July 25, 2023

Uniform Law Commission
111 N. Wabash Avenue
Suite 1010
Chicago, Illinois 60602

Sent via email to Lucy Grelle, Publications Manager, at lgrelle@uniformlaws.com

Cc: *Judge Samuel A. Thumma, Chair of the Drafting Committee to Revise the Uniform Determination of Death Act, at sthumma@appeals.az.gov*

Re: *Draft Revised Uniform Determination of Death Act*

Dear Uniform Law Commissioners:

The Texas Medical Association ("TMA") and Texas Hospital Association ("THA") express our appreciation for the opportunity to provide comments to the Uniform Law Commissioners on the draft revised Uniform Determination of Death Act ("rUDDA") being discussed during the Committee of the Whole discussion on July 26, 2023 at the 2023 Annual Meeting of the Uniform Law Commission ("ULC").

TMA is a private, voluntary, non-profit association of more than 57,000 physician and medical student members. It was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its vision is to "Improve the health of all Texans." Created in 1930, THA is the leadership organization and principal advocate for roughly 500 of the state's hospitals and health care systems. Based in Austin, THA enhances its members' abilities to improve accessibility, quality and cost-effectiveness of health care for all Texans. One of the largest hospital associations in the country, THA represents more than 85 percent of the state's acute-care hospitals and health care systems which employ more than 400,000 health care professionals statewide.

TMA and THA are currently engaging in ongoing discussions about the determination of death by neurologic criteria but want to share some initial thoughts and concerns at this time regarding the draft rUDDA. As set forth more fully below, our organizations favor Option 2 of Section 3 (relating

to "Determination of Death"), recommend that a determination of death by neurologic criteria only be made by a physician, and have concerns relating to Sections 4 through 6 of the draft rUDDA (relating to "Time to Gather", "Notification", and "Objection and Accommodation to Objection", respectively).

Additionally, we feel that offering the bracketed language, as included in the draft rUDDA, for potential enactment by states would result in less uniformity amongst states and more conflict and litigation. As noted in the June 22, 2023 memo by the Drafting Committee to Revise the Uniform Determination of Death Act ("Drafting Committee"), such language is substantially different than current approaches by most states.

Section 3. Determination of Death

Section 3(a) includes two options for determination of death for discussion: Option 1 is the Uniform Determination of Death Act (UDDA), as revised by the Committee on Style in 2023; and Option 2 changes "irreversible" to "permanent" for both types of death determinations and specifies that permanent coma, permanent cessation of spontaneous respiratory functions, and permanent loss of brainstem reflexes are the requirements for the determination of death by neurologic criteria. Our organizations favor Option 2, as the criteria therein is widely accepted by physicians and would resolve certain disputes under the UDDA about determination of death by neurologic criteria.

In accordance with Section 3(b), TMA and THA agree that a determination of death by neurologic criteria should be made in accordance with accepted medical standards. We appreciate that the draft rUDDA does not enumerate specific tests to be used to determine death, as this could interfere with or constrain clinical assessment—not only do patients and circumstances differ, but better testing may emerge over time.

Notably, Section 3 does not address who is authorized to determine death. Our organizations recommend adding language providing that only a physician is authorized to determine death by neurologic criteria, as physicians are uniquely qualified by their clinical training, experience, and licensure to make this determination.

Section 4. Time to Gather

Section 4 provides that, before discontinuing the circulatory and respiratory support of an individual determined to be dead by neurologic criteria, a health care institution must allow a reasonable time for those designated by the individual's surrogate to gather at the individual's bedside. TMA and THA appreciate the importance of having loved ones present in end-of-life situations. However, due to the uncertainty and disputes that would result from the draft language, we recommend against creation of this legal mandate.

The lack of clarity or limit as to what constitutes a "reasonable time" is particularly problematic. The designated persons may face geographic, financial, or medical obstacles in their attempts to

gather at the individual's bedside and claim that, under the circumstances, a gathering time of weeks or longer is "reasonable." Additionally, while the Drafting Committee's legislative note states that the draft does not specify whether the gathering would be in person, remote using technology, or a hybrid, a court may interpret the "bedside" language as referring to an in-person gathering.

Our organizations will continue deliberations on what the appropriate parameters for a required time to gather might be, in case the ULC continues to consider such a provision for an rUDDA.

Section 5. Notification

Section 5 would require a health care institution to make a reasonable effort to notify the individual's surrogate before a health care professional could begin a clinical evaluation to determine death by neurologic criteria. Our organizations are concerned that this may impede a physician's ability to make a diagnosis, and thus guide treatment, in a timely fashion. Additionally, we are concerned that the lack of clarity as to what constitutes a "reasonable effort to notify" would lead to litigation.

Section 6. Objection and Accommodation of Objection

Section 6 would preclude a determination of death by neurologic criteria for an individual based on the individual's objection to such a determination. Under optional language, the individual's objection could be established through information provided to the heath care institution by the individual's surrogate.

To provide appropriate patient care, physicians must be allowed, as a baseline, to determine if an individual is living or deceased. Our organizations oppose language in the rUDDA that would require a physician to obtain informed consent prior to performing a clinical evaluation to determine death.

Additionally, like the American Academy of Neurology, TMA and THA recognize the potential for harm to the patient, the family, or other patients and the health care team from indefinite accommodation, including, but not limited to, mistreatment of the newly dead, deprivation of dignity, provision of false hope with resultant distrust, prolongation of the grieving process, undermining of the professional responsibility of the physician to achieve a timely and accurate diagnosis, and an anticipated societal harm arising from a negotiated and inconsistent standard of death. Further, this provision would create a right to indefinite medical interventions for some persons who are, in fact, deceased, without a mechanism to provide and pay for such interventions.

Conclusion

TMA and THA thank the ULC for the opportunity to comment on the draft rUDDA and appreciate the deliberative and open nature of the ULC's process to-date in considering updates to portions of the UDDA. We reserve the right to amend our comments as this process continues. If you have

any questions, please do not hesitate to contact Kelly Walla, TMA Vice President and General Counsel, at kelly.walla@texmed.org, Kelly Flanagan, TMA Associate General Counsel, at kelly.flanagan@texmed.org, or Cesar Lopez, THA Associate General Counsel, at clopez@tha.org.

Sincerely,

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President, Texas Medical Association

Carrie Kroll
Vice President, Advocacy, Quality and Public Policy, Texas Hospital Association

cc: Kelly Walla, JD, LLM
Kelly Flanagan, JD