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November 1, 2007

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Dear Meg:

You asked me to address the issue of incapacity determinations as a prerequisite for the rendering of emergency treatment without consent under §5-607 of the Health-General Article ("HG"), Maryland Code. This provision describes the patient as "incapable of making an informed decision" about the treatment. The question is, who is authorized to decide that a patient is incapable: the attending physician alone, or the attending physician and a second physician? In my view, the determination of the attending physician alone is legally sufficient for emergency treatment under HG §5-607.

## I

## Incapacity and Emergency Treatment

HG §5-607 authorizes a health care provider to treat a patient without consent if all of the following four circumstances exist:

- The patient is "incapable of making an informed decision."
- "The treatment is of an emergency medical nature."

- Another person who has legal authority to give the consent "is not immediately available."

- The attending physician determines that the patient faces "a substantial risk of death or immediate and serious harm" and, to a reasonable degree of medical certainty, "the life or health of the patient would be affected adversely by delaying treatment to obtain consent."

The term "incapable of making an informed decision" is defined in HG §5-601(*l*). The definition identifies the elements of incapacity[1] but specifies neither a process for capacity assessment nor the number (or professional designation) of those who are to make the assessment. This latter point is addressed in HG §5-606(a)(1): "Prior to providing, withholding or withdrawing treatment for which authorization has been obtained or will be sought under this subtitle, the attending physician and a second physician, one of whom shall have examined the patient within 2 hours before making the certification, shall certify in writing that the patient is incapable of making an informed decision regarding the treatment. The certification shall be based on a personal examination of the patient." The requirement that a second physician join in the certification is excused if the patient "is unconscious, or unable to communicate by any means." HG §5-607(a)(2).

Your question posits that a patient arrives at an emergency department staffed by only a single physician, a common practice. The patient is not unconscious and is able to communicate, but the physician assesses the patient as unable to make an informed decision about the proposed treatment. The physician also judges that the other elements for valid emergency treatment without consent are present. The issue is whether treatment must be delayed until a second physician can be found to examine the patient and confirm the patient's incapacity.

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[1] A patient is "incapable of making an informed decision" if the patient "is unable to understand the nature, extent, or probable consequences of the proposed treatment or course of treatment, is unable to make a rational evaluation of the burdens, risks, and benefits of the treatment or course of treatment, or is unable to communicate a decision."

## II

## Analysis

One could the read the incapacity determination language in HG §5-606(a) as applicable to emergency treatment under HG §5-607. Under this reading, the emergency department physician is seeking to provide treatment "for which authorization has been obtained or will be sought under this subtitle." Therefore, the two-physician certification of incapacity must be done "prior to providing" this treatment.

In my view, however, this reading is erroneous. It does not take account of the common law and statutory context for the provision of emergency treatment without consent.

### *A. Common Law*

Long before enactment of the Health Care Decisions Act, Maryland common law recognized the "emergency doctrine" under which patient consent is assumed. *See Sard v. Hardy*, 281 Md. 432, 439 (1977) (the patient's consent is required when "treating a mentally competent adult *under non-emergency circumstances*") (emphasis added). As described in a 1961 law review article cited approvingly by the Court of Appeals in *Sard v. Hardy*, "if the circumstances of a given case present a danger to the life, limb or health of a patient and the surgeon is unable to obtain the consent of the patient before operating, either because he is unconscious, intoxicated, insane, or otherwise legally incapable of consenting, consent will be implied." Robert Powell, *Consent to Operative Procedures,* 21 Md. L. Rev. 189, 199 (1961).

Under the common law doctrine, the incapacity of the patient was to be decided by the physician assessing how dire the situation was. English cases make this point clear. *See e.g., In re F. (Mental Patient: Sterilization),* 2 A.C. 1 (House of Lords 1990). *See generally* John Vinen, *Epilepsy, Ethics, Consent and Emergency Care*, 23 Med. & L. 593 (2004). American cases have not departed from this reliance on the attending physician. *See, e.g. Canterbury v. Spence*, 464 F.2d 772, 788-89 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). *See generally* Restatement (Second) Torts §892D (1979).

### *B. Statutes*

The first statutory codification of the emergency doctrine occurred in Chapter 357 of the Laws of Maryland 1980. With only nonsubstantive changes in wording, this provision

has been carried forward to what is now HG §5-607. Codified at the time in former Article 43, §135C, this provision authorized a physician "treating a disabled person" to proceed with emergency treatment if the delay would pose a substantial risk of death or serious harm.[2] The attending physician alone was authorized to make the required judgments, including whether the patient was a "disabled person." In other words, the physician's authority under common law was preserved. The Court of Appeals has described HG §5-607 as "accord[ing] with the common law doctrine of informed consent, which is suspended in an emergency situation." *Wright v. Johns Hopkins Health Syst. Corp.*, 353 Md. 568, 595 (1999). *See* HG §5-616(a).[3]

The two-physician certification requirement for incapacity came into the Health Care Decisions Act from a quite different direction. It was first enacted in 1984 as HG §20-107(e), as a basis for substituted consent by a family member for certain treatments. Chapters 540 and 591, Laws of Maryland 1984. There is no indication whatever that the two-physician requirement was meant as a new element of emergency treatment decision making, and of course the 1984 legislation did not amend the 1980 codification of the common law emergency doctrine.

The fact that the two separate provisions were added (with very substantial amendments to the substantive consent mechanism) to the Health Care Decisions Act of 1993 does not mean that the General Assembly extended the two-physician requirement into a domain that it had never reached previously. In my view, such a departure from the common law doctrine, as codified in HG §5-607, would require a far more explicit legislative pronouncement. "In fact, unless the legislature makes it expressly clear that its purpose is to change the common law, it is presumed that no such change was intended." *Azarian v. Witte*, 140 Md. App. 70, 95, *aff'd* 369 Md. 518 (2001).

Reading the statute as requiring two-physician certification of incapacity before the rendering of emergency treatment would result in problems that the Legislature did not

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[2] A "disabled person" was defined as "an individual who lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person as to health care because of any physical or mental disability, senility, other mental weakness, disease, habitual drunkenness, or addiction to drugs." Former Article 43, §135C(a). This term and its definition remain in the statute for guardianship of the person. *See* §§ 13-101(e) and 13-705(b) of the Estates and Trusts Article.

[3] The provisions of the Health Care Decisions Act "are cumulative ... and do not impair any existing rights or responsibilities which a health care provider ... may have in regard to the provision ... of life-sustaining procedures under the common law or statutes of the State."

intend to cause. As you point out, many emergency departments are staffed with but a single physician. Even assuming that a second, on-call physician could be summoned, in some cases this would put the attending physician to the choice of delaying necessary treatment or forfeiting the immunity that is provided under HG §5-609(a)(2).[4] The Act need not and should not be construed to result in this dilemma.

## III

## Conclusion

For all of these reasons, I advise that a certification of incapacity by two physicians under HG §5-606(a) is not required for purposes of emergency treatment without consent under HG §5-607. I hope that this letter of advice, although not to be cited as an opinion of the Attorney General, is fully responsive to your inquiry.

Very truly yours,

JS

Jack Schwartz
Assistant Attorney General
Director, Health Policy Development

[4] "A health care provider providing, withholding or withdrawing treatment under authorization obtained under this subtitle does not incur liability arising out of any claim to the extent the claim is based on lack of consent or authorization of the action."