

J. JOSEPH CURRAN, JR.
Attorney General
Jschwartz@oag.state.md.us

E-MAIL

(410) 576-7003

TELECOPIER NO.



STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

CARMEN M. SHEPARD
DONNA HILL STATON
Deputy Attorneys General

(410) 576-6327

WRITER'S DIRECT DIAL NO.

February 10, 2000

Dr. Thomas E. Finucane
Division of Geriatric Medicine and Gerontology
Johns Hopkins Geriatric Center
5505 Bayview Circle
Baltimore, Maryland 21224

Dear Tom:

Your presentation yesterday has prompted me to attempt a tabulation of physicians' risk of legal trouble related to the entry of a DNAR order. As we discussed, some physicians believe that entry of a DNAR order under circumstances not covered by the Health Care Decisions Act is a forbidden act that can lead directly to civil liability or a State investigation. That view incorrectly equates loss of immunity with liability and ignores the actual grounds on which the State might act against a physician. I would describe the risk situation as follows:

Category	Action	Risk and nature of liability
Immunity	Enters DNAR order on the basis of a provision in the HCDA and after appropriate certification.	No risk. Any case gets dismissed because of HCDA immunity.
No liability	Enters DNAR order to implement patient's advance directive or family request but cannot or does not do HCDA certification.	Low risk. Potential plaintiff (e.g., late-arriving relative) would probably lose malpractice case; unlikely to prove that action fell below prevailing standard of care and harmed patient.

February 10, 2000

Page 2

Malpractice liability	Enters DNAR order despite advance directive or family request for CPR, when CPR is not certified as medically ineffective.	High risk. Plaintiff likely wins. Disciplinary action unlikely if this is an isolated occurrence.
Disciplinary action	Shows a pattern of negligence re entry of DNAR orders that amounts to incompetence or unprofessional conduct.	Very high risk. Possible reprimand, suspension, loss of license. No criminal sanctions.

While I acknowledge that this table lacks even a pretense of scientific precision (and, as always, reliance on my advice must be hedged against the possibility that the courts might construe the law differently), I hope that it is helpful in clarifying the legal background.

Very truly yours,



Jack Schwartz
Assistant Attorney General
Director, Health Policy Development