

**PHYSICIAN-ASSISTED DEATH: INSIGHT FOR
THE TEXAS PRACTITIONER IN AN EVOLVING
LANDSCAPE IN FAVOR OF AID-IN-DYING**

Comment

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I. INTRODUCTION

The sun began peeking through the blinds, and the sound of monitors continued to echo through the room. The day began with another dreaded morning, the fifth one in a row she had spent lying in the same hospital bed—staff coming and going all day and all night, labs at 3:00 A.M., an X-ray at 4:00 A.M., MRIs, more labs; the vicious cycle would certainly continue today as well. The pain started about a month ago—a lot of pain, in every bone in her body. Constant and inexplicable pain—until now. This week provided answers and explanations that no 48-year-old wants to hear: “You have terminal cancer.” Its origin still unknown but tests verified that it has spread throughout her bones. Now the doctors are finding it in her lungs and possibly other organs as well.

The doctors say she has treatment options—chemotherapy, radiation, or both—but there are no guarantees that these options would even save her life. Sadly, even with treatment, the chance of survival beyond six months is slim. The alternative is for the medical staff to make the patient as comfortable as possible and wait out the seemingly inevitable. She lays in bed listening to the hum of the medical equipment and thinks about what kind of life she may have ahead of her. Chemotherapy, radiation, more hospitals, increasingly violent pain—is it even worth it? The pain is getting worse, and she does not dare try to move a muscle in her body out of fear that doing so may increase

the agony. As she lies in the bed, she considers whether there are any other options; she heard about physician-assisted death in the news but knows that it certainly is not an option as a Texas resident.¹ A second thought popped into her head: how difficult would it be to move to another state where physician-assisted death is authorized, and would this choice affect her children and her current estate plan?² A glance at the whiteboard across the room tells her it is too early to receive any more morphine at this time. The suffering is too much to bear, so she closes her eyes and prays that this day is her last.

In many jurisdictions, patients like the one above have only limited options available: chemotherapy, radiation, waiting, and hoping.³ On the other hand, several states provide another option: a small, lethal dose of physician-prescribed medication for the mentally competent, terminal patient to take at the patient's own discretion when the time feels right.⁴ This option is recognized as physician-assisted death (PAD) or aid-in-dying.⁵ Since the turn of the century, this procedure has gained momentum and slowly evolved the legal and medical landscape.⁶ Currently, the procedure is legal in three states, beginning with Oregon in 1997 and followed by Washington and Vermont nearly a decade later.⁷ Montana decriminalized the procedure after the Montana Supreme Court ruling in *Baxter v. State* in 2009.⁸ In 2016, five states—California, New York, New Jersey, Maryland, and Connecticut—and the District of Columbia had pending legislation concerning the legalization or decriminalization of the practice.⁹ As of August 2015, New Mexico state

1. See *infra* Part III.

2. See *infra* Parts IV–VI.

3. See *Opinion 2.211*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2211.page?> (last visited Mar. 17, 2015) [<https://perma.cc/SHCS-DNLQ>]; see *End-of-Life Care for People Who Have Cancer*, NAT'L CANCER INST., <http://www.cancer.gov/about-cancer/advanced-cancer/care-choices/care-fact-sheet#q1> (last visited on Oct. 5, 2015) [<https://perma.cc/SDR6-NQU6>].

4. *Death with Dignity: The Laws & How to Access Them*, DEATH WITH DIGNITY NAT'L CTR., <http://www.deathwithdignity.org/access-acts> (last visited Oct. 5, 2015) [<https://perma.cc/6XFM-RGPN>].

5. See *id.*

6. See generally *id.* (providing general information on states that have legalized). See *Baxter v. State*, 224 P.3d 1211 (Mont. 2009); *Morris v. Brandenburg*, 356 P.3d 564 (N.M. App. Ct. 2015).

7. OR. REV. STAT. ANN. § 127.800 (West 2015); WASH. REV. CODE ANN. § 70.245.010 (West 2015); VT. STAT. ANN. tit. 18, § 5281-5293 (West 2015).

8. *Baxter*, 224 P.3d at 1222.

9. See Kenneth Lovett, *EXCLUSIVE: Timothy Cardinal Dolan will fight efforts in New York to legalize physician-assisted suicide*, N.Y. DAILY NEWS (Feb. 9, 2015), <http://www.nydailynews.com/new-york/timothy-cardinal-dolan-fight-bill-assisted-suicide-article-1.2107898> [<https://perma.cc/F6UA-JP3L>]; see Andrew Ford, *N.J. Conflicted On Aid-in-Dying*, COURIER POST ONLINE (Mar. 4, 2015), <http://www.courierpostonline.com/story/news/local/new-jersey/2015/03/03/new-jersey-fighting-die-christie-mum/24330561/> [<https://perma.cc/LX7K-ZM9J>]; see Ovetta Wiggins, *Maryland Weighs "Death With Dignity" Legislation*, WASH. POST (Mar. 6, 2015), http://www.washingtonpost.com/local/md-politics/maryland-weighs-death-with-dignity-legislation/2015/03/06/187fa3b6-c3a0-11e4-9ec2-b418f57a4a99_story.html [<https://perma.cc/E6TN-MKQ6>]; Mike DeBonis, *'Death with Dignity' laws are proposed, bringing national debate to D.C. and Md.*, WASH. POST (Jan. 16, 2015), <http://www.washingtonpost.com/local/dc-politics/death-with-dignity-laws-are-proposed-bringing-national-debate->

courts are split on how to resolve this issue.¹⁰ With this influx of new legislation and potential change, these jurisdictions might provide a terminal patient an additional state to consider for relocation in the near future.¹¹

The sweeping change taking place throughout the United States creates substantial legal questions that these individuals, particularly those who do not reside in an authorized state, need answered: which state should they relocate to fulfill their end-of-life plan, and how would the election of this procedure affect their estate plans?¹²

This comment aims to provide a contextual overview of the physician-assisted death movement, a discussion of the various laws governing the topic within the United States, and an exploration of several legal considerations estate planning and elder law practitioners should address when assisting clients who wish to relocate to a state where they may opt for physician-assisted death.¹³ This comment will also analyze the statutory construction of the laws in states where PAD is legal and outline the current situations in the states currently debating legalizing the procedure.¹⁴ Further, this comment will discuss the related legal and ethical concerns, and whether a professional duty exists for practitioners assisting their clients to align their estate plan with their end-of-life plan.¹⁵ Finally, this comment aims to assist practitioners in generating additional questions to ask clients during estate planning consultations, as well as aid in creating proactive ways to alleviate any issues that may arise after a client relocates to a PAD-authorized state.¹⁶

II. A BRIEF HISTORY OF PHYSICIAN-ASSISTED DEATH IN THE UNITED STATES

A. Early Movements

The first substantially documented physician-assisted death movement in the United States took place in the Midwest—namely Iowa and Ohio—in 1906.¹⁷ Anna S. Hall, a wealthy heir and daughter of famous explorer Charles

to-dc-and-md/2015/01/16/8354bba8-9d09-11e4-a7ee-526210d665b4_story.html [https://perma.cc/U9X4-ZKEG]; see Ken Dixon, *Aid-in-Dying Bill Hasn't Gained Sufficient Support*, CT POST (Apr. 9, 2015), <http://www.ctpost.com/local/article/For-3rd-time-aid-in-dying-bill-lacked-support-6190026.php> [https://perma.cc/KZB6-937K].

10. *Morris*, 356 P.3d 564.

11. See *infra* Section III.C.

12. See *infra* Part V.

13. See *infra* Parts II–VII.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Parts IV–VI.

17. Jacob M. Appel, *A Duty to Kill? A Duty to Die? Rethinking the Euthanasia Controversy of 1906*, ACADEMIA.COM 4–11 (2014), http://www.academia.edu/1598698/A_Duty_to_Kill_A_Duty_to_Die_Rethinking_the_Euthanasia_Controversy_of_1906 [https://perma.cc/Z5N1-HFVA].

F. Hall, served as the catalyst of the first public debates over the topic.¹⁸ After Anna's mother succumbed to a long, agonizing bout with liver cancer, Anna spent the majority of her time advocating for the legalization of physician-assisted death, or euthanasia.¹⁹ Anna wrote letters to "prominent medical men, educators, and humanitarians of the whole country willing to endorse her ideas publically."²⁰

On January 24, 1906, after gaining support from her lobbying efforts, a bill legalizing physician-assisted death went before the State House in Columbus, Ohio.²¹ This bill proposed to permit physicians to prescribe a sufficient dose of morphine to the terminal patient to prevent subsequent suffering.²² After introduction on the House floor, the bill, which received the moniker "the chloroform bill," met some debate, but it ultimately met a "silent and painless death in committee."²³

As a result of Anna Hall's advocacy, the public debate about legalization of physician-assisted death soon reached Iowa.²⁴ On March 10, 1906, the Iowa House of Representatives received a more extensive, radical bill that required "all physicians to aid incurables in ending their own lives."²⁵ Remarkably, many prominent physicians from Iowa authored this proposal, and the medical community offered considerable support.²⁶ However, attitudes differed greatly, and many Representatives relied on tradition as a ground to dismiss the radical proposition.²⁷ Despite its failure, the authors and proponents of the bill asserted that "their immediate object was to start people thinking along the line suggested," and despite the revolutionary substance of the bill, several of the authors predicted that the State Assembly would pass a similar bill during their lifetime.²⁸ The public debate about the legality of physician-assisted death or euthanasia has occurred more frequently in state legislatures across the country.²⁹

18. *See id.* at 4.

19. *See id.* at 4–6.

20. *See id.*

21. *See id.* at 9.

22. *See id.*

23. *See id.* at 11.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.* at 14.

29. *See id.*

B. Physician-Assisted Death in the Late Twentieth Century

1. Jack Kevorkian

In the 1980s and 1990s, Dr. Jack Kevorkian made national headlines with his personal crusade for assisted suicide.³⁰ Kevorkian, a pathologist who practiced in Michigan, authored numerous medical articles outlining his beliefs regarding physician-assisted death and his personal philosophy on death.³¹ Kevorkian became infamous when he injected “Janet Adkins, a 54-year old Alzheimer’s patient,” with a combination of chemicals intravenously to assist her in ending her life.³² “Michigan’s indecisive stance on assisted suicide” resulted in the dismissal of the criminal case against Kevorkian.³³ In 1992, the Michigan Legislature outlawed physician-assisted suicide making it a felony punishable with up to five years in prison.³⁴ In 1999, the Michigan Supreme Court convicted Kevorkian of second-degree murder and sentenced him to twenty-five years in prison.³⁵ Kevorkian appealed, and the appellate court affirmed the district court’s ruling.³⁶

2. Washington v. Gluckberg

In the wake of the publicity that the Kevorkian cases created, the United States Supreme Court voiced its opinion on the assisted suicide debate in *Washington v. Gluckberg*.³⁷ In the well-known case, a group of physicians contested Washington State’s ban on assisted suicide, claiming that assisted suicide was a protected liberty interest under the Due Process Clause of the Fourteenth Amendment.³⁸ Chief Justice Rehnquist’s majority opinion further clarified the legal proposition established in *Moore v. East Cleveland*; namely, that fundamental liberty interests must be “deeply rooted in the nation’s history and tradition,” and physician-assisted suicide does not meet that constitutional threshold.³⁹ Washington State subsequently passed its own Death with Dignity Act making physician-assisted death legal in 2008.⁴⁰

30. *Jack Kevorkian*, BIO., <http://www.biography.com/people/jack-kevorkian-9364141#crusade-for-assisted-suicide> (last visited Sept. 21, 2015) [<https://perma.cc/T9YA-QU6T>].

31. *See id.*

32. *See id.*

33. *See id.*; *see* *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994).

34. *Jack Kevorkian*, *supra* note 30.

35. *See id.*

36. *See id.*; *Kevorkian*, 248 Mich. App. 373 (2001).

37. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

38. *See id.* at 705.

39. *See id.* at 703.

40. *See infra* Section III.A.

C. Brittany Maynard and Her Effect on the PAD Movement

Arguably, the largest groundswell of support for the physician-assisted death movement followed the November 1, 2014 death of Brittany Maynard who campaigned for the right to die with dignity.⁴¹ Doctors diagnosed Maynard with terminal brain cancer at the age of 29, and after Maynard weighed her prognosis and end-of-life options, she decided to relocate to Oregon—one of four states where she could opt for physician-assisted death.⁴²

Maynard, who had a strong personal belief that every individual should have the right to choose death with dignity, collaborated with Compassion & Choices, an end of life advocacy organization, to air an interview in which she advocated for death with dignity as a human right.⁴³ Many national news outlets also published her open letter online, advocating for the proposal of aid-in-death legislation to provide terminal patients an additional alternative.⁴⁴ As a result of this national outreach, many states are now considering the merits of making this end-of-life option legal and presenting bills for legislative review.⁴⁵ With this increased awareness, terminal clients could have additional states to relocate to in the future.⁴⁶ The next section of this comment looks at the states that are currently viable options for relocation and some states that have legislation awaiting executive approval.⁴⁷

III. THE CURRENT LEGAL LANDSCAPE—CHANGES ON THE RISE?

Like Brittany Maynard, currently a patient suffering from a terminal illness may relocate to only four states that have aid-in-death laws—with the potential addition of further jurisdictions on the horizon.⁴⁸ Texas practitioners and estate planners alike should keep a close eye on the changing landscape and evolving legislation regarding whether additional jurisdictions are made available to clients wishing to relocate to another state to satisfy their end-of-life plan.⁴⁹ Moreover, Texas practitioners should be able to communicate the benefits and disadvantages of moving to a state that permits PAD to the client, how the particular requirements of the state law

41. *About Brittany Maynard*, THE BRITTANY MAYNARD FUND, <http://thebrittanyfund.org/about/> (last visited Oct. 5, 2015) [<https://perma.cc/F2ZA-SHVM>].

42. *Id.*

43. *Id.*

44. See Brittany Maynard, *My right to death with dignity at 29*, CNN (Nov. 2, 2014), <http://www.cnn.com/2014/10/07/opinion/maynard-assisted-suicide-cancer-dignity/> [<https://perma.cc/ASB7-JFEA>].

45. See *id.*; see *infra* Section III.D.

46. Brittany Maynard, *supra* note 43; see *infra* Section III.D.

47. See *supra* Part II; see also *infra* Part III.

48. See *infra* Sections III.A–C.

49. See *infra* Sections III.A–C.

will affect the client, and give informed advice depending on the particular client's financial situation.⁵⁰

A. *The Legalized States*

1. *Oregon*

Oregon was the first state to legalize physician-assisted death with its Death with Dignity Act (the "Oregon DWD Act") in late 1997, which is found in its entirety in Chapter 127 of the Oregon Revised Statutes.⁵¹ As outlined in the state code, only capable adults may opt for PAD:

[An a]dult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner.⁵²

The statute qualifies that no individual may seek assisted death "solely because of age or disability."⁵³ Moreover, the written request presented to a physician must be "signed and dated by the patient and witnessed by at least two individuals who . . . attest that to the best of their knowledge and belief the patient is capable, acting voluntarily, and is not being coerced to sign the request."⁵⁴ These stringent requirements demonstrate the legislators' extensive consideration regarding qualification for this procedure; these factors ensure that only the intended beneficiaries—terminally ill, sound-minded individuals who have spent adequate time considering the effects of their decision—may elect for physician-assisted death.⁵⁵

At least one of the witness cannot be a relative, an agent of a healthcare facility, or "a person who at the time the request is signed would be entitled to any portion of the estate of the qualified patient upon death under any will or by operation of law."⁵⁶ After a patient presents a request to an attending physician, a consulting physician must examine the patient to confirm the attending physician's attestation that the patient is indeed "suffering from a terminal disease, and verify that the patient is capable, is acting voluntarily and has made an informed decision."⁵⁷ Lastly, if a consulting physician deems a patient qualified for the procedure, the patient must additionally

50. See *infra* Sections III.A–C.

51. OR. REV. STAT. ANN. § 127.800 (West 2015).

52. See *id.* § 127.805.

53. *Id.*

54. See *id.* § 127.810.

55. *Id.* § 127.800–.810.

56. *Id.*

57. See *id.* § 127.820.

make the request orally and then again make the request within fifteen days of the initial oral request for the physician to gauge the patient's desire to follow through with the procedure.⁵⁸

From the date of Oregon DWD Act's implementation to February 2, 2015, a total of 1,327 patients were approved for prescriptions, and 859 patients have died under the Act.⁵⁹ Comparing the seventeen years worth of annual reporting, the number of prescriptions and deaths has slowly risen and both reached a high in 2014.⁶⁰ In 2014, 155 patients received prescriptions and patients elected to take the prescription at a rate of 60.6%.⁶¹ Furthermore, the highest percentage of patients were over the age of sixty-five and suffering from cancer.⁶² According to the reports, eighty-three physicians issued the 155 prescriptions in 2014, which equals less than two prescriptions per physician.⁶³ These statistics indicate that only a little more than half of the patients prescribed the lethal medication actually follow through with ending their life.⁶⁴ Further, these statistics are evidence that the state's physicians are not handing these prescriptions out in large volume.⁶⁵

2. Washington

In 2008, Washington became the second state to legalize the procedure with the enactment of its Death with Dignity Act (the "DWD Act"), which the state fully implemented in 2009.⁶⁶ The Washington Legislature modeled its act after the Oregon DWD Act and used much of the same language.⁶⁷ All of the requirements of Washington's Act are consistent with the other and compel the same actions of the state's patients and physicians.⁶⁸ The major differences, however, are in Washington's annual reporting requirements.⁶⁹ Since its last reporting on May 2, 2014, Washington patients received 549 prescriptions with 485 patients electing to take the medication—a rate of 88.3%.⁷⁰ Similar to Oregon, both the prescription and death rates have

58. *See id.* § 127.840.

59. *Oregon's Death with Dignity Act—2014*, OR. PUB. HEALTH DIV., <https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year17.pdf> (last visited Oct. 5, 2015) [<https://perma.cc/TBTW-5R3R>].

60. *See id.*

61. *Id.*

62. *Id.*

63. *See id.*

64. *Id.*

65. *See id.*

66. WASH. REV. CODE. ANN. § 70.245 (West 2015).

67. *See id.* § 70.245.020.

68. *See id.* § 70.245.

69. *See Washington State Dept. of Health 2013 Death with Dignity Act Report*, WASH. STATE DEPT. OF HEALTH, <http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct2013.pdf> (last visited on Oct. 5, 2015) [<https://perma.cc/FT96-8HVG>].

70. *Id.*

steadily risen since the implementation of the DWD Act.⁷¹ In 2014, 176 patients received prescriptions, and 126 patients elected to take the medication.⁷² Moreover, like Oregon, the highest percentage of patients in Washington were over the age of sixty-five and suffering from a form of cancer—over 70% in both categories.⁷³ Although this statistic might seem markedly high, it serves to illustrate that the intended beneficiaries of Washington’s DWD Act—terminally ill, elderly patients—are choosing to take advantage of the state’s laws.⁷⁴ Moreover, as discussed below, these statistics might reflect a sizeable number of terminal patients who have moved into the state due to Washington’s favorable estate planning implications.⁷⁵

3. Vermont

Vermont was the third state to implement a Death with Dignity statute on May 20, 2013.⁷⁶ Although worded differently, the Vermont’s Patient Choice and Control at End of Life Act requires the same elements for qualification as Oregon and Washington, and it holds its physicians to the same level of professional responsibility for verifying the veracity of a patient’s request and mental stability.⁷⁷ As of this writing, the Vermont Department of Health has yet to release any annual reporting to accompany the implementation of its state’s act.⁷⁸

B. The Decriminalized States

In addition to the three legalized states, Montana and New Mexico constitute the current decriminalized states.⁷⁹ Despite not having “legalized” status, both states are viable options for a client to relocate to in order to seek PAD and provide an identical procedure with varying requirements.⁸⁰ Similar to the subsequent subsections discussing the legalized states, the following paragraphs provide a background for the two decriminalized states.⁸¹

71. *See id.*

72. *Id.*

73. *Id.*

74. *See id.*

75. *See id.*; *see infra* Section V.A.

76. *See Vermont*, DEATH WITH DIGNITY NAT’L CTR., <http://www.deathwithdignity.org/category/vermont> (last visited Sept. 21, 2015) [<https://perma.cc/7HRP-P5JL>].

77. VT. STAT. ANN. tit. 18, §§ 5281–5293 (West 2015).

78. *See Patient Choice and Control at End of Life*, VT. DEPT. OF HEALTH, http://healthvermont.gov/family/end_of_life_care/patient_choice.aspx (last visited Oct. 5, 2015). [<https://perma.cc/TY63-W36A>].

79. *See infra* Section III.B.1–2.

80. *See infra* Section III.B.1–2.

81. *See infra* Part III.B.1–2.

1. Montana

In lieu of legalization via state legislation, Montana became the only state in the nation to decriminalize the procedure following the state's Supreme Court decision in *Baxter v. State*.⁸² In *Baxter*, a terminally ill patient, along with a group of physicians and the advocacy group Compassion & Choices, brought an action contesting the constitutionality of the application of Montana's homicide statutes to physicians who provide assistance in dying to terminally-ill patients.⁸³ The Montana Supreme Court concluded that physician-assisted death was not a constitutionally guaranteed right under its state's constitution; however, neither legal precedent nor statutory interpretation deems the procedure against public policy.⁸⁴

As it currently stands, the state legislature has continued its protection of *Baxter* the past three legislative sessions.⁸⁵ Despite the legally nuanced differences, terminally-ill residents of Montana may still seek out physicians willing to perform aid-in-dying; there is no difference for patients whether they live in a legalized state (Washington, Oregon, or Vermont) or in Montana.⁸⁶ Until state representatives decide to act in direct opposition to the judiciary, patients seeking aid-in-death may still consider relocation to Montana to fulfill their end-of-life plan.⁸⁷

2. New Mexico

New Mexico could potentially become the second state to decriminalize physician-assisted death contingent on its state's supreme court decision in *Morris v. Brandenburg*; the court heard oral arguments on October 26, 2015 and is expected to issue an opinion before the end of 2015 or early 2016.⁸⁸ The impact of this decision is enormous; if the court overturns the appellate court ruling, it creates a new jurisdiction for terminally-ill patients to consider

82. *Baxter v. State*, 224 P.3d 1211, 1222 (Mont. 2009).

83. *See id.*

84. *See id.* at 1220–22.

85. *End of Life Liberty Survives Another Legislative Session; In a Victory for Terminally Ill Montanans, Aid in Dying Remains a Medical Option*, COMPASSION & CHOICES (Apr. 28, 2015), <https://www.compassionandchoices.org/2015/04/28/end-of-life-liberty-survives-another-legislative-session-in-a-victory-for-terminally-ill-montanans-aid-in-dying-remains-a-medical-option/> [https://perma.cc/JRF3-QZN2].

86. *See id.*

87. *See id.*

88. [Author's Note: Since this writing and completion of this comment, the New Mexico Supreme Court has ruled that the practice of PAD shall not be decriminalized within the state; therefore, no longer making New Mexico a viable option for relocation in the analysis in Part V.E; *see Morris v. Brandenburg*, 376 P.3d 836 (N.M. 2016).] *See Morris v. Brandenburg*, 356 P.3d 564 (N.M. App. Ct. 2015); *see Emil J. Kiehne, NM Supreme Court to hear assisted suicide case this morning*, N. M. APPELLATE L. BLOG (Oct. 26, 2015), <http://nmappellatelaw.com/nm-supreme-court-to-hear-assisted-suicide-case-this-morning/> [https://perma.cc/TY63-W36A].

if seeking PAD.⁸⁹ Conversely, if the court upholds the appellate court decision, this will provide other courts with non-binding case law to consider in making its own state decisions, namely, that PAD is suicide as applied to state criminal statutes and not a protected liberty under a state's constitution.⁹⁰ As a result, Texas estate planners and elder law practitioners should monitor this case closely to see whether New Mexico will join the list of states where terminally-ill clients may seek guidance to relocate and fulfill their end of life plan.⁹¹

C. A Wave of Pending Legislation—California, Colorado, New Jersey, and Washington D.C.

In addition to New Mexico, Texas practitioners should also keep a watchful eye on the legislative actions currently taking place in California, Colorado, New Jersey, and the District of Columbia.⁹² California passed right-to-die legislation that went into effect during the summer of 2016; Colorado passed its aid-in-dying ballot initiative during the most recent election in November.⁹³ Moreover, New Jersey and Washington, D.C. have similar bills making their way through respective legislatures.⁹⁴ The Washington D.C. bill should go before Congress for approval in 2017, and the New Jersey bill awaits governor signature or veto; either way, resolution of the matter in both jurisdictions should occur before the end of 2017.⁹⁵

IV. THE TERMINALLY ILL PATIENT BECOMES A PROSPECTIVE CLIENT—
ETHICAL AND LEGAL CONCERNS

Now consider the hypothetical terminal patient comes into your office and requests to have a will, trust, and power of attorney documentation drafted.⁹⁶ During the initial consultation, the prospective client expressly mentions the desire to opt for PAD, although the individual has no idea where to move or the legal implications of that decision.⁹⁷ As a prudent estate

89. See *Morris*, 356 P.3d at 585.

90. Compare *Baxter v. State*, 224 P.3d 1211, 1239 (Mont. 2009), with *Morris*, 356 P.3d at 585.

91. See *infra* Part V.

92. See Greg Botelho, *California governor signs 'right to die' bill*, CNN (Oct. 6, 2015), <http://www.cnn.com/2015/10/05/us/california-assisted-dying-legislation/>; see Jennifer Brown, *Colorado passes medical aid in dying, joining five other states*, DENVER POST (Nov. 8, 2016), <http://www.denverpost.com/2016/11/08/colorado-aid-in-dying-proposition-106-election-results/> [<https://perma.cc/9Z8U-DPS4>]; see Mike DeBonis, *supra* note 9.

93. Botelho, *supra* note 92; see Brown, *supra* note 92.

94. See Susan K. Livio, *'Aid in dying' for terminally ill patients passes N.J. Assembly*, NJ.COM (Oct. 20, 2016), http://www.nj.com/politics/index.ssf/2016/10/aid_in_dying_legislation_for_terminally_ill_assemb.html [<https://perma.cc/77D5-KZ7S>]; see also DeBonis, *supra* note 9.

95. See Livio, *supra* note 94; see DeBonis, *supra* note 9.

96. See *supra* Part I.

97. See *infra* Part V.

planner or elder law professional, what do you tell the prospective client?⁹⁸ Furthermore, what if you are philosophically opposed to the client's decision to seek out PAD? Is there an ethical or professional duty to present clients with legal options that the particular attorney does not philosophically agree with, especially if the attorney voluntarily chooses to enter into an attorney/client relationship, but fails to address or discuss the client's desire to opt for PAD?⁹⁹

The Texas Disciplinary Rules of Professional Conduct may resolve the potential ethical dilemma, if one exists, illustrated in the situation outlined above.¹⁰⁰ Pursuant to Rule 2.01, "a lawyer shall exercise independent professional judgment and render *candid* advice."¹⁰¹ Comment 2 associated with Rule 2.01 provides further clarification: The State Bar may consider directly failing to tend to the client's desire (i.e. disclosing to the attorney the intent to relocate to a state where the client can opt for PAD) as inadequate candor or couching advice in narrow legal terms, which may violate the professional rule.¹⁰²

In addition, the Bar may consider an attorney's decision to draft the client's estate documents while ignoring the client's full intentions—or worse, failing to draft the documents with the client's relocation in mind—as potential malpractice.¹⁰³ Specifically, this particular attorney action (or inaction) may fall under Rule 1.01 mandating an attorney to provide competent and diligent representation.¹⁰⁴ If the attorney fails to follow Rule 1.01(b)–(c) and neglects to draft documentation that would survive judicial scrutiny under another state's estate or elder laws and neglects to incorporate phraseology necessary for a client opting for PAD, then legal implications could result that could significantly affect the client's estate.¹⁰⁵

Based on the professional rules analyzed above, it is in the best interest of the attorney and client to terminate the relationship—or never enter into a relationship—if the attorney is religiously, morally, or philosophically opposed to a client's desire to seek aid-in-death.¹⁰⁶ By either proceeding with the client's wishes, withdrawing from representation, or candidly referring the client to another attorney after initial consultation, an attorney may safely avoid any conceivable breach of fiduciary duty or professional conduct.¹⁰⁷

98. See *infra* Part IV.

99. See *infra* Part IV.

100. See TEX. DISCIPLINARY R. PROF'L. CONDUCT (1989).

101. *Id.* 2.01 (emphasis added).

102. See *id.* at cmt. 2.

103. See *id.* at 1.01.

104. *Id.*

105. See *id.* 1.01(b)–(c); see *infra* Part V.

106. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.01, 2.01 (1989).

107. See *id.*

V. COMPARING ESTATE PLANNING IMPLICATIONS AMONG VIABLE PAD STATES

Suppose an attorney enters into a relationship with a client who expresses the desire to relocate to a PAD-authorized state if the client were to become terminally ill.¹⁰⁸ When consulting with the client and drafting the estate planning documents, what state should an attorney recommend?¹⁰⁹ Texas practitioners should be able to communicate the benefits and disadvantages to the client of moving to a particular state that permits PAD and give informed advice depending on the particular client's financial situation.¹¹⁰ Several factors to consider include the particular state's residency requirements, income tax implications, estate tax implications, and homestead exemptions.¹¹¹

A. Washington

1. Residency Requirements

Meeting the residency requirements in Washington State is fairly straightforward and can be done in a short amount of time.¹¹² According to Washington's government website, there are several options available to obtain Washington residency—apply for a Washington driver's license, register to vote in the state, or “buy property and/or maintain a residence for personal use.”¹¹³ Maintaining property also includes renting or leasing a residence within the state.¹¹⁴ In addition, Washington law requires an individual to obtain a driver's license within thirty days after moving into the state.¹¹⁵ In summary, a client considering a move to Washington can realistically obtain residency within the state in approximately one month.¹¹⁶

2. Income Tax

In regard to tax planning, both attorneys and clients should consider a move to Washington if the client is wealthy and has significant income because Washington is one of seven states to boast the exclusion of a state

108. See *supra* Part IV.

109. See *supra* Part IV; see *infra* Sections V.A–F.

110. See *infra* Sections V.A–F.

111. See *infra* Sections V.A–F.

112. See *Become a Resident*, ACCESS WASH., [http://access.wa.gov/topics/living/become resident](http://access.wa.gov/topics/living/become%20resident) (last visited Oct. 29, 2015) [<https://perma.cc/6FN9-YUAM>].

113. *Id.*

114. *Id.*

115. See *Moving? Get a WA License*, WASH. STATE DEP'T OF LICENSING, <http://www.dol.wa.gov/driverslicense/moving.html> (last visited Oct. 29, 2015) [<https://perma.cc/7JRG-LYDH>].

116. See ACCESS WASH., *supra* note 112.

income tax.¹¹⁷ This is a significant consideration because Washington is the only PAD-authorized state that does not have a state income tax.¹¹⁸ Depending on the general wealth of the client, in addition to the importance of meticulous tax planning, Washington should garner some contemplation as a viable place to relocate.¹¹⁹

3. Estate Tax

Table 1: Computation of Washington Estate Tax For Dates of Death January 1, 2014 and After¹²⁰

If Washington Taxable Estate		The Amount of Tax Equals		Of Washington Taxable Estate Value Greater Than
Is at Least	But Less Than	Initial Tax Amount	Plus Tax Rate %	
\$0	\$1,000,000	\$0	10.00%	\$0
\$1,000,000	\$2,000,000	\$100,000	14.00%	\$1,000,000
\$2,000,000	\$3,000,000	\$240,000	15.00%	\$2,000,000
\$3,000,000	\$4,000,000	\$390,000	16.00%	\$3,000,000
\$4,000,000	\$6,000,000	\$550,000	18.00%	\$4,000,000
\$6,000,000	\$7,000,000	\$910,000	19.00%	\$6,000,000
\$7,000,000	\$9,000,000	\$1,100,000	19.50%	\$7,000,000
\$9,000,000		\$1,490,000	20.00%	\$9,000,000

On the other hand, Washington's aggressive, stringent estate taxation structure likely overshadows the favorable benefit of lacking a state income tax.¹²¹ According to Washington's Department of Revenue, in 2015, the estate tax filing threshold was \$2 million with an applicable exclusion amount of \$2.054 million.¹²² Moreover, the state assessment and refund rates from 2012 to 2016 have been locked at 2%.¹²³ Given the double estate taxation (federal and state), clients may be wary of relocating to Washington if their estate exceeds the threshold amount; and therefore, an attorney should consider the tax planning implications of recommending such a move depending on the financial standing of the particular client.¹²⁴

117. See Tonya Moreno, *Seven States Without an Income Tax*, BALANCE, <http://www.thebalance.com/states-without-an-income-tax-3193345> (last visited Jan. 28, 2017) [<https://perma.cc/QV2R-3CTG>].

118. *Id.*

119. See WASH. STATE DEP'T OF LICENSING, *supra* note 115.

120. See *Estate tax tables*, WASH. STATE DEP'T. OF REVENUE, http://dor.wa.gov/content/findtaxes.andrates/othertaxes/tax_estatetaxtables.aspx (last visited Oct. 29, 2015) [<https://perma.cc/8QK3-PBHX>].

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

4. Homestead Exemption

Like Texas, Washington State permits a limited homestead exemption under state law.¹²⁵ Further, the statute describes that the exemption may not exceed “the total net value of the lands, manufactured homes, mobile home, improvements, and other personal property” that constitutes a dwelling under state law, or “the sum of [\$125,000] in the case of lands, manufactured homes, mobile home, and improvements, or the sum of [\$15,000] in the case of other personal property.”¹²⁶ The exemption is limited because the above statute states that when the

homestead is subject to execution, attachment, or seizure by or under any legal process whatever to satisfy a judgment in favor of any state for failure to pay that state’s income tax on benefits received while a resident of the state of Washington from a pension or other retirement plan

then the state fails to recognize an exemption.¹²⁷ Considering Texas’s extensive protection of homestead laws and its homestead exemptions, attorneys should consider whether a relocation to Washington would be in the client’s best interests; however, leasing or renting property to obtain residency can minimize some of Washington’s lesser homestead protections and property tax credits.¹²⁸

B. Oregon

1. Residency Requirements

Oregon’s residency requirements are quite similar to Washington’s and are outlined in the Oregon Revised Statutes.¹²⁹ According to the statute, a citizen may obtain residency by purchasing a residence with the intent to remain, registering and titling one’s vehicles, seeking gainful employment, or taking action to indicate the desire to acquire a residence, or:

(a) Remaining in this state for a consecutive period of six months or more regardless of the domicile of the person. (b) Placing children in a public school without payment of nonresident tuition fees. (c) Making a declaration to be a resident of this state for the purpose of obtaining, at

125. WASH. REV. CODE ANN. § 6.13.030 (West 2007).

126. *Id.*

127. *Id.*

128. See David J. Willis, *Homestead Protections in Texas*, LONE STAR LAND L., <http://www.lonestarlandlaw.com/Texas-Homestead.html> (last visited Oct. 30, 2015) [<https://perma.cc/HW89-2TFK>]; see *supra* Section V.A.1.

129. See OR. REV. STAT. ANN. § 803.200 (West 2015).

resident rates, a state license or tuition fees at an educational institution maintained by public funds.¹³⁰

After considering all factors, a client that desires to relocate to Oregon could successfully gain residency in approximately one month or less.¹³¹

2. Income Tax

Table 2: 2014-2015 Oregon Income Tax Table¹³²

Tax Bracket (Single)	Marginal Tax Rate	Tax Bracket (Married)	Marginal Tax Rate
\$0+	5.00%	\$0+	5.00%
\$3,300+	7.00%	\$6,500+	7.00%
\$8,250+	9.00%	\$16,300	9.00%
\$125,000+	9.90%	\$250,000	9.90%

Unlike its northern neighbor, Oregon does have a state income tax.¹³³ Oregon's tax scheme is higher than any other state analyzed within this section at the lower and upper tax brackets.¹³⁴ This aggressive scheme will affect any individual seeking residency in Oregon across any income level.¹³⁵ As indicated above, a Texas practitioner should seriously consider these rather high tax rates from a tax planning perspective if a client wishes to relocate to Oregon to fulfill the client's end-of-life plan.¹³⁶

130. See *id.* § 803.200(1)(a)–(c).

131. See *id.* § 803.200; see *Oregon Residency & Domicile*, OREGON.GOV, <http://www.oregon.gov/odot/dmv/pages/driverid/residency.aspx> (last visited Oct. 30, 2015) [<https://perma.cc/SN3G-JYTM>].

132. *Oregon Income Tax Brackets*, TAX BRACKETS.ORG, <http://www.tax-brackets.org/oregontaxtable> (last visited Oct. 28, 2015) [<https://perma.cc/FR45-XX6G>].

133. See Kay Bell, *State Taxes: Oregon, Bankrate* (Mar. 8, 2016), www.bankrate.com/finance/tax/state-taxes-oregon.aspx [<https://perma.cc/HFT3-WMVY>].

134. Compare *supra* Section V.B.2 with *infra* Sections V.C.2, V.D.2, V.E.2 (explaining the tax schemes among the various states).

135. See OR. REV. STAT. ANN. § 803.200; *Oregon Residency & Domicile*, *supra* note 131.

136. See OR. REV. STAT. ANN. § 803.200; *Oregon Residency & Domicile*, *supra* note 131.

3. Estate Tax

Table 3: 2015 Oregon Estate Tax Rates¹³⁷

Taxable Estate	Marginal Tax Rate	Taxable Estate	Marginal Tax Rate
\$1M-\$1.5M	10%	\$5.5M-\$6.5M	12%
\$1.5M-\$2.5M	10.25%	\$6.5M-\$7.5M	13%
\$2.5M-\$3.5M	10.5%	\$7.5M-\$8.5M	14%
\$3.5M-\$4.5M	11%	\$8.5M-\$9.5M	15%
\$4.5M-\$5.5M	11.5%	\$9.5M+	16%

Comparing the estate tax rate evidence that Oregon's tax structure is significantly more aggressive than Washington State's.¹³⁸ Although both begin taxation at the \$1 million threshold at 10%, Oregon's quickly accelerates to a whopping 20% for estates over \$9 million.¹³⁹ For clients with sizeable estates, attorneys should discuss this area of estate planning extensively, especially if the client has expressed a desire to move to Oregon.¹⁴⁰ As an aside, one benefit of relocating to Oregon is that it is one of five states without a sales tax.¹⁴¹

4. Homestead Exemption

In comparison to Washington State, Oregon gives significantly less for a homestead exemption.¹⁴² In addition, Oregon statutorily limits its homestead protection by providing a shelter against the following debts: (1) construction or mechanic's liens, (2) purchase-money or mortgage liens, (3) land sale contracts against property, and (4) potentially child support judgments with discretion left to judges to determine the financial situation of the homeowner.¹⁴³ According to the statute, the Oregon homestead exemption is \$40,000 for a single homeowner and \$50,000 for two

137. *Oregon Estate Tax Rates 2011 to the Present*, MYATT & BELL, P.C., <http://www.myattandbell.com/oregon-estate-tax-rates-2011-present/> (last updated Mar. 31, 2015) [<https://perma.cc/ZN8F-FKJP>].

138. Compare *supra* Table 1, with *supra* Table 3 (explaining the differences between the Oregon and Washington tax schemes).

139. Compare *supra* Table 1, with *supra* Table 3 (explaining the difference between the Oregon and Washington tax schemes).

140. Compare *supra* Table 1, with *supra* Table 3 (showing the importance of discussing tax planning with clients).

141. Tonya Moreno, *States Without an Sales Tax*, ABOUT MONEY, <http://taxes.about.com/od/statetaxes/a/States-Without-A-Sales-Tax.htm> (last visited Oct. 29, 2015) [<https://perma.cc/R4U8-EY2F>].

142. See OR. REV. STAT. ANN. § 18.395-.422 (West 2015).

143. *Oregon Homestead Laws*, FINDLAW.COM, <http://statelaws.findlaw.com/oregon-law/oregon-homestead-laws.html> (last visited Oct. 30, 2015) [<https://perma.cc/UK3A-TMGM>].

homeowners with interest in the domicile.¹⁴⁴ Attorneys should certainly address this disadvantage with a client interested in moving to Oregon for end-of-life purposes based on this substantially lesser amount of homestead protection.¹⁴⁵

C. Vermont

1. Residency Requirements

Akin to Washington and Oregon, Vermont's residency requirements are quite similar; however, Vermont appears to have the quickest path to state residency.¹⁴⁶ According to Vermont's Department of Motor Vehicles webpage, the only requirements for residency are that a prospective resident either purchase or rent property within the state and obtain a driver's license or identification card within thirty days of relocating to the state.¹⁴⁷ Furthermore, to apply for a Vermont driver's license or identification card, a prospective resident must provide two pieces of mail with the applicant's name and listing the Vermont address.¹⁴⁸ These requirements considered, a client that desires to relocate to Vermont could successfully gain residency in as little as one week, granted the client rented property and mail could be sent and received quickly; at the latest, a patient could obtain residency in roughly a month.¹⁴⁹

144. OR. § 18.395.

145. *See id.*; *see Oregon Homestead Laws*, *supra* note 143.

146. *Proof of Residency Requirements for a Vermont License/Permit/ID*, VT. DEP'T. OF MOTOR VEHICLES, <http://dmv.vermont.gov/licenses/drivers/requirements/identity#Residency> (last visited Jan. 4, 2016) [<https://perma.cc/5C4B-JJCJ>].

147. *Id.*

148. *Id.*

149. *See id.*

2. Income Tax

Table 4: 2014-2015 Vermont Income Tax Table¹⁵⁰

Tax Bracket (Single)	Marginal Tax Rate	Tax Bracket (Married)	Marginal Tax Rate
\$0+	3.55%	\$0+	3.55%
\$36,900+	6.80%	\$73,800+	6.80%
\$89,350+	7.80%	\$148,850	7.80%
\$186,350+	8.80%	\$226,850+	8.80%
\$405,100+	8.95%	\$405,100+	8.95%

Like Oregon, Vermont also has a state income tax; however, Vermont has lower marginal tax rates across all tax brackets.¹⁵¹ Contemplated independently, Vermont has the benefit over Oregon with regard to income tax rates but falls short to Washington as the only PAD state without a state income tax.¹⁵²

3. Estate Tax

Based on questionably-drafted legislation, Vermont's estate taxation scheme is a curious one and one to monitor for changes going forward.¹⁵³ Currently, if an estate's value is in excess of \$2.75 million it is subject to the estate tax.¹⁵⁴ The interesting and unusual aspect of this scheme is that it is a regressive tax system: the beginning marginal rate is 45%, then decreases to 9.6% for estates over \$3.2 million, and then increases to 16% for estates with value exceeding \$10 million.¹⁵⁵ A Texas practitioner should monitor changes to this tax calculation going forward for wealthy clients requesting to relocate to Vermont.¹⁵⁶

150. *Vermont Income Tax Brackets*, TAX BRACKETS.ORG, <http://www.tax-brackets.org/vermont-taxtable> (last visited Oct. 28, 2015) [<https://perma.cc/19MEV-W4N5>].

151. *Id.*; see *supra* Table 2.

152. Compare Table 4, with Tables 1, 2 (showing the pros and cons of moving to Vermont).

153. *Estate Taxation – Federal & Vermont*, VERMONTSTATEPLAN.COM, <http://www.vermontestateplan.com/esttax.html> (last visited Oct. 28, 2015) [<https://perma.cc/DBQ6-CBFA>].

154. *Id.*

155. *Id.*

156. *Id.*

4. Homestead Exemption

Vermont's homestead protection and exemptions are quite similar to Washington's and are considerably better, monetarily, than Oregon's.¹⁵⁷ Vermont allows a maximum value of exempt property of \$125,000; in addition, if the property has greater value than the maximum allowed exemption (\$125,000), then the property owner may choose what portion of the property to apply the homestead protection.¹⁵⁸ For those clients wishing to purchase a domicile in Vermont when relocating, comparing the nuanced differences between Washington State and Vermont may yield fruitful.¹⁵⁹

D. Montana

1. Residency Requirements

Although obtaining residency in Montana may not be more difficult than in the other states already discussed above, there are additional requirements for a prospective applicant: one must obtain a domicile in the state, must title and register vehicles in the state, and must obtain a Montana driver's license within sixty days of relocation.¹⁶⁰ Like Texas, the only requirements for the registration and titling of a vehicle in Montana are an application, proof of insurance, title, and the necessary fees.¹⁶¹ Despite the added hurdles, one could reasonably assume that a patient could relocate to Montana in roughly the same one-month time frame as the other states outlined above.¹⁶²

157. Compare Section V.C.4 with Sections V.A.4 & V.B.4 (explaining the benefits and drawbacks of Vermont's homestead laws).

158. *Vermont Homestead Laws*, FINDLAW.COM, <http://statelaws.findlaw.com/vermont-law/vermont-homestead-laws.html> (last visited Oct. 28, 2015) [<https://perma.cc/LV57-M95M>].

159. See *id.*; see *supra* Section V.A.4.

160. See *New to Montana*, DMV.ORG, <http://www.dmv.org/mt-montana/new-to-montana.php> (last visited Jan. 4, 2016) [<https://perma.cc/96J2-JQQT>].

161. See *Car Registration in Montana*, DMV.ORG <http://www.dmv.org/mt-montana/car-registration.php> (last visited Jan. 4, 2016) [<https://perma.cc/Y685-G7KL>].

162. See *Vermont Homestead Laws*, *supra* note 158; see *New to Montana*, *supra* note 160.

2. Income Tax

Table 5: 2014-2015 Montana Income Tax Table¹⁶³

Tax Bracket (Single)	Marginal Tax Rate	Tax Bracket (Married)	Marginal Tax Rate
\$0+	1.00%	\$0+	1.00%
\$2,800+	2.00%	\$2,800+	2.00%
\$4,900+	3.00%	\$4,900+	3.00%
\$7,400+	4.00%	\$7,400+	4.00%
\$10,100+	5.00%	\$10,100+	5.00%
\$13,000+	6.00%	\$13,000+	6.00%
\$16,700+	6.90%	\$16,700	6.90%

A benefit to relocating to Montana is that it has a favorable state income tax scheme compared to Oregon and Vermont.¹⁶⁴ For individuals in the lower and extreme upper tax brackets, the tax rates are lower than the other states as well.¹⁶⁵ Although Texas does have an income tax, patients desiring to leave Texas to relocate to a PAD-viable state should keep Montana on the periphery for this benefit alone.¹⁶⁶

3. Estate Tax

Another significant advantage to moving to Montana is the state's discontinued use of an estate tax.¹⁶⁷ Beginning with the phase out initiated by the Economic Growth and Tax Reconciliation Act (EGTRRA) of 2001, in tandem with other state inheritance taxation acts, Montana no longer collects an estate tax or an inheritance tax as of 2005.¹⁶⁸ Montana is the only PAD-viable state that does not collect an estate tax, making it a substantial factor when determining where to relocate.¹⁶⁹

163. *Montana Income Tax Brackets*, TAX BRACKETS.ORG, <http://www.tax-brackets.org/montana-taxtable> (last visited Oct. 28, 2015) [https://perma.cc/A6FY-T985].

164. *Compare* Table 5, with Tables 2, 4 (showing the benefits of Montana's state income tax).

165. *Compare* Table 5, with Tables 2, 4 (explaining that it does not matter what section of the tax bracket a client falls in).

166. *Compare* Table 5, with Tables 2, 4 (explain the benefits of Montana).

167. *Estate and Inheritance Taxes*, MONTANA.GOV, http://revenue.mt.gov/home/individuals/estate-inheritance_taxes (last visited Jan. 4, 2016) [https://perma.cc/5S24-Z7SR].

168. *Id.*

169. *Id.*

4. Homestead Exemption

The favorable homestead protection and exemption in Montana is another significant advantage to relocation.¹⁷⁰ In Montana, a single homeowner may claim up to a \$250,000 exemption on the home, and married homeowners may double the homestead exemption to \$500,000.¹⁷¹ This exemption scheme is substantially more than any of the other PAD-viable states and any attorney that knows a client intends to purchase a domicile once relocating to a PAD-authorized state should give it serious consideration.¹⁷²

E. New Mexico

1. Residency Requirements

Pending the issuance of an opinion by the New Mexico Supreme Court in *Morris v. Brandenburg*, New Mexico could become the fifth state for clients to consider as a PAD destination.¹⁷³ Comparable to the other states discussed above, New Mexico has relatively quick and straightforward requirements for state residency.¹⁷⁴ According to the state's Department of Motor Vehicles website, the first step in obtaining residency is to immediately report to apply for a New Mexico driver's license or ID card.¹⁷⁵ The website also conspicuously states that an individual may need to pass the written and driving tests to acquire a New Mexico driver's license.¹⁷⁶ Moreover, to obtain state residency, a prospective resident must provide two forms of proof of residency that have the printed physical New Mexico address, such as a rental agreement, utility bill, insurance or bank statement, employment pay stub, or tax statement.¹⁷⁷ The last step for individuals seeking state residency is to register and title their vehicle with the state's Department of Motor Vehicles within thirty days of residency.¹⁷⁸ In comparison to the other four states analyzed, individuals can establish

170. See *The Montana Homestead Exemption*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/montana-bankruptcy-homestead-exemption.html> (last visited Jan. 4, 2016) [<https://perma.cc/6HYF-F54P>]; see also MONT. CODE ANN. § 70-32-101 (2016) (explaining what qualifies for exemptions on Montana's homestead laws).

171. See *Estate and Inheritance Taxes*, *supra* note 167.

172. See *id.*

173. See *supra* Section III.B.2.

174. See *New to New Mexico*, DMV.ORG, <http://www.dmv.org/nm-new-mexico/new-to-new-mexico.php> (last visited Jan. 18, 2016) [<https://perma.cc/CLP9-8KWL>].

175. See *id.*

176. See *id.*

177. *New Mexico Residency*, MVD N.M., <http://www.mvd.newmexico.gov/proof-of-new-mexico-residency.aspx> (last visited Jan. 18, 2016) [<https://perma.cc/S5AM-9ZJM>].

178. See *New to New Mexico*, *supra* note 174.

residency in New Mexico in roughly the same time frame of thirty days or less.¹⁷⁹

2. Income Tax

Table 6: 2015-2016 New Mexico Income Tax Table¹⁸⁰

Tax Bracket (Single)	Marginal Tax Rate	Tax Bracket (Married)	Marginal Tax Rate
\$0+	1.70%	\$0+	1.70%
\$5,500+	3.20%	\$8,000+	3.20%
\$11,000+	4.70%	\$16,000	4.70%
\$16,000+	4.90%	\$24,000	4.90%

A significant benefit of relocation to New Mexico is the state's favorable income tax scheme.¹⁸¹ Among the three other states with a state income tax, New Mexico has the lowest rates among the upper and lower tax brackets, with 1.7% at the lowest and 4.9% at the highest.¹⁸² This particular fact should make New Mexico a serious candidate for relocation if approved by the New Mexico Supreme Court—especially among Texas residents looking for a short distance to travel to satisfy their end-of-life plans.¹⁸³ With all analysis considered, New Mexico ranks second among all the five states in the most favorable income tax category.¹⁸⁴

3. Estate Tax

New Mexico, like Montana, is the only other PAD state to boast the lack of an estate tax.¹⁸⁵ The state phased out its estate tax beginning in January 2005; however, if an estate exceeds the \$5.43 million threshold for the federal estate tax, then the estate must still file a New Mexico estate tax return.¹⁸⁶ Despite not collecting an estate tax, a fiduciary income tax return is still

179. *See id.*; *see also* MVD N.M., *supra* note 177.

180. *New Mexico Income Tax Brackets*, TAX BRACKETS.ORG, <http://www.tax-brackets.org/new-mexicotaxtable> (last visited Jan. 18, 2016) [<https://perma.cc/H9PE-UQKM>].

181. *Id.*

182. *Id.*

183. *Id.*

184. *Compare supra* Section V.E.2, with Sections V.A.2, V.B.2, V.C.2, V.D.2 (showing the favorability of New Mexico tax laws).

185. *See Estate, Trust, and Fiduciary Income Tax*, N.M. TAXATION & REVENUE, <http://www.tax.newmexico.gov/Individuals/other-individual-taxes.aspx> (last visited Jan. 18, 2016) [<https://perma.cc/LM9Z-6CUD>].

186. *See id.*

required and is taxed subject to income tax at the personal income tax rates outlined in the previous section.¹⁸⁷ The absence of an estate tax should be taken seriously since only Montana can claim the same distinction; with the lowest income tax rates as well, New Mexico should be high on prospective transplants' list of PAD-authorized destinations in which to relocate.¹⁸⁸

4. Homestead Exemption

New Mexico, like the other four states, also offers a homestead exemption to protect residents' property from attachment or foreclosure.¹⁸⁹ Comparable to the other statutes, New Mexico's exemption law protects any dwelling or land up to the amount of \$60,000.¹⁹⁰ For jointly owned property, the amount of this exemption doubles for a total of \$120,000.¹⁹¹ This likely constitutes a disadvantageous aspect for relocation to New Mexico due to the factors analyzed in this section.¹⁹² New Mexico and Oregon are the only states that fail to provide over \$125,000 in homestead protection to its residents.¹⁹³ Clients considering a move to New Mexico should strongly consider whether they intend on purchasing property when they relocate; if so, the reduced homestead exemption appears to be the only disadvantage to moving to New Mexico to seek physician-assisted death.¹⁹⁴

187. *See id.*

188. *See supra* Section V.E.2; *see* N.M. TAXATION & REVENUE, *supra* note 185.

189. *See* N.M. STAT. ANN. § 42-10-9 (West 2015).

190. *See id.*

191. *See id.*

192. *See id.*

193. *See infra* Section V.F.

194. *See supra* Section V.E; *see* N.M. § 42-10-9.

F. A Direct Comparison Among PAD-Viable States

1. A Brief Comparative Overview

Table 7: A Direct Comparison Among PAD-Viable States¹⁹⁵

	Washington	Oregon	Vermont	Montana	New Mexico
Residency Within 1 Month	X	X	X	X	X
Lacks State Income Tax	X				
Lacks Estate Tax				X	X
Homestead Exemption Greater Than \$125K	X		X	X	

To aid in distilling and condensing the information discussed in the previous subsections, Table 6, above, gives a direct comparison of the four aforementioned factors.¹⁹⁶ Based on these limited factors, this table should assist in providing a simple visual indicating which state is a favorable relocation destination.¹⁹⁷ As indicated by the table, Washington and Montana should garner significant consideration—albeit based on contrasting rationales—as a destination for Texas residents to relocate if they seek PAD.¹⁹⁸ Washington State’s primary benefit is its lack of a state income tax, while Montana and New Mexico boast their lack of an estate tax.¹⁹⁹ The significance of these particular benefits will depend largely on the financial situation and estate planning goals of the particular client; however, this illustration does allow for a quick comparison of the factors previously discussed in this section.²⁰⁰

195. *See supra* Sections V.A–D.

196. *See supra* Sections V.A–D.

197. *See supra* Sections V.A–D.

198. *See supra* Sections V.A–D.

199. *See supra* Sections V.A–D.

200. *See supra* Sections V.A–D.

2. Cost of Living Comparison

The last aspect to be compared among PAD-viable states is the cost of living based on the major urban area of each state.²⁰¹ For the purposes of this illustration, Dallas, Texas, was used as the base city.²⁰² For a terminal patient from Dallas, Texas, with a total income of \$50,000, the individual would need approximately \$71,680 to maintain the current financial situation in Seattle, Washington.²⁰³ For the same client to relocate to Portland, Oregon, that individual would need to make \$66,598 to maintain status quo.²⁰⁴ To relocate to Burlington, Vermont, this figure is slightly reduced to \$63,900.²⁰⁵ Moving to Bozeman, Montana, changes the total to only \$53,216.²⁰⁶ Lastly, if the client chose to move the least distance to Albuquerque, New Mexico, the cost of living is \$49,689—the closest comparison of the sample.²⁰⁷ In all of these calculations, with the exception of New Mexico, the largest price difference was housing; however, groceries, utilities, and transportation were all marginally higher than Texas as well.²⁰⁸ These calculations illustrate the importance of considering how the cost of living will vary among the PAD-viable states, and Texas practitioners should weigh this information carefully when prospective clients wish to relocate to another state to fulfill an end-of-life plan.²⁰⁹

VI. DRAFTING A SIMPLE RELOCATION CLAUSE IN CLIENT'S ESTATE PLANNING DOCUMENTATION

Once a client and attorney decide on the best location for a client to relocate, how should a Texas attorney best communicate the client's wishes?²¹⁰ Based on conventional legal wisdom the most effective way to communicate a client's end-of-life wishes is to include them in the estate planning legal documentation such as a living will, advance directive, or medical power of attorney.²¹¹ Although the need for legal documentation will be rare in the case of relocation to a PAD-authorized state due to state competency requirements, Texas attorneys may have a unique situation arise

201. See *supra* Section V.F.1.

202. See *infra* Section V.F.2; see *Cost of Living Calculator*, CNN MONEY, <http://money.cnn.com/calculator/pf/cost-of-living/> (last visited Jan. 18, 2016) [<https://perma.cc/TC68-KNZA>].

203. CNN MONEY, *supra* note 202.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. See *infra* Part VI.

211. See *infra* Part VI; see *Death with Dignity in Connecticut*, CIPPARONE & ZACCARO, P.C., <http://www.truststateselderlawct.com/blog/death-dignity-connecticut> (last visited Jan. 4, 2016). [<https://perma.cc/G3JP-JVRX>].

in which drafting a client's wishes may be necessary.²¹² Any Texas practitioner that consults with a client seeking solace that the execution of the end-of-life plan will be done according to the client's wishes could incorporate language, specifically a clear and conspicuous clause, which will explicitly communicate the client's desire to relocate to a PAD-authorized state upon the client's diagnosis with a terminal illness.²¹³ However, the need for legal drafting will be rare because, the majority of the time, the client could act on the client's own behalf and move to a PAD-authorized state as long as the individual is competent and meets the other requirements of the particular state.²¹⁴ A simple relocation clause could include, but certainly is not limited to, the following example:

In the case that I become diagnosed with a terminal illness and remain mentally capable, I request the help of my attorney to relocate me immediately to [insert chosen state here] where physician-assisted death is authorized so that I may fulfill my end-of-life plan and end my life with dignity. I also consent to my attorney picking an appropriate state if necessary. I further request that any agent appointed under a financial or medical power of attorney act in furtherance of this request. I, of capable and sound mind, and with the consultation of my attorney, have considered all benefits and disadvantages of relocation and have decided that seeking physician-assisted death best satisfies my end-of-life plan. Lastly, this decision cannot be superseded or revoked without express revocation by subsequent medical directive or power of attorney.²¹⁵

More eloquent drafting, including detailed language, of this clause may further assure that this client's desires are satisfied without an individual who would benefit from preventing the relocation of the client raising a contest.²¹⁶ Further, because this certainly is a new area of legal importance in Texas—and looks to become increasingly more important as legislation and social morality evolves—practitioners should ready themselves for a growth of questioning regarding this type of end-of-life planning.²¹⁷ As this area of the law evolves, the need for relocation clauses in legal documentation may arise in unique circumstances to ensure a client's desires are achieved and to meet the client's objectives.²¹⁸

212. See *supra* Part III.

213. See CIPPARONE & ZACCARO, P.C., *supra* note 211.

214. See *supra* Part III; see CIPPARONE & ZACCARO, P.C., *supra* note 211.

215. See *supra* Part III; see CIPPARONE & ZACCARO, P.C., *supra* note 211.

216. See *supra* Part III; see CIPPARONE & ZACCARO, P.C., *supra* note 211.

217. See *supra* Parts I–VI.

218. See *supra* Part VI.

VII. CONCLUSION

Today, Texas residents have few choices when it comes to end-of-life planning, especially if one desires to seek physician-assisted death.²¹⁹ In the case of the fictitious patient in the introduction of this comment, she only has two extremely difficult options to choose from—fight the terminal disease as long as her body will allow or seek legal assistance from her estate planner to relocate her to a PAD-authorized state that affects her estate plan as little as possible.²²⁰ Indeed, this is a tough decision and equally difficult task for her attorney.²²¹ These complications are a direct result of the negative publicity and the divisive moral and social arguments against allowing patients the right to choose the manner in which they end their lives.²²² Until further evolution in the state of the law, patients are prohibited from seeking this type of treatment in Texas; therefore, this leaves patients only with the option of relocating to a state where they can fulfill their plan.²²³

Ostensibly, the future of this type of legislation is truly unpredictable.²²⁴ As the general population continues to add pressure on state legislators to legalize the right to seek end-of-life treatment for terminal illnesses, equal pressure on legal practitioners to draft executing documentation to relocate clients will diminish with time.²²⁵ This influx of publicity and clamor for PAD legalization, along with potential decriminalization in states like New Mexico, give hope that someday mentally capable terminal patients will have the liberty to end their lives with dignity if they so choose.²²⁶ Although, PAD certainly has its dissenters and arguable disadvantages morally, socially, and religiously; the tranquility, control, and liberty it provides a terminal patient is equivalent or greater to the criticism it faces.²²⁷

There is little dispute that the death with dignity movement has grown extensively over the last two decades—four states now permit PAD, while numerous others either have legislation awaiting executive signature or counsel awaiting judicial opinion.²²⁸ Reflecting on this significant legal transformation, and the potential for further evolution, Texas patients, clients, and practitioners alike will foreseeably have an easier path to navigate this hotly debated, divisive topic in the not-so-distant future.²²⁹

219. *See supra* Part I.

220. *See supra* Part I.

221. *See supra* Parts IV–V.

222. *See supra* Parts II–V.

223. *See supra* Parts I–V.

224. *See supra* Parts I–V.

225. *See supra* Parts II–VI.

226. *See supra* Parts II–III.

227. *See supra* Parts I–III.

228. *See supra* Parts II–III.

229. *See supra* Parts I–VII.