

May 28, 2002

The Honorable J. Anita Stup
Maryland House of Delegates
587 Pumphouse Road
Frederick, Maryland 21703

Dear Delegate Stup:

I am writing in response to your letter of May 13, 2002, concerning the obligation of a health care facility to honor advance directives. Your question was prompted by a posted notice in an ambulatory surgical center to the effect that the facility would not adhere to instructions in an advance directive to limit the use of life-sustaining procedures.

I surely agree with you that, as a general matter, the Health Care Decisions Act assumes and intends that health care providers will act in a way consistent with the instructions in an individual's advance directive, once the individual is certified to be in one of the conditions that is covered by an advance directive. In fact, the Office of Health Care Quality in the Department of Health and Mental Hygiene recently imposed a \$10,000 civil penalty on a nursing home that knowingly performed an intervention contrary to a resident's advance directive. In addition, the Court of Appeals has intimated that a health care facility might be liable for negligence if it performed an intervention contrary to a legally effective advance directive. *Wright v. Johns Hopkins Health Systems Corp.*, 353 Md. 568, 585-86 (1999). That same case held, however, that no liability attached if the medical conditions specified in the advance directive were not yet certified as being present.

When the Health Care Decisions Act was debated, some advocates argued that it should contain a “conscience clause,” authorizing health care providers to decline to follow instructions in an advance directive that might conflict with their personal or institutional beliefs. As enacted, the Act recognizes that a health care provider may decline to comply with instructions about health care. If it does, the provider’s primary obligation is to so inform the patient, health care agent, or surrogate. For those already receiving care at the facility, like a hospital in-patient, the facility must also notify the decision maker that the person may request a transfer to another facility and that the provider will make every reasonable effort to assist in the transfer. §5-613(a) of the Health-General Article.

This same provision bars a provider from imposing care over the objection of the patient or the patient’s authorized proxy. §5-613(b). What it does not do, however, is bar a provider from conditioning access to the facility on a patient’s (or proxy’s) agreement to accept certain care.

In the case of an ambulatory surgical center, presumably the overwhelming majority of its patients are *not* in a terminal or end-stage condition, which are the conditions that usually trigger the actual implementation of an advance directive. Therefore, even if some patients who use the center have advance directives, unless they have been certified to be in one of these conditions, the appropriate response to a cardiac arrest would be attempted resuscitation. Given the characteristics of its patient population, the center might decide to train its staff uniformly to attempt resuscitation and not carve out an exception for the relatively few patients who not only have advance directives but also have been certified to be in a terminal or end-stage condition.

Thus, I do not think it violates the Health Care Decisions Act for an ambulatory surgical center to notify patients that, as a matter of its facility policy, it declines to implement care-limiting instructions in an advance directive. This information should be communicated in a way that effectively notifies a patient *before* he or she agrees to use the facility’s services. The facility’s policy could be material to a patient’s choice whether to use that facility and therefore must be communicated in a timely and effective manner. I cannot comment, however, on whether the particular facility’s practice of posting the notice of its policy is consistent with its informed consent obligations or accreditation requirements.

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May 28, 2002

Page 3

In summary, as a matter of both law and ethics, health care providers generally are expected to provide care that conforms to the priorities and wishes of the patient. Nonetheless, a provider does have some latitude under the Health Care Decisions Act to decline to follow patient instructions. I hope that this information is helpful to you.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC/cdo