

Ethics: Advance Directives, Medical Power of Attorney, and Capacity

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Learning Objectives



At the conclusion of this activity, participants will be able to:

1. Identify legal issues and know when to ask for guidance.
2. Illustrate ethical issues and difficulties of determining capacity.
3. Summarize the types and limitations of living wills, advance directives, and medical powers of attorney.

Polling Questions



- Who has discussed a living will, advance directive, or healthcare power of attorney with a patient?

Yes or No

- Who has a living will, advance directive or healthcare power of attorney, personally?

Yes or No

Capacity and Medical Decision-Making



- Why is this important?
- What do we consider?
 - Patient autonomy
 - Medically appropriate care
 - Best Interest
 - Patient's religion, culture, values, etc.

Informed Consent



- Assess the patient’s ability to understand relevant medical information and the implications of treatment alternatives and to make an independent, voluntary decision.
- Present relevant information accurately and sensitively, in keeping with the patient’s preferences for receiving medical information. The physician should include information about:
 - The diagnosis (when known)
 - The nature and purpose of recommended interventions
 - The burdens, risks, and expected benefits of all options, including forgoing treatment
- Document the informed consent conversation and the patient’s (or surrogate’s) decision in the medical record in some manner. When the patient/surrogate has provided specific written consent, the consent form should be included in the record.

American Medical Association, Informed Consent: Code of Medical Ethics Opinion 2.1.1. Available at <https://www.ama-assn.org/delivering-care/ethics/informed-consent>

Factors (from the Lawyer's Perspective)



- The client's ability to articulate reasoning leading to a decision,
- Variability of state of mind and ability to appreciate consequences of a decision;
- The substantive fairness of a decision; and
- The consistency of a decision with the known long-term commitments and values of the client.

Rule 1.14: Client with Diminished Capacity. American Bar Association Model Rules of Professional Conduct. Available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/.

- **§ 54.1-2983.2. Capacity; required determinations.**
- A. Every adult shall be presumed to be capable of making an informed decision unless he is determined to be incapable of making an informed decision in accordance with this article. A determination that a patient is incapable of making an informed decision may apply to a particular health care decision, to a specified set of health care decisions, or to all health care decisions. No person shall be deemed incapable of making an informed decision based solely on a particular clinical diagnosis.

Scenario and Polling Question



- Patient with a 103° temperature
- Patient who is 10 years old
- Patient prescribed Percocet

- Would any of the following decisions by these patients raise concerns about capacity?
 - Deciding which visitors are authorized
 - Deciding who can be their health care agent/surrogate
 - Deciding between two different procedures for cancer treatment
 - All of the above

Situational Competency



- Examples:
- Teenager may be legally competent to consent to sexual activity, but not to make most medical decisions;
- Attorney who has dementia who can make medical decisions, but lacks capacity to be a fiduciary

Difficulties in Determining Capacity



- Language barriers
- Jargon
- Comfort with provider or situation
- Presence of others
- Fluctuations in Capacity
 - Dementia, Traumatic Brain Injury (TBI), stroke
 - Mental Health
 - Drugs (prescription or otherwise)

Definitions



- Advanced Medical Directive or living will:
 - Expression of an individual's desires regarding the continuation of or withdrawal or withholding of life-prolonging procedures
 - Terminal physical condition or is in a persistent vegetative state.

- Healthcare power of attorney
 - Appointment of someone else to make healthcare decisions for a patient

Army Regulation 27-3, The Army Legal Assistance Program (26 March 2020).

Healthcare Power of Attorney



- What is a “durable” power of attorney?
 - Survives a patient’s incapacity

- What is a springing power of attorney?
 - Becomes effective (“springs”) when a certain event happens, generally incapacity

Scenario



- Bob, an 84 year-old patient, comes for his yearly check-up. In the past, Bob has told you he doesn't want any heroic measures to save him if something should happen. He discloses to you that he is worried that his spouse won't carry out his wishes.

- What do you do?

Scenario



- Jim brings in his health care decision documents, which he got at your recommendation. Jim is seeing you for a second visit in preparation for necessary major surgery, which has a chance of negative outcomes. You notice that his document is titled “Non-Durable Healthcare Power of Attorney”.
- What do you do?

Common Sections of Healthcare Decision Documents



- Picking an agent and back-up agent
 - Look at the powers of the agent section
- Life-Sustaining Treatment
 - Imminent Death
 - Unaware of myself and surroundings
 - Persistent Vegetative State
- Treatment of “secondary” conditions

From the Maryland Template Form



C. Powers and Rights of Health Care Agent

I want my agent to have full power to make health care decisions for me, including the power to:

1. Consent or not to medical procedures and treatments which my doctors offer, including things that are intended to keep me alive, like ventilators and feeding tubes;
2. Decide who my doctor and other health care providers should be; and
3. Decide where I should be treated, including whether I should be in a hospital, nursing home, other medical care facility, or hospice program.
4. I also want my agent to:
 - a. Ride with me in an ambulance if ever I need to be rushed to the hospital; and
 - b. Be able to visit me if I am in a hospital or any other health care facility.

This power is subject to the following conditions or limitations: (Optional; form valid if left blank)

<http://www.marylandattorneygeneral.gov/Pages/HealthPolicy/AdvanceDirectives.aspx>

From the Maryland Template Form



- G. Access to my Health Information – Federal Privacy Law (Health Insurance Portability and Accountability Act- HIPAA) Authorization
 1. If, prior to the time the person selected as my agent has power to act under this document, my doctor wants to discuss with that person my capacity to make my own health care decisions, I authorize my doctor to disclose protected health information which relates to that issue.
 2. Once my agent has full power to act under this document, my agent may request, receive, and review any information, oral or written, regarding my physical or mental health, including, but not limited to, medical and hospital records and other protected health information, and consent to disclosure of this information.
 3. For all purposes related to this document, my agent is my personal representative under the Health Insurance Portability and Accountability Act (HIPAA). My agent may sign, as my personal representative, any release forms or other HIPAA-related materials.

Virginia Template Form



2. If my condition makes me unaware of myself or my surroundings or unable to interact with others, and it is reasonably certain that I will never recover this awareness or ability even with medical treatment, then:

I do not want any treatments to prolong my life. This includes tube feeding, IV fluids, cardiopulmonary resuscitation (CPR), ventilator/respirator (breathing machine), kidney dialysis or antibiotics. I understand that I still will receive treatment to relieve pain and make me comfortable.

I want all treatments to prolong my life as long as possible within the limits of generally accepted health care standards. I understand that I will receive treatment to relieve pain and make me comfortable.

I want to try treatments for a period of time in the hope of some improvement of my condition. I suggest _____ as the period of time after which such treatment should be stopped if my condition has not improved. Any agent or surrogate may specify the exact time period in consultation with my physician. I understand that I still will receive treatment to relieve pain and make me comfortable.

Other choices, as follows:

Common Sections of Health Care Decision Documents



- Preferences for specific things:
 - Medication
 - Visitation
 - Specific treatments
- Organ Donation
- Burial Preferences
- Medical History

What can I tell a patient about these documents?



- Provide a copy to your physician(s);
- Keep a copy in your personal files where it is accessible to others;
- Tell your closest relatives and friends what is in the document;
 - Pros and cons?
- Provide a copy to the person(s) you named as your health care agent;
- Consider registering the documents with a state or national registry

Scenario



- Jane comes to your office for some blood work. She's brought her living will, and wants you to file it in her record. Jane tells you not to tell her adult daughter about her decisions, because her daughter disagrees with her religious beliefs and health care decisions. Jane's daughter is her agent.

- What do you do?

Can I be a witness for these documents?



- Maybe.
- Most states require that at least one witness not be a relative or someone named in the will of the patient.
- Some states require that the witness not be a health care provider, nursing home employee, etc.
 - Why? Check your facility policies.
- Recommend: think of people in your facility who can be witnesses.

What do I do if there is a dispute?



- Scenario: Erik is in a vegetative state. His spouse wants him to be given life-sustaining measures, but his parents do not. It is getting contentious. What do you do?
- Document.
- Did you or another provider previously document any directives or wishes for the patient?
- Does your state have an advance health care directives registry?
- Contact your ethics committee.
- Reach out to support resources: chaplain, hospice, grieving resources, etc.

Documentation



- Document, document, document
- Why did you make certain decisions?
- What did you know about the patient's views and goals for health care?
 - When the patient told you his or her views, did the patient have decision-making capacity? Why?
- How did you make this decision? Did you get a second opinion or consult with another? Did you speak to your ethics committee or related resource?
- What consultations did you have with the surrogate or agent?

Records Management



- Medical Departments will note the existence of an advance directive into the Health Record, with the use of appropriate metadata tags.
- Advance medical directives and powers of attorney will be kept digitally, and the patient will be allowed to take the originals.

Department of Defense Instruction, DoD Health Record Life Cycle Management (April 11, 2017).

Enforceability of Specific Provisions



- Depends on State law
- Depends on stated wishes
- Depends on situation
- Depends on whether the document is available

Example: Maryland Template



G. Effect of Stated Preferences


(Read both of these statements carefully. Then, initial one only.)

1. I realize I cannot foresee everything that might happen after I can no longer decide for myself. My stated preferences are meant to guide whoever is making decisions on my behalf and my health care providers, but I authorize them to be flexible in applying these statements if they feel that doing so would be in my best interest.

 _____

>>OR <<

2. I realize I cannot foresee everything that might happen after I can no longer decide for myself. Still, I want whoever is making decisions on my behalf and my health care providers to follow my stated preferences exactly as written, even if they think that some alternative is better.

 _____

Special Rules: Military



- Power of Attorney (POAs) for Service members are generally automatically extended if missing in action or Prisoner of War (POW), BUT must name a relative. (50 U.S.C. § 4022)
- Advance medical directives and health care power of attorney documents are exempt from “form” requirements of the State, and are valid in any State as much as any like document would be. (10 U.S.C. § 1044c)

Other Forms



- Do Not Resuscitate (DNR)
- Physician Orders for Life-Sustaining Treatment or Medical Orders for Life-Sustaining Treatment (MOLST)

Emerging Issues



- Advance directives and Pregnancy
 - Many states ban or restrict the withdrawal of life-sustaining therapy if the patient is pregnant

Example: Oklahoma



- From the Oklahoma Department of Health Template Advance Directive:
 - “I understand that if I have been diagnosed as pregnant and that diagnosis is known to my attending physician, I will be provided with life-sustaining treatment and artificially administered hydration and nutrition unless I have, in my own words, specifically authorized that during a course of pregnancy, life-sustaining treatment and/or artificially administered hydration and/or nutrition shall be withheld or withdrawn.”

https://www.ok.gov/health/Data_and_Statistics/Center_For_Health_Statistics/Health_Care_Information/Advance_Directives/

Example: Texas



- Texas Health and Safety Code, Chapter 166, Advance Directives
- Texas Health and Safety Code, § 166.049. Pregnant Patients
 - A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient.

Example: Virginia



This advance directive amendment lets you give instructions about what you want and do not want if you cannot recover from a severe illness or injury and you are pregnant. Some people may want to give different instructions than what they put down for end-of-life care generally.

1. The first type of condition that you can give treatment

VIRGINIA ADVANCE DIRECTIVE AMENDMENT **Life-Prolonging Treatments During Pregnancy**

I, [redacted] (date of birth: [redacted]),
update my advance directive (dated: [redacted]) to add these instructions in
case I am pregnant and a doctor determines that I have a terminal condition. If there
is any conflict between this amendment and my advance directive, then this
amendment should be followed.

1. If I am pregnant and my doctor determines that my death is imminent (very close)
and medical treatment will not help me recover, then:

Emerging Issues



- Mental Health Declarations
- Patient's wishes on:
 - Electroconvulsive treatment
 - Psychoactive medication
 - Treatment locations
 - Preferences regarding restraint, seclusion, and medication.
 - Preferences regarding the gender of a provider.
- For example, Virginia law allows for the treatment of a patient, over patient protest, if the patient's advance directive explicitly authorizes the patient's agent to do so over the patient's later protest. (§ 54.1-2986.2. Health care decisions in the event of patient protest.)

Key Takeaways



- Issue-spotting and knowing when to ask an expert or get a second opinion.
- Be aware there are service specific requirements as well as local jurisdiction concerns.
- Know the effect and purpose of different types of health care decision documents.

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The Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901–4043. (2015). <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter50&edition=prelim>

Examples of Forms



- Maryland Advance Directive, available at <http://www.marylandattorneygeneral.gov/Pages/HealthPolicy/AdvanceDirectives.aspx>.
- Oklahoma State Department of Health, Oklahoma Advance Directives, available at [https://www.ok.gov/health/Data and Statistics/Center For Health Statistics/Health Care Information/Advance Directives/](https://www.ok.gov/health/Data_and_Statistics/Center_For_Health_Statistics/Health_Care_Information/Advance_Directives/).
- Tennessee Declaration of Mental Health, available at [https://www.tn.gov/content/dam/tn/mentalhealth/documents/Declaration for Mental Health Treatment-Form.pdf](https://www.tn.gov/content/dam/tn/mentalhealth/documents/Declaration_for_Mental_Health_Treatment-Form.pdf).
- Texas Declaration of Mental Health Treatment, available at <https://hhs.texas.gov/sites/default/files/documents/laws-regulations/forms/DMHT/DMHT.pdf>.
- Virginia Healthcare Decision forms, available at <https://www.vsb.org/site/public/healthcare-decisions-day-information-for-providers/>.

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