstances, I direct that I be permitted to die naturally. If I am unable to give directions . . . I intend that my family and physician honor this document . . . .

Ex. B–1. The use of the word "if" indicates a possible future condition, and the word "direct" signals the directive or instruction to physicians. Rather than asserting a fact, the Living Will states Charlie's future medical directives (if incapacitated), as well as Charlie's contemporaneous observations at the time of the Living Will's execution.[2] The purpose of offering the Living Will to the Court

[2]The Living Will's "Declaration of Witnesses" section is admissible as lay witness opinions under Federal Rule of Evidence 701 because they are "rationally based on [their]

is to prove only that what was said by Charlie and the witnesses. It still contains no fact being asserted as true and is not being offered to prove a truth. The Living Will, therefore, is not subject to the hearsay ban.

IV. Alternatively, the Living Will falls within recognized hearsay exceptions.

Even if this Court were to find that the Living Will is technically hearsay, the document is still admissible because recognized exceptions to the hearsay ban apply.

First, the Living Will is admissible because it shows Charlie's state of mind. This qualifies as a hearsay exception under Federal Rule of Evidence 803(3), entitled "Then Existing Mental, Emotional, or Physical Condition." Fed. R. Evid. 803(3). This rule permits the admission of out-of-court statements regarding a "declarant's then-existing state of mind (such as motive, intent, or plan) or emotional . . . condition (such as mental feeling, pain, or bodily health)." *Id.* The Living Will indicates Charlie's plan and intent not to receive medical treatment in specific circumstances. The Living Will consists of a series of adopted statements reflecting Charlie's then-existing state of mind on the issue of life-sustaining

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perception[s]," help determine whether Charlie provided informed consent to remove life-sustaining treatments, and are not based on "scientific, technical, or other specialized knowledge."

procedures at the time the Living Will was executed. The first page specifically provides a formal declaration of Charles's state of mind: "If I am in a COMA or PERSISTENT VEGETATIVE STATE, as determined by my physician, the following are my directions: I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physicians allow me to die with dignity." Ex. B–1. He initialed and dated that choice. Those words express both his then-existing intent and plan should a specific future event occur. As a statement of his then-existing state of mind, Exhibit B is exempt from hearsay.

Second, the Living Will is also admissible because it was a statement made for the purpose of medical diagnosis or treatment. Federal Rule of Evidence 803(4) allows for statements made for medical diagnosis or treatment to be admitted regardless of whether the declarant is available as a witness. The rationale for allowing such statements is premised on the idea that the declarant's selfish motive in receiving proper medical treatment guarantees the statement's trustworthiness. *White v. Illinois*, 502 U.S. 346, 356 (1992). The Living Will meets the requirements for satisfying Rule 803(4) because it is consistent with the purposes of treatment and becase it is the type of statement reasonably relied upon by physicians. *Morgan v. Foretich*, 846 F.2d 941, 949 (4th Cir. 1988).

Third, the Living Will also fits within the residual exception codified in Federal Rule of Evidence 807. Charlie's Living Will is the most probative evidence of Charlie's informed consent to withholding artificial nutrition, and there is strong circumstantial evidence that the statements in it are true. A hearsay statement—not specifically covered by Rule 803—is not excluded by the rule against hearsay if:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

Fed. R. Evid. 807.

The rule excluding hearsay ensures that only trustworthy statements are admissible. Charlie filled out and signed the Living Will believing it would determine what care he received, should he enter a coma or persistent vegetative state. Strong circumstantial evidence establishes these statements' trustworthiness, because his statements have life-or-death consequences. Charlie indicated that he understood what the words "coma" and "persistent vegetative state" meant and

what treatment he wanted should he be in either state. Finally, an important circumstantial guarantee of trustworthiness can be gleaned from the sheer gravity of a living will. Anyone executing a living will would do so in a trustworthy manner.

Conclusion

This Court should admit Exhibit B into evidence.

Respectfully submitted

/s/

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Attorneys for Plaintiff

DATE: March 9, 2012

Certification
(attached as a separate document)

We hereby certify that our brief has 2228 words.

Team ZZ

South Texas College of Law

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DATE: March 9, 2012