MEMORANDUM

TO: **Committee to Revise the Uniform Health Care Decisions Act**
FROM: **Nina Kohn, Reporter**
DATE: **September 27, 2022**
RE: **Issues for the Committee's Consideration**

At our October meeting, we will work through the draft Uniform Health Care Decisions Act section by section. While your thoughts are critical on all parts of the draft, this memo describes some of the issues on which the Committee Chair, Vice Chair and I believe thoughts from Committee members and observers would be especially important.

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Definition of mental health care. In the previous draft, the term "mental health care" was not defined. At the annual meeting, this lack of a definition raised some concerns. This draft therefore adds a proposed definition of "mental health care" as a placeholder. Thoughts on this definition would be most appreciated. There was also confusion from Commissioners at the Annual Meeting about the interplay between an advance directive that includes wishes about mental health care for an individual who does not necessarily have a mental health condition and an advance directive addressing only mental health care issues. Hopefully, including a workable definition for "mental health care" will alleviate these concerns.

"Person interested in the welfare of an individual" language. One issue is whether this term is the correct one in all the places it is used. Another is whether the definition itself is too broad (especially in subsection (f) where it speaks of a person with an ongoing personal or professional relationship). We would like to discuss both issues.

Determinations of capacity in urgent situations. In previous drafts discussed by this Committee, only certain health care providers were permitted to make capacity determinations. At the July Annual Meeting, a Commissioner asked how capacity determinations would be made in a situation where immediate treatment is needed to avoid bodily harm, the patient appeared to lack capacity, and none of the listed professionals was reasonably available. In response, we added proposed language in Sections 5(a) and 5(b) to address this concern. Thoughts on this change would be most appreciated.

Training and expertise for making determinations of lack of capacity. As drafted, Section 5 indicates that certain individuals making capacity determinations must have "training and expertise" in making such determinations and assessing the abilities and limitations of individuals such as the patient. At the July Annual Meeting, a couple of Commissioners queried whether this language is ambiguous and would create confusion. Do we need to be more

prescriptive in the draft regarding the level or type of training and expertise someone must have before making a determination of lack of capacity? Should we consider descriptors or requirements other than "training and expertise"?

Decisions by patients who lack capacity. A key issue is whether certain decisions can be made by an individual even after the individual has been determined to lack capacity. For example: In Section 12, should a person who has been determined to lack capacity to make health care decisions have the ability to revoke an instruction? In Section 11(j) should a person who lacks capacity be able to disqualify a surrogate?

Power to consent to nursing home placement. It would be helpful to hear thoughts on whether an agent should only be permitted to consent to nursing home placement if explicitly granted that power. As currently drafted in Section (d)(4), nursing home placement is a "hot power" that does require such explicit grant of authority. We have heard concern, however, that this will make it much more difficult for agents to comply with their duties and push people into the guardianship system.

Disqualification of a default surrogate. In Section (12)(n), the draft permits a responsible health care provider who reasonably determines that an individual who has assumed authority to act as a default surrogate "is not willing or able to comply with the duties under Section 14" to "recognize the individual or individuals next in priority under subsection (b) as the default surrogate." A question is whether such disqualification should be permitted. On the one hand, it allows providers to look out for the interests of their patients; on the other, it invites providers to cherry pick surrogates who will rubber stamp their decisions. A secondary question is whether, if a disqualification of this type is desirable, if the approach taken in the draft is the right one.

Duties of providers. The draft addresses provider duties in Section 17. It includes in subsections (d) and (e) provisions that permit a provider to not comply with a patient's decision under certain conditions. These are important issues which we believe would benefit from greater discussion than has been had to date.