

Legal Issues in Advance Directives And End of Life Health Care Planning

Helping Patients Achieve End of Life Health Care Wishes

p.s.

Poyner Spruill^{LLP}

ATTORNEYS AT LAW

These materials have been prepared by Poyner Spruill LLP for informational purposes only and are not legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

A Case Study

- Elderly female resident creates Living 11 years ago
 - No artificial measures to sustain life / no CPR
- Later creates Health Care Power of Attorney naming husband as health care agent
 - But, limits his power by requiring him to honor her Living Will
- During hospital stay, after “long discussion” with MD, she executes a DNR Order
 - She’s certified for hospice
- Enters skilled nursing facility; now unable to communicate

A Case Study

- At SNF admission, husband says my wife was terminal; now she's not; she's here to get therapy
 - It was therapy to improve quality of life/transfers/not curative
- Husband says wife is full code
- Facility staff create Medical Record face sheet: Full Code
- Patient arrests a midnight
- Charge nurse has read chart; sees Living Will, HCPOA and DNR and does not initiate CPR
- Calls husband: your wife is passing, come on over
- Husband goes ballistic—she's full code
- Facility initiates CPR—far too late

A Case Study

- Centers for Medicare/Medicaid Services: This is an “immediate jeopardy”
 - Failing to give resident the care she or her surrogate directed
- On appeal, reversed:
 - Wife was clear not once, not twice, but three times: No CPR
 - Husband was authorized Health Care Agent
 - And he did direct facility to make wife full code
 - But wife placed limits on his power: “must follow my Living Will”
 - Husband’s directive of full care exceeded his authority
 - SNF properly followed the wishes of the patient: no code
 - But, facility had an inconsistent medical record—low level error because it did not lead to mistake
 - Image the reverse: failing to properly document a full code request

Barriers to Implementation of Health Care Advance Directives

- The “legal” and the “practical” overlap
- Barriers include:
 - Understanding of and education around advance directives
 - Mechanics of creating and implementing advance directives
 - Our current laws, including:
 - Well-intended obstacles; and
 - Areas we’ve not properly or fully addressed

Consistency of Health Care Provider Training

- Lack of education in general remains an issue
- Staff turnover, including licensed professionals
 - Creates challenges for sustaining training levels around ADs
- Confusion over health system policies versus what the law permits or requires
- In a typical health care facility, or even large systems, which lawyers and non-lawyer professionals are tasked with end of life health care legal issues?
 - This impacts how training is delivered & what is taught
 - Imagine the lawyer vs. the chaplain vs. the social worker vs. the physician

Where the Legal Meets the Ethical

- “Do No Harm”
- “Physician, heal thyself”
- We train health care providers to cure, improve, restore
- That’s “ethical” across all health care disciplines
- For some providers, understanding/acknowledging that no care is a good health care decision when
 - Its informed; and
 - What the patient or legally-authorized surrogate really wants
- Believing this, or not, impacts volume and quality of advance directives information conveyed, and sometimes the accuracy

Understanding Authorized Surrogates

- Who can decide for me?
- When do delegated end of life healthcare planning powers kick in?
- Accurate charting/recordation of:
 - Competent patients/residents
 - Versus authorized surrogates
- Understanding the limits of delegated surrogacy powers
 - Not all are created equal
- Resolving “family” conflicts both with and without advance directives and documented patient wishes

What Exactly is an Advance Directive

- Knowing the basic Advance Directives N.C. law authorizes
- Knowing the distinction in each and what each does and does not cover/authorize/empower
- Distinctions in advance directives and medical orders
 - Including the Medical Order for Scope of Treatment form
- We can't teach what we don't know
- We can't teach well what we don't know well
- We can't counsel what we don't understand
- We can't implement what we don't comprehend

Barriers to Execution/Implementation of Advance Directives

- Our statutory forms are complicated
 - Drafted by lawyers
 - Try explaining one to a patient
- Designed to be comprehensive and risk-averse
- The rise of “alternative” Advance Directives in N.C.
 - “Five Wishes”
 - “An Advance Directive for North Carolina: A Practical Form for All Adults”
- The “2-witness” and notary public requirements in N.C.
- Legislative aversion to modifying our current laws

Accurate Charting of Advance Directives and Patient Wishes

- Most common legal issue I see
 - Patient created an Advance Directive, protected it and shared it
 - Somehow, from home to hospital or long term care or MD office
 - Through all those EHR systems and paper systems that don't speak to each other
 - Or via untrained personnel handling medical records
 - Or human error
 - They aren't translated to clear, consistent individual medical records
 - Mistakes are unethical, averse to patient wishes, and expensive