

May 3, 2002

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Dear Ken:

I am writing in response to your letter of April 19, 2002, in which you request my views on the relationship between the definition of “end-stage condition” in the Health Care Decisions Act (HCDA) and the provision of feeding tubes or other life-sustaining treatments. Your letter presents the case of surveyors concluding that medical orders for tube feeding were inconsistent with the certification that a nursing home resident was in an “end-stage condition.” In the surveyors’ view, as you recount it, the certification implied that tube feeding was “medically ineffective” and, hence, should not have been ordered. Please note that, although this letter is intended to respond to your question with general guidance, I have not reviewed the specific findings of the surveyors or the facts underlying those findings.

In § 5-601(i) of the Health-General Article, the HCDA defines “end-stage condition” as a condition caused by injury, disease, or illness with the following characteristics:

- The condition is “advanced, progressive, [and] irreversible.”
- The condition has caused “severe and permanent deterioration,” as evidenced by both incompetency and “complete physical dependency.” The latter means that the patient is generally unable to perform activities of daily living independently. 78 *Opinions of the Attorney General* 208, 213 (1993).

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- To a reasonable degree of medical certainty, “treatment of the irreversible condition would be medically ineffective.”

The term “medically ineffective treatment” is defined in § 5-601(n) as a medical procedure that will neither “prevent or reduce the deterioration of the health of an individual” nor, in the case of a patient who is in the dying process, “prevent the impending death” of the patient. 79 *Opinions of the Attorney General* 218, 234 (1994).

Thus, integral to the certification of an “end-stage condition” is the conclusion of the attending and a consulting physician that no medical intervention would reverse or retard the underlying progressive condition. If an effective treatment for the underlying condition is available, then the condition would not be “irreversible.” Likewise, such a treatment would not be “medically ineffective.”

It is by no means true, however, that *all* medical treatment of a patient in an end-stage condition is perforce “medically ineffective.” A treatment might be effective for a symptom or a secondary condition even if no treatment exists for the underlying condition. To take an obvious example, pain management of a patient in an end-stage condition is not medically ineffective; indeed, it is legally required. See House Bill 423 of 2002 (to be effective October 1, 2002); letter of advice from Assistant Attorney General Jack Schwartz to Becky Sutton (March 5, 1999). Another example would be a patient with advanced Alzheimer’s disease, certified as a result of the disease to be in an end-stage condition, who develops pneumonia. Depending on the medical facts, the pneumonia might be treatable with antibiotics. If so, antibiotic therapy is not medically ineffective, despite the lack of medically effective treatment for the Alzheimer’s disease. (Whether antibiotic therapy *should* be used is another matter; the answer to that question would depend on what the patient wrote in an advance directive, if any, or the decision of a health care agent or surrogate.)

This analysis applies to tube feeding. As the Attorney General explained in a recent opinion, the HCDA allows physicians to certify that tube feeding is medically ineffective for patients with advanced dementia. 85 *Opinions of the Attorney General* ___ [Op. No. 00-029 (November 16, 2000)]. The opinion reviewed the medical literature suggesting that tube feeding did not ameliorate the deterioration caused by the underlying disease process, nor did it prevent impending death. However, the opinion never suggested that tube feeding is necessarily medically ineffective for all patients, under all circumstances, in an end-stage condition. Perhaps tube feeding on a temporary basis, for example, would be a medically effective response to a transient problem, whereas tube feeding in response to the swallowing difficulties of end-stage dementia would be medically ineffective. In our view, the decision

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whether tube feeding or another intervention is medically ineffective for a patient in an end-stage condition depends on the specific clinical circumstances.

To summarize, the certification of end-stage condition necessarily implies that all interventions are ineffective with respect to the inevitable outcome of the underlying condition. Yet, whether tube feeding or another intervention might be effective as to a medical problem apart from the underlying condition itself is a medical judgment call that is not preordained by the certification of end-stage condition.

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

Very truly yours,

Jack Schwartz
Assistant Attorney General
Director, Health Policy Development