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Harold B. Bob, M.D.
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Dear Dr. Bob:

You have requested my advice concerning the interplay between, on the one hand, the limitation in the Health Care Decisions Act on surrogate decisions to withhold or withdraw life-sustaining medical treatments and, on the other hand, the opportunity for a surrogate to express preferences about life-sustaining medical treatments on the Patient's Plan of Care form.

I

Background

Your question posits the following facts: A newly admitted nursing home resident has progressive dementia, lacks decision-making capacity, and did not appoint a health care agent. Because the patient remains capable of minimal ambulation and self-feeding, the attending physician has not certified her to be in an end-stage condition.[1] Given the course of the disease, however, in the near future the patient likely will no longer be able to walk or eat unassisted and so, at that time, will meet the criteria for end-stage condition. Likewise

[1] If a patient is able to perform one or more activities of daily living independently, the Act's criteria for end-stage condition are not met. Health-General Article § 5-601(i)(1) (end-stage condition requires "complete physical dependency"). *See* 78 *Opinions of the Attorney General* 208 (1993), available at: http://www.oag.state.md.us/Opinions/1993/78oag208.pdf

at that future time, her nutritional status probably could be sustained only through the use of a feeding tube.[2] The patient's surrogate wishes to fill out the Patient's Plan of Care (PPOC) form. Although there is no current issue about the use of a feeding tube, the surrogate is adamant that "mother would not want a tube" and insists on so indicating in Part H of the form.

You ask whether, under these circumstances, the surrogate may state such a decision on the PPOC form or, conversely, must be told that this entry is invalid. If the surrogate is permitted to make this decision on the PPOC form, your inquiry continues, may the attending physician enter an order, in furtherance of the PPOC decision, that a feeding tube not be inserted should the patient stop eating?

II

Legal Analysis

Both the surrogate's use of the PPOC form and the physician's order must be consistent with Health-General § 5-606(b)(1), which in relevant part provides as follows: "A health care provider may not withhold or withdraw life-sustaining procedures ... on the basis of the authorization of a surrogate unless ... [the] attending physician and a second physician have certified that the patient is in a terminal condition or has an end-stage condition."[3] Compliance with § 5-606(b)(1) is to be measured as of the time when a life-sustaining procedure is withheld or withdrawn. At that time, the patient should have been certified to be in a terminal or end-stage condition. *Planning* the withholding or withdrawal of a life-sustaining procedure, as distinct from actually doing so, may be done in advance of the certification.

As in the case prompting your question, it would not be unusual for a surrogate to be filling out a PPOC form for a patient who has not yet been certified to be in a terminal or end-stage condition. One use of the form is to address those end-of life treatment issues that

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[2] A patient could be in end-stage condition and so unable to self-feed and yet not need a feeding tube, if assistance in eating would yield satisfactory results. Indeed, the Act requires reasonable efforts to assist with eating and drinking. § 5-611(d).

[3] Tube feeding is a "life-sustaining procedure." § 5-601(m)(2). Another possibility, irrelevant to your question and not further discussed in this letter, is that a patient is certified to be in a persistent vegetative state. § 5-606(b)(2).

are foreseeable for a patient who, as summarized in a chart in our Office's *Explanatory Guide*, is "not end-of-life, but is so unstable or acutely ill as to require consideration of life-sustaining treatment issues."[4] Use of the PPOC at this point in the patient's decline might promote more thoughtful decision making than is possible in the midst of a later crisis. Nevertheless, a surrogate who indicates on the PPOC form a decision to forgo a life-sustaining procedure may not, simply by doing so, accelerate the implementation of this preference. It cannot be given effect until *after* certification of terminal or end-stage condition.[5] Explaining this to the surrogate ought not to be too difficult, given that the patient is still eating, so there is no current issue about use of a feeding tube, only an anticipated one.

Moreover, if a patient was not in terminal or end-stage condition when the PPOC form was filled out and then deteriorates so that certification has become appropriate, this is a significant change in the patient's condition calling for a review of (though not necessarily a change in) the PPOC form. If the preference was against the use of a life-sustaining procedure prior to certification, it is highly probable that the surrogate's preference will be the same after certification. Still, a review of the PPOC form will be necessary.

A surrogate's decision on the PPOC form is not self-effectuating. Hence, I turn next to the issue of the physician's order. Usually, a physician's order reflecting a palliative care approach, with explicit or implicit limitations on the use of life-sustaining procedures, would be entered at the end of a sequence of events: the patient's condition deteriorates, clinical observations confirm that the Act's criteria for terminal or end-stage condition are satisfied, the condition is certified by the attending and a consulting physician, the surrogate decides to forgo life-sustaining procedures, and the attending physician enters appropriate medical orders. This sequence best comports with the Act's definitions of end-stage and terminal conditions, which imply that the physicians' certification of condition is made against a background of already observed, rather than predicted, clinical phenomena – for example, that the condition deemed end-stage "has caused ... complete physical dependency." § 5-601(i)(1).

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[4] *Explanatory Guide for Health Care Professionals*, p. 4 (August 2005), available at: http://www.oag.state.md.us/Healthpol/PPOC_explanatory_professionals_final.pdf

[5] As Attorney General Curran pointed out immediately after the PPOC legislation passed, the PPOC form is intended to complement, not to supplant, the Act's decision-making processes. Bill Review Letter of April 29, 2004, available at: http://www.oag.state.md.us/Healthpol/SB352HB556ltr.pdf. Hence, a surrogate has no new authority by virtue of the opportunity to complete a PPOC form. See letter to Herbert H. Hubbard (October 25, 2005), available at: http://www.oag.state.md.us/Healthpol/Hubbard%20Advice%20Letter.pdf

One exception to this usual sequence, discussed in a prior Attorney General's opinion, involves a DNR order.[6] If a patient has a disease process that has not yet reached the point of a terminal or end-stage condition, but, to a reasonable degree of medical certainty, the patient's experiencing a cardiac arrest would signify that the patient was then in a terminal or end-stage condition, and a surrogate does not want CPR to be attempted, certification of the terminal or end-stage condition (as of the time of arrest) and entry of a DNR order may be done now. In fact, it must be done now, if it is to be done at all, there being no possibility of awaiting the arrest, certifying the condition that has just then manifested itself, and writing the DNR order. This approach, though exceptional, is consistent with the Act because, at the time that the life-sustaining procedure (attempted CPR) is withheld, the patient "is in" a certified condition, as required by § 5-606(b)(1).

I think it is a matter of medical judgment, not legal interpretation, whether any situation other than code status might similarly necessitate anticipatory certification as the only way to preserve the surrogate's right to make a decision about the treatment. But this approach should be seen as exceptional, and I doubt that it could apply to the question of tube feeding. I am not ignoring the possibility that the loss of the ability to eat, once it occurs, might mark the beginning of a terminal or end-stage condition, just as a cardiac arrest might. The difference, of course, is that if a patient has a cardiac arrest, the decision of what to do in response can only have been made in advance, for there is no time to consider the matter once the event occurs. By contrast, once a patient stops eating, there *is* at least a little time to decide what to do in response. There is also time, once the clinical situation has occurred, for the certification and the entry of appropriate orders to carry out the surrogate's decision.

III

Conclusion

In my view, for a patient in the kind of precarious state that you describe, a surrogate may properly use the PPOC form to summarize preferences about reasonably foreseeable end-of-life treatment issues, including a preference that a feeding tube not be used. This is so even if the patient has not yet been certified to be in a terminal or end-stage condition. However, a physician's order that no feeding tube be used should await the surrogate's

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[6] This issue is discussed in 79 *Opinions of the Attorney General* 218 (1994), available at: http://www.oag.state.md.us/Opinions/1994/79oag218.pdf

confirmation of this decision *after* the patient's condition has declined to the point that a terminal or end-stage condition has been certified.

I hope that this letter of advice, although not an 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