

LETTERHEAD:

The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, MA 02108-1698

ADDRESSED TO:

Alex L. Moschella, Esq.
Metro Elder and Disability Law Associates
6 Liberty Avenue, Powder House Square
Somerville, MA 02144

DATED:

July 24, 1997

Dear Attorney Moschella:

This letter is in response to the questions raised at the National Academy of Elder Law Attorneys Massachusetts Chapter program in April regarding whether, under Rogers v. Commissioner of the Department of Mental Health, the caretaker of an incompetent patient is required to obtain a court order prior to administering prescribed antipsychotic medication, even if: (1) the incompetent patient had previously appointed an authorized health care agent pursuant to G. L. c. 201D [The Health Care Proxy Act]; (2) the agent has consented to the medication on the patient's behalf; and (3) the patient has not objected to or refused the medication. It is our understanding that there has been some confusion among the elder law practitioners as to how to interpret the Attorney General's long term care facility regulations, 940 CMR 4.08 (18) and (19), when this issue arises. While this letter does not serve as a formal published opinion of the Attorney General, which may only be issued pursuant to specific statutory authority not applicable here, in the interest of addressing a matter of significant concern to elders and long term health care providers, we offer the following informal clarification.

In Rogers, the Supreme Judicial Court held that before antipsychotic drugs could be administered to an incompetent patient, counsel and a guardian must be appointed for the patient and the court must then determine what the incompetent patient's desires would have been, had he or she been competent to consent on his or her own behalf. If the court determines the patient would have consented to the medication, the court is required to establish a treatment plan and a treatment-monitoring mechanism as well. The underlying purpose of a Rogers hearing is to protect incompetent patients from forcible treatment in circumstances where the patient would refuse the treatment were he or she competent to do so.

As you know, the Legislature enacted the Health Care Proxy Act seven years after the Rogers decision as a way of providing individuals with the means for maintaining control over medical decision-making in the event that they should become incapacitated. In cases involving a validly executed health care proxy, the person selects a substitute decision maker who is thereby legally

authorized to represent the principal's own health care decision-making rights. The statute lays out specific requirements that must be fulfilled before a health care agent can exercise his or her authority on behalf of the patient. Specifically, the law requires that the health care agent must consult with all of the principal's health care providers and must fully consider all acceptable medical alternatives regarding the principal's diagnosis, treatment and side effects. M.G.L. c. 201D, section 5. The law also requires that the agent consider the principal's wishes, if known—including the principal's religious and moral beliefs—or, if the principal's wishes are unknown, in accordance with the agent's assessment of the principal's best interests. *id.* Under the law, every person has the right to exercise informed consent and appoint a health care agent by executing a valid health care proxy while he or she is competent. Moreover, a principal may revoke a health care proxy at any time by any act evidencing a specific intent to revoke the proxy.

We believe Chapter 201D, in all significant respects, establishes standards that are consistent with the Rogers requirements for both informed consent by the patient and for substitution of judgment by the health care agent. As set forth in Rogers, the factors to be considered by a judge in determining whether a judicial "substituted judgment" decision is required include: (1) the patient's expressed preferences regarding treatment; (2) the strength of the patient's religious convictions; (3) the impact of the decision on the patient's family; (4) the probability of adverse side effects; (5) the patient's prognosis without treatment; (6) the patient's prognosis with treatment; and (7) any other factors which appear relevant to the determination. 390 Mass. at 505-508. These factors coincide with the requirements that a health care proxy agent must consider in making health care decisions for a principal pursuant to the Health Care Proxy Act. M.G.L. c. 201D, sections 5 and 6. Because a decision made by an authorized health care agent provides the patient with the same type of protection a Rogers hearing is designed to provide, we conclude that an authorized health care agent may consent on behalf of an incompetent patient to the administration of antipsychotic medication with a Rogers hearing.

We note first, in the Attorney General's view, a consent to antipsychotic drugs on behalf of an incompetent patient made by an authorized health care agent will only eliminate the need for a Rogers hearing if the patient does not in any way indicate a contrary decision. When a patient refuses or objects to the administration of antipsychotic medications, we believe that a court-ordered substituted judgment is required, whether or not the patient has a valid health care proxy. M.G.L. c. 201D, section 7, permits the principal to revoke his or her proxy "by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy." Refusal to accept medication may be deemed a revocation of the proxy and would, therefore, void any consent previously given by the agent. Moreover, an incompetent patient without a health care proxy always requires a Rogers hearing, regardless of whether the patient will accept the proffered medication, because he or she is incapable of giving consent and has not previously designated a proxy to do so on his or her half.

I hope that this letter offers some assistance in your work. The intent of the Attorney General's long term care regulations is to protect patients covered by Rogers. However, we see no benefit to patients in interpreting the regulations in a way that both effectively deprives an incompetent patient of his or her right to have an authorized health agent chosen by the patient make decisions on the patient's behalf and imposes delay and expense on an incompetent patient

without adding any protection to the patient's interests.

In light of this letter, the Attorney General would be very interested in working further with the private bar to (1) encourage the use of health care proxies, especially prior to nursing home admissions; (2) educate the general public about the specific issues raised by Rogers and the use of antipsychotic drugs; and (3) ensure compliance with the long term care facility regulations. Please do not hesitate to contact me at the number below if you wish to discuss this matter further. Thank you.

Sincerely,

Barbara Anthony
Assistant Attorney General
Chief, Public Protection Bureau
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cc: Kenneth A. Behar, Esq., Behar & Kalman
Robert D. Fleischner, Esq., Center for Public Representation
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Scott Plumb, Massachusetts Extended Care Federation
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Please note: This letter appears as a photocopy in the materials of "Legal, Medical & Ethical Issues Concerning End of Life Decision-Making", a day-long conference presented by the Center for Advanced Legal Studies on November 4, 2005 at Suffolk University Law School, Boston, MA. It was retyped and made into a PDF document by David Clarke, DMin, JD, MPH, executive director of non-profit Massachusetts Health Decisions and former convener and chair of the Massachusetts Health Care Proxy Task Force, 1991-1992, who takes full responsibility for any errors or omissions herein. As of September, 2008, Barbara Anthony is Executive Director of Health Law Advocates, a non-profit legal advocacy organization in Boston specializing in access to care. Alex Moschella is a principal of Moschella & Winston, LLP, a Somerville firm specializing in elder and special needs law.