May 11, 2020

Honorable Alex M. Azar II, Secretary
Health and Human Services Department
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: COVID-19 Hospital and Critical Access Hospital Notice of Advance Directive Policy Waiver

Dear Secretary Azar:

On behalf of the American Bar Association (ABA) – the largest voluntary association of lawyers and legal professionals in the world – I write to commend you on the efforts of the Department of Health & Human Services (HHS) to respond aggressively to the COVID-19 health crisis by expanding access to needed services through alternatives such as telehealth. However, we are concerned that the recent waiver by the Centers for Medicare and Medicaid Services (CMS) of the regulation that requires hospitals, including critical access hospitals, to inform patients about their advance directive policies will negatively impact patient-directed care.

The waiver announcement, “COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers,” dated April 29, 2020, provides among other directives the following:

**Flexibility in Patient Self Determination Act Requirements (Advance Directives).** CMS is waiving the requirements at sections 1902(a)(58) and 1902(w)(1)(A) of the Act (for Medicaid); 1852(i) of the Act (for Medicare Advantage); and 1866(f) of the Act and 42 CFR §489.102 (for Medicare), which require hospitals and CAHs to provide information about their advance directive policies to patients. CMS is waiving this requirement to allow staff to more efficiently deliver care to a larger number of patients.

While we recognize the need to address the shortage of healthcare resources, a blanket waiver to apply to every patient in every facility may not be necessary, nor appropriate. In situations where time and healthcare circumstances are not stressed, patients should continue to receive information about advance directive policies. Similarly, applying a blanket waiver may most adversely impact low income and vulnerable populations who do not have resources to obtain advance directives prior to finding themselves in emergency situations and its use should therefore be limited.
A key goal of ABA patients’ rights policy has been that every patient or patient’s authorized representative be given an opportunity to discuss issues relating to advance care planning with an appropriately trained representative of the provider organization within a reasonable time after the patient’s admission.

Moreover, since 1989, the ABA has supported regulations mandating all health care providers and facilities to have policies in place regarding health care powers of attorney and other advance directives, determine whether or not patients have prepared any such directive, and inform patients of their legal rights to control health care decisions, including the right to appoint an agent or surrogate through a durable power of attorney.

The justification stated for the blanket waiver, “to allow staff to more efficiently deliver care to a larger number of patients,” is based upon a mistaken assumption. In fact, the failure to ascertain patients’ goals of care and wishes regarding their critical medical care can cause more delays in medical decision-making. Delays can result precisely because of the lack of patient direction, plus communication challenges with family who can’t be physically present, and uncertainty among health care professionals seeking to provide individualized, respectful care.

Surveys suggest that only about one in three adults have health care advance directives, and for this population, the failure of hospitals to ask if a directive exists when the circumstances permit will likely undermine the advance planning efforts of those who have undertaken the steps all of our collective educational efforts encourage. Furthermore, research and clinical practice demonstrate that when patients have open and honest conversations with their healthcare providers about available treatment options, the majority will choose to forgo invasive end-of-life treatments in serious and eventually fatal conditions. This fact can significantly reduce the need to ration life-saving medical resources.

While we fully agree that educating and empowering patients to make their own end-of-life care decisions is a key strategy, it cannot replace the “just in time” communication opportunity afforded at the time of admission under the Patient Self-Determination Act (PSDA). During the pandemic, the health care profession has focused more heavily than ever on the importance of advance care planning discussions even during a growing volume of critical care cases because they honor the dignity of patients while expediting sound decision-making. Several organizations have also released Covid-19 focused conversation resources to help facilitate conversations that are difficult under normal circumstances. Their consensus view is that in this time of high stress for clinicians, in-hospital conversations about goals of care, code status, and receipt of ICU care among high-risk patients with Covid-19 should be formalized and normalized. That is, every patient should hear the same thing.

Rather than waiving PSDA requirements in all circumstances, CMS would be more productive by encouraging hospitals to create expedited, formalized processes to enable and routinize in-hospital conversations, along with encouraging educational opportunities for individuals to engage in advanced care planning discussions before they face a medical crisis. Thus, we recommend the following:

- Reinstate the requirements under the Patient Self-Determination Act for hospitals to
inform patients about their advance directive policies.

- Issue guidance to hospitals to create expedited, formalized processes to enable and routinize in-hospital conversation.

- Issue guidance to urge physicians to engage in advance care planning visits available via telehealth through Medicare.

- Permit limited waiver of the Patient Self-Determination Act requirements only during time periods in which a facility determines that the demand for critical care services exceeds its capacity to implement the requirements.

The ABA applauds your efforts to maximize every resource available to combat the Covid-19 pandemic and protect the health of all Americans. We believe our recommendations above directly support that goal and we stand ready to offer our assistance in these efforts. If you have any questions, please contact ABA Governmental Affairs Legislative Counsel David Eppstein at 202-662-1766, David.Eppstein@americanbar.org.

Sincerely,

Judy Perry Martinez

cc: Honorable Seema Verma
    Administrator
    Centers for Medicare & Medicaid Services