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Dear Jeannie:

I am writing in response to your letter of May 31, 2000, in which you asked me to discuss the legal context for documents that summarize a prior advance directive. That is, at times a patient, when asked pursuant to the federal Patient Self-Determination Act and the Maryland Health Care Decisions Act about any prior advance directive, will indicate that he or she has executed one but did not bring a copy. To respond to this situation, Western Maryland Health System is developing a form for documenting the patient's account of what is in the advance directive. This "interim summary" is evidently intended to help guide care prior to the time that a copy of the actual advance directive is made available.

Although you invited me to review and comment on a draft of the "interim summary" document, I believe it preferable for me to refrain from doing so. I do not want to be perceived as playing a role in the review of hospital policy and procedures that can only appropriately be played by hospital counsel. In an effort to be of some assistance to you, however, I offer the following more general comments:

✦ Care should be taken not to allow either a copy of an advance directive or an "interim summary" of an advance directive's contents to control care planning *when the patient has decision-making capacity*. A patient with an advance directive, like every other patient, is presumed to have capacity unless and until a clinical judgment is made to the contrary. The Health Care Decisions Act reflects this point: "Unless otherwise provided in the document, an advance directive shall become effective when the [patient's] attending

physician and a second physician certify in writing that the patient is incapable of making an informed decision." §5-602(e)(1) of the Health-General Article. As discussed in my letter to you of April 25, 2000, the capacity to give (or refuse) informed consent means that a patient may directly decide concrete issues about end-of-life care) for example, code status during the current hospital stay. Under these circumstances, an advance directive is beside the point.[1] Regardless of what it or the interim summary says, the patient's informed consent controls.

✦ A patient who has an advance directive and retains decision-making capacity is free to revoke or change the advance directive at any time. One means of doing so is "by the execution of a subsequent directive." §5-604. When a patient reports a prior advance directive but does not provide a copy, a hospital must decide whether its policy is to facilitate the creation of a new advance directive or whether, as Western Maryland Health System has apparently decided, it will seek to capture information about the old one. If, for example, a patient were presented with "the interim summary" document and signed it with two witnesses, the new document would itself become the only legally effective advance directive and would therefore establish the basis for care planning after the patient lost capacity. Likewise, if the patient had a witnessed discussion about care preferences with his or her attending physician, that oral advance directive, if properly documented in the patient's chart, would supplant any prior directive.

Reflecting an apparent policy decision to rely on already executed advance directives, however, the "interim summary" as currently drafted is not an advance directive of either kind. Despite some language echoing a written advance directive[2], it is unwitnessed and therefore does not meet the Act's requirements for either a written or oral advance directive. §5-602(c) and (d). Further, the document explicitly states that is intended "to provide

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[1]A rare exception occurs when a patient, although retaining decision-making capacity, chooses to vest decision-making authority in a health care agent immediately.

[2]For example, the patient asked to identify one of the following choices: "I direct that my life not be extended by life-sustaining procedures, including the administration of nutrition and hydration artificially"; or: "I direct that my life not be extended by life-sustaining procedures, except that, if I am unable to take food by mouth, I wish to be receive nutrition and hydration artificially"; or: "I direct that, no matter what my condition, I be given all available medical treatment in accordance with accepted health care standards." This phrasing is drawn from the optional form in §5-603 of the Act.

guidance to hospital personnel in the absence of my advance directive. This summary does not replace my advance directive."

Accordingly, the hospital should adopt a procedure to ensure that, when a copy of the advance directive is obtained, it replaces the "interim summary" in the chart. No one should rely on the summary once the actual advance directive is in hand. Any discrepancy between the summary and the advance directive is to be resolved by adhering to the latter.

✦ What, then, is the effect of the "interim summary"? First, it can serve as an important tool for a surrogate decision maker if, prior to getting a copy of the patient's advance directive, the surrogate is compelled by circumstances to make a decision. Because the surrogate is, if possible, to base any decision "on the wishes of the patient" (§5-605(c)(1)), and because the summary will be a signed statement of those wishes, the surrogate should make decisions that are consistent with the summary. Second, the hospital is free to take account of the interim summary in formulating a proposed care plan.

I hope that this letter of advice, although not an official opinion of the Attorney General, is responsive to your inquiry. Please let me know if I may be of further assistance.

Very truly yours,

Jack Schwartz
Assistant Attorney General
Director, Health Policy Development