Advance Directives: Legal Liability and the Good Faith Standard Thaddeus M. Pope, J.D., Ph.D.

National Healthcare Decisions Day April 15, 2011

What is an advance directive

Document that instructs providers about your care when you cannot

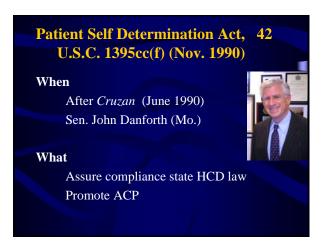
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No capacity If no agent (appointed by AD) If no guardian (appointed by court) If no surrogate (appointed by patient) Then default surrogate (in order) Spouse Adult child Parent Adult sibling Adult grandchild Adult niece or nephew

3 sources of legal obligations

- TJC Accreditation standards
- Medicare COPs from CMS
- Delaware Health Care Decision Act





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

CHAPTER IVCENTERS FOR MEDIC	
DEPARTMENT OF HEALTH AND HU PART 482-CONDITIONS OF PARTIC	
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### 482.1 Basis and scope. ### 482.2 Provision of emergency services	s by nonparticipating hospitals.
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§482.13	42 CFR Ch. IV (10-1-08 Edition)
emergencies and referral when appropriate. $ \\$	decisions regarding his or her care. The patient's rights include being informed of his or her health status, being in-
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 [51 FR 22042, June 17, 1986; 51 FR 27847, Aug. 4, 1986, as amended at 53 FR 6549, Mar. 1, 1988; 53 FR 18987, May 26, 1988; 56 FR 8852, Mar. 1 	volved in care planning and treatment, and being able to request or refuse
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SUBJECT: Revise Appendix A, "Interpretive Guidelines for Hospitals"

is repeated for clarity and accuracy in representing the regulatory citation.

I. SUMMARY OF CHANGES: Appendix A is being revised to reflect amended regulations and survey and certification policy issuances concerning the Conditions of Participation for Hospitals, 42 CFR Part 482. It also contains new guidance related to the Patients' Rights Final Rule, 42 CFR 482.13(e), (f), and (g), published in the Federal Register December 8, 2006 (71 FR 71378). In addition, Regulatory text that appears in brackets was included in a previous tag, but

HOSPITAL INTERPRETIVE GUIDELINES-PATIENTS' RIGHTS				
TAG Number	REGULATION	GUIDANCE TO SURVEYORS		
A 750	§482.13 Condition of participation: Patients' rights. A hospital must protect and promote each patient's rights.	Interpretive Guidelines: E462.13. These requirements apply to all Medicare or Medicaid-participating hospitals including short-term, psychiatric, rehabilitation, long-term, children's and atomol-drug, whether or not finely are accredited. This rule does not apply to psychiatric feelines for widoulas under age 21, to residential treatment centers (unless these services are provided in a hospital setting), nor to Critical Access Hospitals (See Social Security Act (the Act) §1861(e)).		
A 751	(a) Standard: Notice of rights (1) A hospital must inform each patient, or when appropriate, the patients representative is allowed under State ian), of the patient's rights, in advance of furnishing or discontinuing patient care whenever possible.	This regulation requires that whenever possible, the hospital informs each patient of his or her nights in annuage that the patient understands. The hospital has the responsibility to establish policies and procedures that effectively ensure that patients and representatives have the information necessary to exercise their rights under the Art. This responsibility includes and is not limited to providing all notices required by statute and responsibility includes and is not limited to providing all notices required by statute and responsibility includes and so make the provider agreement, including the right to an advance directive and notice of non-overaging (see A.C. PR. part 456), as well as in rights listed in this COP. Depending notifier facility, the hospital may have existing mechanisms for notifying patients of their nights. The hospital may be existed in the soft that and devance inferrience unities with these existing notices.		

Education

Staff

To ensure compliance

Community

To ensure reflection

To ensure documentation



Health and Safety
Regulatory Provisions Concerning Public Health
CHAPTER 25. 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.



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: "an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage"

Nicoletta v. Rochester Eye & Human Parts Bank, Inc., 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987)

16 Del. Code 2510(a)

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)(3)

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

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 healthcare decision for a patient, including a decision to withhold or withdraw . . . Example: spouse being separated How could HCP know that

16 Del. Code 2510(a)(2)

Declining to comply with a health-care decision of a person based on a belief that the person then lacked authority

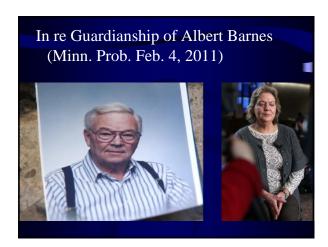
Surrogate must comply
written instructions
values & preferences
best interests

16 Del. Code 2508(d)(2)

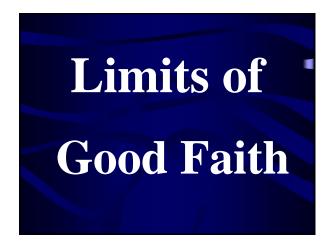
Provider need only comply "to the extent the . . . surrogate is permitted by this chapter."

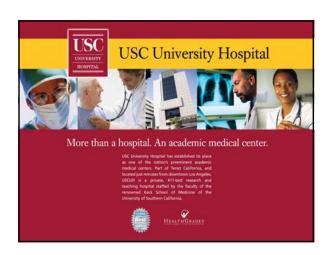












Pascentia McDonald, 74yo

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



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION EIGHT CYNTHIA L. CARDOZA, B195092

Plaintiff and Appellant,

USC UNIVERSITY HOSPITAL et al.,

Defendants and Respondents.

(Los Angeles County Super. Ct. No. BC338034)

August 2008

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In I	Scott B. McFall, State Bar No. 80396	LOS ANGE	LES SUPERIOR COURT
11	Descrit Constants Seems Descrit 207420		
2	AGAJANIAN, McFALL, WEJSS, TETREAU	LT & CRISTILLP	
I I	346 North Larchmont Boulevaru	MEC D	EB 0 12010
3	Los Angeles, California 90004		
1.3	Telephone: (323) 993-0198	DEC 15 2009	OHN A. CLARKE, CLERK
4	Facsimile: (323) 993-9509		
5	Attorneys for Defendant, USC UNIVERSITY		Y MARIA FAUNE, DEPUTY
15	erroneously sued herein as USC SCIENCE HO		
6	entoneously sued nerelii as OSC SCIENCE NO	SPITAL	_
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8	SUPERIOR COURT O	F THE STATE OF CALIFORN	IA
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9	COUNTY OF LOS AN	NGELES - CENTRAL DISTRIC	T
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ha l	CYNTHIA L. CARDOZA.	CASE NO.: BC338034	
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12	Plaintiff,	[PROPOSED] JUDGMENT F	
		HOSPITAL'S MOTION FOR	
13	vs.	JUDGMENT/ADJUDICATIO	ON
14			000
14	USC SCIENCE HOSPITAL, DR. FRED WEAVER, KECK SCHOOL OF	DATE: December 9, 20 TIME: 8:30 a.m.	309
15	MEDICINE, DR. MICHAEL LEKE, DR.	DEPT.: "33"	
r	DOUGLAS HOOD, BOBBY G. MILES.	1 224 4 33	
16	DOCOCKO HOOD, DOBBT O. MICES,		
	Defendants.	File	e by Fax

Judgment for DEF But only after 8 years of litigation



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



