What is an advance directive

Document that instructs providers about your care when you cannot
1. Appointment of agent
   FKA “durable power of attorney for health care”

2. Instructions
   FKA “living will”

1. Choice To Prolong Life
   ___ I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

   OR

2. Choice Not To Prolong Life
   ___ I do not want my life to be prolonged if (please check all that apply)

   (1) I have a terminal condition (an incurable condition from which there is no reasonable medical expectation of recovery and which will cause my death, regardless of the use of life-sustaining treatment). In this case, I give the specific directions indicated:

   Artificial nutrition through a conduit
   Hydration through a conduit
   Cardiopulmonary resuscitation
   Mechanical respiration
   Other (explain) ______________

   I want used  |  I do not want used
   ______     |     ______
   ______     |     ______

A. DESIGNATION OF AGENT: I designate ________________ as my agent to make health care decisions for me. If he/she is not living, willing or able, or reasonably available, to make health care decisions for me, then I designate ________________ as my agent to make health care decisions for me.

   (name of individual you choose as agent)

   (address)     (city)     (state)     (zip code)
   (home phone)     (work phone)
No capacity
– If no agent (appointed by AD)
– If no guardian (appointed by court)
– If no surrogate (appointed by patient)

Then default surrogate (in order)
– Spouse
– Adult child
– Parent
– Adult sibling
– Adult grandchild
– Adult niece or nephew

3 sources of legal obligations

- TJC Accreditation standards
- Medicare COPs from CMS
- Delaware Health Care Decision Act
Patient Self Determination Act, 42 U.S.C. 1395cc(f) (Nov. 1990)

When
After Cruzan (June 1990)
Sen. John Danforth (Mo.)

What
Assure compliance state HCD law
Promote ACP

Conditions of Participation
Congress delegated to CMS
Centers for Medicare & Medicare Services
Agency (inside DHHS)
Implements PSDA with COPs
COPs apply to all patients in facility
482.13 Conditions of participation: Patient’s rights.

A hospital must protect and promote each patient’s rights.

(a) Standard Notice of Rights—(1) A hospital must inform each patient, or when appropriate, the patient’s representative (as allowed under State law), of the patient’s rights, in advance of furnishing or discontinuing patient care whenever possible.

(b) General Notice of Rights—(1) A hospital must provide information about the patient’s rights to the patient or the patient’s representative, as appropriate, in the following situations:

(i) Admission to the hospital;

(ii) Treatment;

(iii) Discharge from the hospital;

(iv) Referral to another provider;

(v) Other significant events during admission.

(d) Right to Consent to Treatment—(1) The patient’s rights include being informed of his or her health status, being involved in care planning and treatment, and being able to request or refuse treatment. This right must not be construed as a mechanism to demand the provision of treatment or services deemed medically unnecessary or inappropriate.

(ii) The patient has the right to formulate advance directives and to have hospital staff and practitioners who provide care in the hospital comply with these directives, in accordance with 42 CFR 482.15 of this part (Definitions), §488.104 of this part (Requirements for providers), and §488.104 of this part (Effective Dates).

The patient has the right to have...
Education

Staff
To ensure compliance

Community
To ensure reflection
To ensure documentation

TITLE 16
Health and Safety
Regulatory Provisions Concerning Public Health
CHAPTER 20. HEALTH-CARE DECISIONS

2501. Definitions.
(a) "Advance health-care directive" shall mean an individual instruction or a power of attorney for health care, or both.
- Notify / inform
- Document
- Respect

**Admission**

Determine if patient has AD

If yes →
- Get it
- Place in chart

If no
- Give assistance on request
- Give information about right to accept, refuse
  - Give information in way patient understands
- Account for age, vision, literacy
- Documentation
  - Have P sign & acknowledge
After admission
Give option to review, revise AD
Must honor AD
  Unless conscience objection per state law
  Unless other exception per state law
Do not make access to care depend on whether have AD

Respect AD – or else
  - TJC
  - CMS
  - State discipline
  - Battery
  - Informed consent
  - IIED

Good faith immunity
Good faith: “an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage”


Health-care provider . . . acting in **good faith** . . . is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

16 Del. Code 2510(a)

Complying with an advance directive and **assuming** that the directive was valid when made and has not been revoked or terminated

16 Del. Code 2510(a)(3)
Example: improper witness makes AD invalid

How could HCP know that

16 Del. Code 2510(a)(1)

Complying with a health-care decision of a person apparently having authority to make a health-care decision for a patient, including a decision to withhold or withdraw . . .

Example: spouse being separated

How could HCP know that
Declining to comply with a health-care decision of a person based on a belief that the person then lacked authority.

Surrogate must comply written instructions values & preferences best interests.

Provider need only comply “to the extent the . . . surrogate is permitted by this chapter.”
Court: Your own personal issues are “impacting your decisions”

“Refocus your assessment”

Limits of Good Faith

USC University Hospital

More than a hospital. An academic medical center.
Pascentia McDonald, 74yo

Advance directive:
1. Bobby Miles is agent
2. Cynthia Cardoza is alternate
3. “Do No prolong life if incurable condition”

Aug. 14, 2002
PM: surgery thoracoabdominal aneurysm
PM: post-op infections

Aug. 30
PM: sepsis, non-cognitive
BM: continued LSMT
BM: 3 additional surgeries
CC: Disagrees with brother

Sept. 17
CC: threatens to sue
USC stops
PM dies
CC still sues (for damages)

USC and providers argue:

Probate Code 4740 immunizes providers who “in good faith comply with a health care decision made by one whom they believe authorized to make it for the patient.”

California Court of Appeals:

“Operation of the immunity here is not so certain.”

“Compliance with an agent’s decision that is at odds with the patient’s own expressed decision, in her AHCD, would probably not qualify as in good faith.”

The agent, Bobby Miles, was not authorized to depart from McDonald’s AHCD.

USC should have known that.
This happens all the time, even at CCHS

Providers follow the surrogate instead of the directive

Often okay because the AD is ambiguous and

But surrogate discretion is sometimes limited to some extent

Uniform Healthcare Decisions Act

Delaware 1996

California 1999
August 2008

Judgment for DEF
But only after 8 years of litigation
Good faith immunity is not immunity \textit{from suit}

It is a fact question to be resolved at trial

Educate Surrogates

Guide For Healthcare Agents & Surrogate Decision-Makers

Making decisions for patients who can't speak for themselves

The Role of the Substitute Decision-Maker (SDM)

Making Healthcare Decisions for Others
Sometimes, you need to replace surrogates.