MEMORANDUM

TO: **Committee to Revise the Uniform Health Care Decisions Act**
FROM: **Nina Kohn, Reporter**
DATE: **April 18, 2022**
RE: **Issues for the Committee's Consideration**

At this week's meeting we will work through the draft Uniform Health Care Decisions Act section by section. We will also have opportunity to discuss issues that cut across sections. To facilitate the discussion, this memo describes some of the issues that affect multiple sections on which it would be especially helpful to hear thoughts from Committee members and observers.

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Locating provider responsibility. In the 1993 Act, certain responsibilities lay with the "supervising physician." In the draft, the term "responsible health care provider" is used instead to recognize there may not be a single supervising provider, and that the provider with primary responsibility may not be a physician. A key question for this Committee is whether the places where a responsible health care provider is given extra responsibility are the right ones. For example, Section 7(b) requires a "health-care provider" to whom an individual communicates an instruction to record the instruction and the date of the instruction in the individual's medical record. The requirement is not limited to a responsible healthcare provider and the question is whether this is the right policy choice. Similarly, Section 11(f) places responsibility for dealing with disagreements among default surrogate class members on the responsible provider only, and here the query is whether this responsibility should be so circumscribed.

Hot powers. As set forth in Section 15 of the draft, there are certain powers an agent appointed under a power of attorney has only if the principal expressly authorizes those powers. I would appreciate detailed discussion as to whether those powers singled out as requiring explicit permission are the rights ones for this treatment, as well as on the specific contours of the powers that need explicit authorization. For example, it would be helpful to hear the Committee's thoughts on whether the language about an institutional review board in Section 15(d)(2) adds value. Similarly, it would be helpful to have further discussion of consent to nursing home placement over the contemporaneous objection of the principal should only be permitted if expressly authorized, and, if so, whether this should be limited to situations where the placement is intended to be permanent as set forth in the draft.

Oral advance directives and oral revocations. The draft currently allows for both oral instructions and oral revocations of instructions and powers of attorney. At previous meetings, there was discussion of the need for allowing oral instructions and revocations, but limited discussion of provisions governing them. A key question for the Committee is whether the draft's provisions around oral advance directives and revocations create the right balance between accessibility and flexibility on one hand, and reliability on the other. For example, under proposed Section 12, an oral revocation is valid if made to a responsible health care

provider. An oral declaration to someone other than a responsible healthcare provider would not revoke the advance directive unless accompanied by clear and convincing evidence of intent to revoke.

Objection to determination of incapacity. Section 6 governs what happens if an individual challenges a determination that the individual lacks capacity. It provides that an individual who makes such a challenge shall be treated as having capacity unless a court determines otherwise. It would be helpful to hear thoughts on this approach. Does it strike the appropriate balance between patient self-determination and protection of vulnerable persons? Is it workable for health care providers? Should there be any exceptions and, if so, what should they be?

Immunity for providers. The draft addresses provider immunity in Section 18. The Chair and I have heard concerns about exposing providers to liability, as well as concerns about not holding providers accountable when they fail to comply with advance directives. The draft tries to strike an appropriate balance. As drafted, Section 18 provides immunity to a healthcare provider who complies with an instruction of an individual who lacks authority to provide that instruction if the provider reasonably believes the person has such authority. At the last Committee meeting, there was some discussion as to whether this standard should be one of "reasonableness" or merely "good faith". The draft has opted for requiring reasonable belief, to ensure that there is some incentive for providers to have a basis for their belief.

Terminology around mental health care. The draft avoids the term "psychiatric" to refer to mental health care or mental health-care facilities. This change is designed to make the language more inclusive and more accessible to laypeople. It would be helpful to hear feedback on the draft's nomenclature around mental health issues.