

ADVANCE DIRECTIVES IN THE SPOTLIGHT

Schiavo Case Leads to Increase in Advance Directives

ALSO IN THIS ISSUE...

*Don't Forget Your
Own Needs*

Page 2

*Upcoming
Baird Holm Speaking
Engagements*

Page 3

In the wake of the Schiavo case, many institutional providers are reporting an influx of advance directives. The case has caused many Americans to discuss their end of life decision-making processes with family members and to review or prepare advance directives. Legal advisers are recommending that their clients submit a copy to their physicians and local hospitals in preparation for the day they may become operable. This makes it important that hospitals review and update their patient rights policies and procedures relating to advance directives.

The Federal Patient Self-Determination Act was adopted in 1990, and imposed the following requirements on hospitals, SNFs, hospices and home health agencies:

1. Written policies and procedures for adult patients must disclose patient rights, including the right to make decisions regarding medical care, to accept or refuse medical or surgical treatment and to formulate an advance directive.
2. Hospitals and SNFs must provide written information on patient rights and related policies at the time of admission. (This includes admission for outpatient care and an on-going obligation to inform an incapacitated patient when he or she later regains capacity.) HHAs and hospices must provide such information before providing services to the patient.
3. The provider must document in the medical record whether the patient has an advance directive.
4. The provider must assure compliance with the requirements of State law concerning advance directives.
5. The provider must provide staff and community education on advance directives.

Just as potential patients have taken a renewed interest in the effect of advance directives, so have physicians and other health care professionals who must implement them. We encourage the update of institutional advance directive

(continued on page 2)

policies to better serve health care professionals when the need arises. We recommend that policies include:

1. Definitions of persistent vegetative state, terminal condition, life-sustaining procedures, competency and capacity.
2. Detailed information on the medical findings and notices to be documented prior to invoking an advance directive.
3. Distinctions between a living will or “declaration” and a power of attorney for health care.
4. Encouragement of informed consent discussions with patients and/or family members.
5. Explanation that capacity may be transitory.
6. Distinction between advance directive and “do not resuscitate” orders.
7. Limited effect of DNRs.
8. Assignment of responsibility for inquiring about advance directives and entering them into archive systems.
9. Any State law limitations on physicians serving as attorneys in fact under a durable power of attorney for health care.
10. Means of documenting and facilitating a revocation and/or replacement of an advance directive.

The Patient Self-Determination Act anticipates that institutional providers will support patients who wish to execute an advance directive at the time of or after admission. This may be done through social services, which may stock some model forms. However, the Schiavo case demonstrates the importance of careful preparation of advance directives, which should (directly or through separate instructions) specifically identify treatments that the patient would accept or refuse. Institutional providers and their social services should not hesitate to refer their patients to local attorneys who have the training to prepare advance directives that will effectuate the patients’ desires in the event of their later incapacity.

Barbara E. Person

Don't Forget Your Own Needs

You undoubtedly read the foregoing article through the eyes of a health care professional – it tells you, as the health care professional or executive, how to implement the advance directive of a patient of your facility and tells you about the need to update your policies. Knowing those rules is important, but it is also important that you look at advance directives from the eyes of you and your family as patients.

Advance directives mainly do two things –

1. They identify and empower a person you name to be your substitute decision maker.
2. They instruct your decision maker what decisions to make and explain the full range of their authority. This is especially important when your decision maker may be called upon to make controversial decisions on your behalf.

What are the advantages of having your own advance directive? That is a fair question, given that most states already recognize the right of family members to make substitute health care decisions in limited circumstances and even assign a priority (e.g., a spouse, an adult child, a parent, or a sibling). In fact, the advantages of a personally-tailored advance directive are many:

1. You get to choose the specific decision maker, regardless of what contrary priority the law in your state might assign. You pick the person you believe will be physically and emotionally best equipped to make decisions on your behalf and follow your specific instructions.
2. You eliminate doubt under sometimes murky state law as to the authority of your designated decision maker to act on your behalf. In most states, the notion of substitute decision

making and the priority of substitute decision makers is drawn from multiple sources, rather than from one clear statutory statement. This leaves room for doubt in difficult cases. It also leaves room for conflict among family members and others.

3. You can clarify the scope of authority (range of permissible decisions) given to your decision maker. That is, can your surrogate just make the decisions in favor of more treatment and prolongation of life, or can he or she also make the decision to refuse or withhold care, even including care recommended by the professionals? In the absence of a written directive, these are the cases that you read about.

4. You can provide specific instructions to guide your decision maker so that their decisions will most closely parallel your wishes. Many people think an advance directive is valuable only when it comes to refusing or withholding care. This is not accurate. An advance directive is a uniquely personal document through which you can instruct your trusted decision maker on your preferences and on what decisions to make.

5. An advance directive can be effective in preventing unrelated third parties from inserting themselves into the decision-making process. That is, in the absence of a clear advance directive, a substitute decision maker may find it necessary to prove that his or her decision is either “in the best interest” of the patient or is the “same decision” the patient would make. Picture you or your family members trying to satisfy one of these standards in a contest of end-of-life decision-making scenario. Contrast that burden with the authority of a duly-appointed and properly-instructed substitute decision maker under an advance directive. In the latter, the decision maker only needs to show

that the decision is within the scope of his or her authority, taking into account the instructions and limitations of the patient.

One other matter is critical as you consider an advance directive for you and your family members. Don't put it off! Advance directives are not something that can wait until you or your family members think it is time for a stroke or an accident. The most famous cases involve individuals who were suddenly and unexpectedly rendered incapable of making decisions at very young ages – typically in their twenties. Executing an advance directive is an action that should be taken now.

Alex (Kelly) M. Clarke

UPCOMING BAIRD HOLM SPEAKING ENGAGEMENTS

May 24

"Legal Issues in Healthcare"

-Julie Knutson

Iowa Society of Healthcare Attorneys Annual Meeting

May 26

"Legal Issues Affecting Rural Iowa Hospitals"

-Kelly Clarke and Jessica Ledbetter

29th Annual Healthcare Conference, Gronewold Bell, KYHNN & Co., P.C.

June 10

"OIG Supplemental Compliance Guidance for Hospitals"

-Barbara Person

HFMA Nebraska Chapter

November 18

Baird Holm Health Law Forum

BAIRD HOLM

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