COMMONWEALTH OF VIRGINIA
COMMISSION ON MENTAL HEALTH LAW REFORM

TASK FORCE ON ADVANCE DIRECTIVES

PROPOSED RECOMMENDATIONS

October 21, 2008

I. CHARGE

Without changing existing Virginia law on advance directives ("AD") for end-of-life care ("EOLC"), the Task Force was charged with drafting legislation pertaining to instructional ADs for health care decisions in contexts other than EOLC, based on the recommendations of the Task Force on Empowerment and Self-Determination. Two major clinical contexts in which such an instructional directive could be especially useful are: (1) cases in which individuals anticipating incapacity from dementia want to give advance instructions regarding their future care; and (2) cases in which individuals with histories of periodic decisional impairment related to acute exacerbation of mental illness want to give advance instructions regarding their health care, including their mental health care, for those periods when they are incapacitated.

II. OVERVIEW OF STATUTORY RECOMMENDATIONS

Although the Task Force proposed several revisions to improve the flow of the Act and to address several issues that are ambiguous in the current law, it made no substantive changes to the law on EOLC ADs. Rather, the principles applicable to EOLC have been used to facilitate use of ADs in the non-EOLC context. The key elements of the recommendations are:

- Without making substantive changes, the draft consolidates frequently used phrases into definitions that are then used in place of the phrases, resulting in clearer, more concise and compact statutes. *See*, *e.g.*, § 54.1-2982 – *"Capable of making an informed decision"*; *"Health care"*; *"Incapable of making an informed decision."* Section 54.1-2982.

- Additional detail has been added to address the required determinations for a finding that a patient is incapable of making an informed decision and the circumstances in which a patient may be determined to be capable of making informed decisions again. Section 54.1-2983.1.

  - The draft includes the concept that a determination that a patient is incapable of making an informed decision may be limited to a particular health care decision, or may be all-encompassing.

- The draft consolidates the various provisions that address the authority of agents or authorized decision makers. Section 54.1-2983.2.

- The draft addresses the interplay between the involuntary commitment statutes (Title 37.2) and ADs. Section 54.1-2983.3.

- The draft addresses the ability of a patient to request adherence to AD instructions that were made when the patient was capable of making an informed decision ("capable patient"), even though the patient is now incapable of making an informed decision ("incapable patient") and protests the treatment that the AD authorized. The Task Force has proposed a version of a "Ulysses" clause, with appropriate safeguards, to address that situation. Section 54.1-2983.4.

  - The Ulysses clause is premised upon the concept that an incapable patient may protest a particular health care treatment or decision even though, when he was capable, he authorized that treatment or decision in his AD and anticipated his own protest. Section 54.1-2983.4(B) addresses how that protest and process are to be handled when determining whether to honor the incapable patient's AD and provide treatment over his protest, or whether to honor the patient's protest and withhold treatment.

- The draft includes a provision addressing situations in which a patient who is incapable of making informed decisions protests a particular treatment, but has not executed a Ulysses clause or does not have an AD. Section 54.1-2983.4(C).

- The draft adds a provision that gives a patient the ability to authorize an agent to approve participation in any health care study, subject to appropriate safeguards. Section 54.1-2983.5

- The model form has been edited consistent with the proposed revisions in the Task Force draft: the instructional AD has been expanded beyond EOLC, to include non-EOLC; and the term "living will" has been replaced with the generic phrase "health care instructions." Section 54.1-2984.

- The meaning of revoking an AD has been clarified and now includes provisions for partial revocation. Section 54.1-2985.

- The list of default decision-makers has been expanded to include non-family members, where no family members are known, willing, or able to serve as decision-maker. Section 54.1-2986(A)(7).

- The immunity provision has been expanded to cover the expanded scope of ADs proposed in the Task Force draft. Section 54.1-2988.

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