

## PORTABLE DNAR ORDERS UNDER RECENT AMENDMENTS TO ALABAMA'S STATUTORY AND ADMINISTRATIVE CODES

In 2016, Alabama's Natural Death Act, Ala. Code § 22-8A-1, *et seq.*, was amended to provide for the portability of "Do Not Attempt Resuscitation," or DNAR, Orders. Prior to these amendments, DNAR Orders were enterprise/facility specific, meaning that upon transfer from one facility to another (e.g., a hospital to a long-term care facility), the process of executing an effective DNAR Order had to start over. The amendments to the Natural Death Act provide for the portability of DNAR Orders by defining the circumstances under which a valid DNAR order is executed, and by providing for the portability of a DNAR Order if same is "entered in the medical record by a physician using the required form designated by the State Board of Health and substantiated by completion of all sections of the form." ALA. CODE § 22-8A-3(7) and (15).

A valid DNAR Order is entered (a) with the consent of the person, if competent; (b) in accord with instructions in an advance directive if the person is not competent or is "no longer able to understand, appreciate and direct his or her medical treatment and has no hope of regaining that ability"; (c) with the consent of a health care proxy or surrogate functioning under provisions of the Natural Death Act; or (d) via instructions by an attorney-in-fact under a durable power of attorney that grants the attorney the power to make the decisions contemplated under Ala. Code § 22-8A-4(b)(1), which addresses decisions regarding the provision, withholding or withdrawing of "life-sustaining treatment or artificially provided nutrition and hydration in instances involving terminal illness or injury and permanent unconsciousness. *See* ALA. CODE §§ 22-8A-3(7), 22-8A-4(b)(1).

Thus, assuming a DNAR Order is validly entered, under the 2016 amendments to the Natural Death Act, it becomes portable if entered into the medical record by a physician using the form designated by the Alabama State Board of Health. In July 2016, the Alabama Department of Public Health developed a proposed rule and form relating to portable DNAR Orders. This rule and form were approved for public comment and ultimately became Ala. Admin. Code. § 420-5-19-.02 on October 3, 2016. As with the statute authorizing its implementation, the regulation provides that "[p]hysicians intending to enter a portable physician DNAR order shall utilize the form attached hereto as Appendix 2 which, when properly completed and executed, shall constitute the portable physician DNAR order as authorized by Act 2016-96."<sup>1</sup> ALA. ADMIN. CODE § 420-5-19-.02(2).

Appendix 2 to the regulation is entitled "Alabama Portable Physician Do Not Attempt Resuscitation Order No CPR/Allow Natural Death," and provides that the order is valid only if two conditions are met. First, the order must be signed by one of the following: the patient; a provider or facility representative if the patient has DNAR instructions in a "duly executed Advance Directive for Health Care with instructions that no life sustaining treatment be

<sup>1</sup> The 2016 amendments to Alabama's Natural Death Act were passed by the Alabama Legislature as Act 2016-96.

provided" so long as said directive is made a part of the patient's medical record; a health care proxy or attorney-in-fact, provided that the proxy or attorney-in-fact designation is made a part of the patient's medical record; or by a surrogate "certified to make decisions...regarding the providing, withholding or withdrawal of life-sustaining treatment for the patient..." provided that the surrogate has consulted with the patient's attending physician and a copy of the Certification of Health Care Decision Surrogate is made a part of the patient's medical record. ALA. ADMIN. CODE § 420-5-19-.02(2), Appx. II. In addition, the portable DNAR Order must also be signed by a physician. *Id.* For an in-hospital DNAR Order, to comply with CMS regulations and best practices generally, the physician must note the time when the order was entered.

A few concluding notes. First, § 420-5-19-.02 establishes that the transferring facility bears much of the burden relative to the portability of a DNAR Order by providing that the transferring facility must "communicate the existence of the order to the receiving facility prior to or during the transfer," and "assure that a copy of the order accompanies the patient in transport to the receiving health care facility." Ala. Admin. Code § 420-5-19-.02(4). Second, the new regulation does not prohibit or limit a physician from issuing a facility-specific DNAR order in accord with "accepted medical practices which, under certain circumstances, may more appropriately fit a patient or his or her family's wishes. *Id.*, at (5). Finally, if the procedural requirements for creating a valid portable DNAR Order are met, the Natural Death Act, as amended, provides for criminal and civil immunity for providers who follow such orders. ALA. CODE § 22-8A-7(c).