June 9, 2005

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Dear Anita:

In a prior letter to you dated January 17, 2003, I summarized the relationship between a patient's living will or similar advance directive containing treatment instructions ("instructional advance directive") and the authority of a surrogate. Now, you have asked about the relationship between a patient's instructional advance directive and a durable power of attorney or similar advance directive appointing a health care agent. The specific issues are these: (1) What effect, if any, do a patient's subsequent oral statements have on the health care agent's duty to carry out an instructional advance directive? (2) If an instructional advance directive declines the use of life-sustaining procedures, may a health care agent nevertheless authorize such procedures for palliative purposes?

I

Instructions in an Advance Directive, Subsequent Patient Comments

The primary task of the health care agent is to make decisions that are based on "the wishes of the patient," if those can be determined. §§ 5-602(h) and 5-605(c).[1] In trying to determine the patient's wishes, the health care agent is to consider the patient's expressed preferences, values, and experience. § 5-605(c)(2). If the patient had made an instructional advance directive, that document would express preferences regarding the provision of, or the withholding or withdraw of life-sustaining treatments, because that is the very purpose of such an advance directive. Consequently, the job of the health care agent is to faithfully carry out an instructional advance directive. 79 *Opinions of the Attorney General* 218, 240 (1994). A health care agent does not have the authority to disregard an instructional advance directive, anymore than the agent may disregard instructions or limitations on the agent's authority contained in the advance directive appointing the agent.

[1] All statutory references are to the Health-General Article, Maryland Code.

The Health Care Decisions Act allows for the possibility of greater health care agent discretion. The provision that assigns decision making standards for an agent, § 5-602(h), begins with the following phrase: "Unless otherwise provided in the patient's advance directive ...." This means that the patient is free to write his or her own standards for the agent's decision making, which could grant discretion to depart from an instructional advance directive. In addition, the instructional advance directive itself might be labeled as guidance only, not binding. The rest of this discussion will assume, however, that the advance directive contains no language affording the agent latitude to make decisions that differ from those in the instructional directive.

Occasionally, a health care agent who seeks to depart from a clearly applicable instructional directive will contend that the instruction has been overtaken by subsequent comments from the patient: "Yes, I know that's what the living will says, but just a few months ago my mother told me something different."

While in general a health care agent may take account of the patient's prior remarks in determining the patient's wishes, § 5-605(c)(2), nevertheless an agent may not rely on such comments to act in a manner that is inconsistent with a clearly applicable instruction in an advance directive. If it were otherwise, then the health care agent would effectively have the power to revoke the patient's advance directive on the basis of alleged oral statements. But even the patient, to revoke an advance directive orally, may do so only "by an oral statement *to a health care practitioner,*" the substance of which is to be documented in the patient's medical record. § 5-604(b). A health care agent may not in effect revoke an advance directive through a hearsay account of oral statements that, even if known to have been made by the patient, would not suffice as an oral revocation.

II

"Life-Sustaining Procedures" for Palliative Purposes

An instructional advance directive, as exemplified by the optional forms in § 5-603, addresses the use of life-sustaining procedures after a future medical misfortune. For example, the first decision point in both the statutory living will and Part B of the statutory advance directive document addresses the use of life-sustaining procedures "if my death from a terminal condition is imminent and even if life-sustaining procedures are used there is no reasonable expectation of my recovery." A common decision is that, under these circumstances, "my life not be extended by life-sustaining procedures."[2]

[2] Of course, the decision might be to request all medically appropriate interventions to extend life. This type of instruction does not raise the issue addressed in the text.

If an instructional advance directive rejects the use of life-sustaining procedures in the event of one or more of the specified conditions, a health care agent nevertheless retains discretion to agree to an intervention that uses the technology of a life-sustaining treatment, but not for the purpose of extending life. A good example is palliative surgery to reduce the pain of an encroaching tumor. Assuming that the surgery involves general anesthesia and that certain CPR techniques are an ancillary aspect of the anesthesia procedure, the health care agent may consent to a temporary suspension of the patient's DNR order during the procedure. This action would not be inconsistent with the instructional advance directive, because the limited purpose of CPR in this context is in aid of the palliative surgery, not as an effort (contrary to the directive) to delay death in the face of the underlying disease process.

I hope that this letter of advice, though not to be cited as opinion of the Attorney General, is fully 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