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Behind the Headlines

Five Oregon lawyers who influenced Oregon's debate on assisted suicide

By Cliff Collins

Oregonians' resounding reiteration of support for doctor-assisted suicide thrust the state squarely into the national and international spotlight regarding end-of-life issues.

From the time state voters first passed Measure 16 in 1994, numerous members of the Oregon State Bar played key roles in promoting, fighting, evaluating or defending the law. Particularly with last fall's second vote on the subject, Measure 51, several bar members – including a judge; spokesmen for proponents and opponents; and a few lawyer-legislators – garnered high profile media attention.

Other, perhaps not as well-known, played pivotal, behind-the-scenes parts. The profiles of five of these individuals help shed light on the emotional, controversial law that will be associated with Oregon for years to come.

ELI D. STUTSMAN

[Eli Stutsman](#) was interested in end-of-life issues before he entered law school at Lewis & Clark. As an undergraduate student at Oregon State University, he weighed these issues in the Religious Studies Department, and then continued to do so in law school. He never expected at the time that one day he would be lead counsel for the chief petitioners of the Oregon Death With Dignity Act, more commonly known as 1994's Measure 16.

Before reaching that point, he practiced in the appellate practice group at the insurance defense firm of Hoffman, Hart & Wagner. Stutsman then opened his own practice handling civil appeals for both plaintiffs and defendants in state and federal courts and was presented with the opportunity to serve the legal needs of the first campaign.

Stutsman had two physicians in his family, and the law firm he had worked with defended a large number of medical malpractice cases. That background, combined with a personal passion, led him to become involved in the planning, drafting, advocacy and defense of what became Measure 16.

“Working on the case was personally gratifying because this is an issue I believed in before I ever attended law school,” he says. As lead counsel for the chief petitioners of Measure 16, he handled ballot title and explanatory statement challenges in addition to the myriad of other legal issues arising out of two well-funded and successful statewide campaigns. He also served as lawyer for the political action committee and non-profit organization backing the issue. During the short 1997 campaign, he individually raised over half a million dollars.

Unlike the first campaign, the second campaign was unexpected. The 1997 Legislature surprised proponents by referring the measure back to the voters for repeal. Stutsman had to turn down and refer out other legal work after Measure 51 went on the fall ballot. “The only time burden is in the heat of the campaign,” Stutsman says. “Legal issues come up constantly and there is no way to schedule them.”



EH Stutsman was interested in end-of-life issues even before he entered law school at Lewis & Clark's Northwestern School of Law.

Stutsman says his day-to-day appellate practice is centered on more mainstream law, and he became involved in a controversial issue because he believed legal reform was necessary. He says Measure 16 was narrowly drawn legislation intended to solve a problem the community identified: that terminally ill patients want access to physician guidance and possibly a prescription in the event they want to hasten their own impending deaths.

He has never argued for a constitutional “right to die,” or in favor of broader laws that would allow lethal injections. He says the patients, doctors, nurses, counselors, attorneys and others involved in drafting Measure 16 also did not endorse these measures or methods such as those employed by Dr. Jack Kevorkian.

He believes Oregon was successful when other states’ efforts failed because Oregon never modeled its law after readily available right-to-die model laws, but

instead sought perspectives from a broader community of interests. Organizers built support by seeking out the opinions and concerns of affected institutions and stakeholders. Although the individuals solicited could not speak out publicly for their hospital, hospice or other association, they nonetheless were able to articulate the “institutional perspective, which is a tremendous aid when attempting to strike an appropriate balance between competing public interests,” Stutsman says. The broad model laws presented by the extreme of the right-to-die movement were rejected “because they attempted to address wide ranging end-of-life concerns even though there was no broad-based community support for such a resolution.”

Although passed by Oregon voters, Measure 16 was quickly enjoined by a federal trial court. Stutsman represented the chief petitioners on appeal to the 9th Circuit. Together with then deputy attorney general Thomas Balmer, he presented the oral argument.

Having won a reversal in the 9th Circuit, he filed briefs opposing the plaintiffs' cert petition in the U.S. Supreme Court.

In his practice, Stutsman handles a number of appeals at any given time, though none nearly as high-profile as Measure 16. "Quite frankly, although this is a very important appeal, the legal issues are not difficult. We expected to win. We never thought we wouldn't win. I have handled more difficult legal issues, but they were not as newsworthy. This issue was important to all."

Stutsman has had many calls from clients and others regarding his participation in Measures 16 and 51. Not one has been negative. "People call me and say, "I had no idea you were doing this. I support it and I'm glad you're my lawyer."

STEPHEN K. BUSHONG

In 1994, Measure 16 won at the polls and was scheduled to take effect as law 30 days afterward. On about the 29th day, the law was challenged.

Assistant Attorney General Steve Bushong and his colleagues in the Oregon Department of Justice were ready. As members of the trial division special litigation unit, part of their job is to track election results to prepare for possible litigation. In this instance, plaintiffs asked for a temporary restraining order.

Bushong argued before U.S. District Judge Michael Hogan that a restraining order shouldn't be granted. Hogan disagreed. He granted the state more time to submit evidence and further refine legal and medical arguments.

Bushong and colleagues obtained affidavits from health professionals and medical ethicists and filed briefs for an April 1995 hearing. In August, the judge ruled that the complainants had standing and that Measure 16 violated the equal protection clause of the 14th Amendment.



Stephen Bushong describes the assisted suicide law and litigation as "the most interesting case" he's worked on since coming to the Department of Justice.

The state appealed. In the meantime, and even before the April hearing, related developments kept cropping up in other states that forced his office to revise their briefs. In July 1996, then-Deputy Attorney General Tom Balmer argued the appeal before the 9th U.S. Circuit Court of Appeals. In February 1997, the court ruled that the plaintiffs had no standing and remanded the case to the district court with instructions to dismiss.

The case ended up in the U.S. Supreme Court, which last fall declined to review it. Oregon voters then seconded that opinion with a resounding rejection of Measure 51, which would have repealed Measure 16.

“In many ways, the legal issues were not unusual or difficult,” says Bushong. “But the subject matter was of such importance, it made it the most interesting case I’ve worked on since coming to the Department of Justice.”

He arrived there in 1994. Previously, Bushong, a Michigan native, had clerked for a federal judge and then spent eight years handling complex litigation and appeals with Miller Nash in Portland. A graduate of the University of Michigan and its law school, Bushong says his years at the law firm were invaluable in his “development as a lawyer and as a human being.”

But, he adds, “I had always been interested in public service.” Bushong’s unit handles “constitutional law issues, complex litigation and high-profile lawsuits.” For example, Bushong defended the litigation challenging the first Oregon execution carried out in decades, and his unit defends lawsuits such as those on salmon species and the term-limits law. His unit defends any lawsuit challenging a ballot measure, state law or program. “It makes practice extremely challenging and worthwhile,” he says. “The cases we handle make a difference to all Oregonians – they’re important to a lot of people. That makes for a very satisfying career.

“When I started this case, an AIDS patient called and told me, ‘This is the most important case you will ever work on in our career.’ I will never forget that. When you hear from people who are directly affected by the law, that has an impact.”

Still, no matter what the issue, the job of Bushong and his colleagues is not to make policy; it is to make legal determinations about the constitutionality of laws passed by the Legislature or the people. That means whether he personally supports the matter at hand – which, in the instance of the assisted suicide law, he did – doesn’t matter, he emphasizes.

Bushong says the Measure 16 case “can’t help but help me in handling other high-profile litigation... Certainly the experience of working on a case of this importance, that generates this much interest internationally, is helpful to my career as a lawyer and public servant.”

THOMAS O. ALDERMAN

When plaintiffs filed a lawsuit in December 1994 challenging Measure 16, the lawyer who filed it was Tom Alderman, who once ran for public office and who also once assisted with representation of petitioners of a ballot measure that would prohibit state funding of abortion.

Alderman wasn't surprised when opponents of physician-assisted suicide tapped him. "I was the most likely suspect," says the Eugene lawyer, who is in solo general civil practice. "I've been kind of an activist. They know where my sympathy lies."

Alderman necessarily took a back seat to lead counsel James Bopp Jr. of National Right to Life, an Indiana attorney who was not admitted to practice in the district. Bopp and his colleague, Richard Coleson, ran strategy and sent Alderman enormous, 120-page briefs to submit. "They also argued motions," Alderman says. "I sat at the counsel table. They were in the driver's seat at all times."

Alderman sees his role as small yet critical to the case. "I assisted in many ways," he says. He interviewed prospective plaintiffs and conducted depositions of defendants. "This was important, because their testimony formed the basis for arguments on both sides on whether the case should be tried or be decided by summary judgment, and as to which side should be awarded summary judgment."

Between December 1994 and July 1995, he spent about 300 hours on the case, none of which was compensated because his side lost. He acknowledges the gamble of taking the case, but he says, "Some things you just do because it's right."



Tom Alderman says he wasn't surprised when opponents of physician-assisted suicide came to him: "I was the most likely suspect."

A graduate of the University of Oregon and its law school, Alderman got interested in public affairs at the time Christian conservatives first gained control of the Oregon Republican Central Committee. Alderman, who was a Democrat at the time, didn't like what he was hearing from the Rev. Jerry Falwell, founder of the Moral Majority.

"I didn't believe Mr. Falwell was right, that this was a Christian society, so everyone else is a second-class citizen." Nor did Alderman think the reverse was true, that Christians should be treated as second-class citizens. "There had to be a way to reconcile the two without discriminating against people."

He sought answers for questions regarding the relationship between church and state, and studied constitutional law. In 1986, he took on a lawsuit related to a measure prohibiting state funding of abortions. In 1996, he ran for the state House of Representatives from District 39, a move he now calls "impetuous." His unsuccessful bid was not over abortion, but because he wants to see reform in the way elections, especially on initiatives, are run as "marketing and media campaigns."

When Alderman was asked to file against Measure 16, his decision was easy. "I said I would do it. I didn't know the details (of the measure), but I intuitively thought it was bad policy and was opposed to it on general philosophical terms. It was not until later

that I learned how poorly written Measure 16 was.” But, he adds, “I don’t think religious beliefs alone are enough to justify opposing it.”

Alderman thought Measure 51 had a chance, if only because its supporters spent far more money; but he was not surprised by the vote. “I don’t think it’s peculiar to Oregon. A lot of people all over the country have similar sentiments. I think we as a civilization are losing respect for the value of human life.”

WILLIAM E. TAYLOR JR.

Bill Taylor, senior counsel to the House Judiciary Committee, has spent six sessions in Salem, but he had never worked on any legislative matter remotely as powerful as physician-assisted suicide.

“The abortion issue pales by comparison,” he reflects. “Everyone faces death. This issue cuts across ideological and political lines. Very emotional issues. On both sides were people of good faith.”



Bill Taylor dealt with 150 to 200 bills during the legislative session. But the assisted-suicide bill took half of his time.

As committee counsel, Taylor’s job is to analyze proposed legislation and policy, “make sure it reads clearly and succinctly,” present it and schedule hearings. He invites proponents and opponents, and brings in people to testify who have technical expertise when it is required. He also does “facilitation – most bills can be summarized in one or two key points,” he says.

He carried the assisted-suicide bill for both the House and Senate, working with and at the direction of Sens. Kate Brown, Neil Bryant and Ken Baker, all attorneys, and Reps. John Minnis and Ron Sunseri. Taylor invited testimony from representatives of hospitals, medicine and state agencies such as the state medical examiner’s office.

There were 30 or 40 hours of hearings, he recalls. During the 1997 session, “I probably had 150 to 200 bills,” says Taylor. But the assisted-suicide bill “took up at least 50 percent of my time – 25 to 30 hours a week for a month.”

Hearings were far from business as usual: “Emotions were high. Pictures of departed spouses were brought in. Others compared it to Germany in the ‘30s. Which makes it hard to deal with. I give a lot of credit to the members, the way they handled it... there was no tension among members, no loss of temper or animosity.”

During sessions, three additional lawyers work just for the Judiciary Committee. The hardest time, he says, is the day after the session ends: Eighteen-hour days for six or more months, then “nothing going on.”

Taylor’s speech betrays his New England roots. A native of Massachusetts, he got his law degree at Suffolk University in Boston, master’s degree from Georgetown and bachelor’s degree from Holy Cross. After he caught Potomac fever, he moved to study in Washington, D.C., where he met his future wife (an Oregon native).

Over a six-year period, Taylor held positions on Capitol Hill ranging from working at the Federal Elections Commission to general counsel for the U.S. Capitol Police. In 1984, the Taylors took up permanent residence in her home state, “which reminded me a lot of New England,” he says. He spent his first year in Portland working in tax law, “and didn’t like it.” Taylor then landed a job with the House Judiciary Committee. He has held several posts since, “but now home is the Legislative Counsel Office.”

Taylor indicates that part of his role is to identify problems with legislation. Two examples he named from the Measure 16 bill: It didn’t specifically define residency requirements sufficiently, and it left ambiguous points regarding hospitals’ and pharmacists’ conscience clauses. The Senate minority report, filed by Brown, would have fixed many problems with the law, he says, but it failed. The majority referred the bill, unchanged, back to the ballot as Measure 51.

Taylor sees his job as no different from other lawyers’ in that he works for the client, and the clients in his case are the members of the Legislature. But he didn’t view the assisted-suicide law as just another case, and he questions whether such an issue should be decided by the initiative process. The initiative can be fine for setting general policy, he says, “but it has difficulty with the details.”

“This is major policy,” he adds, “3,000 years of ethics and laws. In Western civilization, it was in classical Greek society when this issue first came up. Granted, they didn’t have our ability to prolong life.” A policy matter such as this, he feels, “requires greater deliberation” of the details than initiatives allow.

KELLY T. HAGAN

For the last three years, representatives of 25 health-related organizations have met at least once a month on the Task Force to Improve the Care of Terminally Ill Oregonians.

Kelly Hagan, one of five attorneys serving on the committee, represents the Health Law Section of the Oregon State Bar. The task force is producing a much-anticipated set of

guidelines, to be released in February of this year, intended to help providers address requests for physician-assisted suicide.

“It’s been a huge amount of work,” says Hagan, who authored a chapter on negligence and liability issues. The task force includes people with strong views on both sides of the issue, yet they have worked well together. “The task force is scrupulously neutral,” he says. “There are stark differences of opinion personally and organizationally, yet they all approach it with professionalism.

“We all agree it should be implemented fairly and well,” Hagan says. “I was real impressed and real grateful that people brought that (perspective). When the rhetoric heated up (in the campaign), people stayed on task.”



Kelly Hagan is a member of the Task Force working to produce guidelines on Oregon’s assisted-suicide law. Despite all the attention to the new law, he says, “I don’t think there will be that many physician-assisted suicides.”

Hagan says Measure 16 leaves out a lot of detail, and the compendium of guidelines should aid practitioners, owing to the task force’s “hashing these issues out over a period of time... It’s really benefited from the time it’s taken.”

On the other hand, Hagan says that externally there has been some “concern that people will be held to the standards of the task force.” Instead, he thinks it offers a point of departure. “Doctors involved will take what they think will help and leave the rest. They are going to define what the standard of care will be in this area. It’s properly the province of doctors.”

Hagan says the task force has felt some pressure to get the compendium completed quickly, but it has resisted. It first wants to circulate the guidelines for comment. The committee has stuck to its plan, he says, of “preparing a fairly finished product before we let it out of the task force.”

Hagan is with the law firm of Cooney & Crew, where his practice emphasizes health and employment law. He obtained his bachelor’s degree from Stanford and law degree from the University of Oregon. He has chaired the OSB’s Health Law Section, and represents many physicians and medical groups. One of Hagan’s major clients is the Oregon Medical Association. He advises the OMA on legislative matters and helps the OMA’s lobbyist analyze and draft legislation.

The OMA remained officially neutral on Measure 16 in 1994, but it opposed Measure 51 last year. He says the organization always has remained neutral on the *issue* of physician-assisted suicide even though it opposed the *law* in the second go-round.

“I don’t think there will be that many physician-assisted suicides,” concludes Hagan, who believes better palliative care will result from better awareness.

ABOUT THE AUTHOR

Cliff Collins is a Portland-area free-lance writer. His work has appeared many times in the past in the OSB Bulletin.