



Advance Directives and Durable Do Not Resuscitate Orders — 2010 Proposed Amendments

VIRGINIA HEALTHCARE DECISIONS ACT

Last year, the General Assembly made significant revisions to the Virginia Health Care Decisions Act (Va. Code § 54.1-2982 *et seq.*) governing Advance Directives and Durable Do Not Resuscitate Orders (DDNRs) that went into effect July 1, 2009. Now that the laws have been in operation for several months, providers have voiced concern or confusion over several of the new provisions. To address these issues, the Supreme Court of Virginia's Commission on Mental Health Law Reform Advance Directives Task Force has proposed several new amendments to the Health Care Decisions Act.^{FN} Some of the more substantive changes are highlighted below:

- ◆ **Existing Law:** Requires an "ethics committee" to review certain decisions made by the facility, including the provision of treatment over a patient's protest.

Proposed Amendment: To more accurately reflect the function of the committee, the Task Force has renamed the committee the "healthcare decisions review committee" and has prescribed specific compositional requirements for the committee (i.e. at least five individuals, including at least one physician, one licensed

professional nurse, and one individual responsible for social services at the facility; at least one of the committee members must have experience in clinical ethics; and at least two of the committee members must be independent – that is, not have an employment or contractual relationship with the facility). If the facility does not have a healthcare decisions review committee, two physicians not currently involved in the care of the patient may act in place of a healthcare decisions review committee.

- ◆ **Existing Law:** Allows treatment over the protest of an incapacitated person if certain criteria are satisfied.

Proposed Amendment: To eliminate provider confusion over the "treatment over protest" provision, the Task Force has revised the language to clarify that:

- a person may include language in an advance directive to allow future treatment over their protest provided his physician (or psychologist) certifies his mental capacity at the time of execution; and
- ii) treatment may be provided over the protest of

^{FN} Senate Bill No. 275 (Whipple), offered January 13, 2010, incorporates the Task Force's recommended changes.



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an incapacitated person (even in the absence of an advance directive) when the patient's agent or authorized decision-maker consents to such treatment based on the patient's basic values and best interests, and after the proposed treatment is approved as "ethically acceptable" by the facility's health care decisions review committee or two independent physicians.

- ◆ **Existing Law:** Provides that an advance directive cannot trump the law

Proposed Amendment: Further clarifies that an advance directive cannot override involuntary treatment while in the hospital, including emergency treatment.

- ◆ **Existing Law:** Although the Health Care Decisions Act has always required a two-physician (or one physician and one psychologist) certification that a patient lacks decision making capacity, the 2009 legislation required that the second examiner be "independent" of the patient's treatment team. After enactment of this law, many providers raised serious practical issues related to the two-examiner requirement pointing out that they did not have sufficient physician and/or psychologist resources to comply with it and that a second opinion is unnecessary to confirm decisional incapacity in the case of a patient who is in a coma or who is grossly impaired due to a stroke.

Proposed Amendment: Omits the second examiner requirement when the patient is unconscious or suffering from a profound impairment of consciousness; and broadens the class of professionals who are qualified to

provide the second capacity determination to include nurse practitioners and clinical nurse specialists.

- ◆ **Existing law:** In Virginia, only spouses and blood relatives are included in the statutory list of persons authorized to make healthcare decisions for a patient who is incapable of making informed decisions and who has not appointed a healthcare agent.

Proposed Amendment: After significant study and comment, the Task Force proposes broadening the list of possible substitute decision-makers to include a close friend who "has exhibited special care and concern" for the patient; is familiar with the patient's preferences and values; and who is "currently involved in the care of the patient."

DURABLE DO NOT RESUSCITATE ORDER REGULATIONS

In furtherance of the State's commitment to advance healthcare planning and reform, the Board of Health has also proposed substantive changes to the Durable Do Not Resuscitate ("DDNR") Order regulations (12 VAC 5-66-10 *et seq.*). The Board's changes are intended to clarify the use, intent and applicability of DDNR Orders and remedy healthcare providers' ongoing confusion with these rules. Comments related to the proposed regulatory amendments, must be forwarded to Virginia Department of Health no later than February 19, 2010.

To summarize, the proposed revisions will (i) allow the use of a less restrictive DDNR Order form; (ii) allow the use of legible electronic copies of DDNR Order forms; (iii) and clarify the use of Other DNR Orders from the patient's physician that are not printed



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on the standardized form. Several of the more substantive amendments proposed are highlighted below:

- ◆ **Existing Law:** Photocopies of DDNR Orders may only be used for informational purposes and cannot be used as a basis to withhold CPR – an original DDNR Order is required.

Proposed Amendment: Allows health care personnel to honor photocopies of DDNR Orders so that they may be used in lieu of the original orders.

- ◆ **Existing Law:** Requires the use of a special DDNR Order form printed on distinctive paper (yellow form) that can only be obtained by a physician in hard-copy form from the Virginia Office of Emergency Medical Services (“VOEMS”).

Proposed Amendment: Permits a physician to download the DDNR Order form from the VOEMS website. The downloadable version contains three identical forms: 1) one form to be kept by the patient; 2) the second form to be placed in the patient’s medical record; and 3) the third form to be used for requesting an Alternate DDNR (jewelry).

- ◆ **Existing Law:** A DNR order written by a physician that is not contained on the standardized DDNR form (“Other DNR Order”) is only effective during the patient’s current admission to the hospital or other healthcare facility and terminates upon discharge.

Proposed Amendment: Clarifies that an Other DNR Order must contain all the same information required on the standardized DDNR Order form; and expands the coverage of an Other DNR Order to include not only the patient’s stay in the hospital or other healthcare facility, but also transfer between healthcare

facilities “when the patient remains attended by qualified healthcare professionals.”

- ◆ **Existing Law:** A DDNR Order may be revoked at any time by the patient by physically destroying the DDNR Order form (or having another person destroy it in his presence and at his direction); or by expressly requesting that it be revoked. An authorized agent may also revoke a DDNR Order unless the agent knows the patient would object to the revocation.

Proposed Amendment: Adds that if a patient or agent revokes an Other DNR Order, health care personnel are required to assure that the revocation is honored by updating or destroying the Other DNR Order.

- ◆ **Existing Law:** Upon issuing a DDNR Order, the physician must i) obtain the signature of the patient; ii) execute and date the DDNR Order; iii) explain how to and who may revoke the DDNR Order.

Proposed Amendment: Adds the following additional physician responsibilities: i) explain to the patient when the DDNR Order form is valid; ii) document the patient’s full legal name; iii) obtain the signature of the patient or the person authorized to consent on the patient’s behalf on all three DDNR Order forms; iv) make sure that the physician’s name is clearly printed and the DDNR Order form is signed; v) note the contact telephone number for the issuing physician; vi) issue the original DDNR Order form, patient and DDNR jewelry copies to the patient and maintain the medical record copy in the patient’s medical file.

- ◆ **Existing Law:** Health care personnel are to ask a family member to look for the original DDNR Order form or other written



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DNR order when caring for a patient in cardiac or respiratory arrest, who is known or suspected to have a DDNR Order that has not been located.

Proposed Amendment: Deletes the above requirements and clarifies that if a DDNR Order form or Alternate DDNR is not immediately available, care should be provided until a valid DDNR Order form, Alternate DDNR or Other DNR Order can be produced.

- ◆ Existing Law: Provides that “endotracheal intubation or other advanced airway management” should be withheld if a DDNR Order or other DNR Order is in place, but instructs that “airway management (excluding intubation or advanced airway management)” may be provided as comfort care.

Proposed Amendment: Distinguishes “advanced airway management,” withheld pursuant to a DDNR, from airway management that may be provided as comfort care.

If you have any questions or concerns regarding the proposed amendments or would like assistance in formally commenting on the proposed regulations please contact our Regulatory Team: Mary C. Malone, Jeannie A. Adams, Emily W.G. Towey or Michelle E. Calloway by telephone at 804.967.9604 or by email at mmalone@hdjn.com, jadmas@hdjn.com, etowey@hdjn.com or mcalloway@hdjn.com. You may also contact our Governmental Affairs Team: Scott Johnson, sjohnson@hdjn.com; Gerald C. Canaan, II, jcanaan@hdjn.com; or Karah L. Gunther, kgunther@hdjn.com for further information or assistance regarding the proposed legislation. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm’s website at www.hdjn.com.

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