

**Advance Directives:
Legal Liability and the
Good Faith Standard**

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National Healthcare Decisions Day

April 15, 2011

**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 1 of 2 qualifying conditions if refuse LSMT

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

_____ (i) 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:

| | I want used | I do not want used |
|--|-------------|--------------------|
| Artificial nutrition through a conduit | _____ | _____ |
| Hydration through a conduit | _____ | _____ |
| Cardiopulmonary resuscitation | _____ | _____ |
| Mechanical respiration | _____ | _____ |
| Other (explain) _____ | _____ | _____ |

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

Title 42--Public Health

CHAPTER IV--CENTERS FOR MEDICARE & MEDICAID SERVICES,
DEPARTMENT OF HEALTH AND HUMAN SERVICES (CONTINUED)

PART 482--CONDITIONS OF PARTICIPATION FOR HOSPITALS

| | | |
|---|--------|---|
|  | 482.1 | Basis and scope. |
|  | 482.2 | Provision of emergency services by nonparticipating hospitals. |
|  | 482.11 | Condition of participation: Compliance with Federal, State and local laws. |
|  | 482.12 | Condition of participation: Governing body. |
|  | 482.13 | Condition of participation: Patient's rights. |
|  | 482.21 | Condition of participation: Quality assessment and performance improvement program. |
|  | 482.22 | Condition of participation: Medical staff. |

§ 482.13 **42 CFR Ch. IV (10--1-08 Edition)**

emergencies and referral when appropriate.

[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, 1991; 56 FR 23022, May 20, 1991; 59 FR 46514, Sept. 8, 1994; 63 FR 20130, Apr. 23, 1998; 63 FR 33874, June 22, 1998; 68 FR 53262, Sept. 9, 2003]

§ 482.13 Condition 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.

decisions regarding his or her care. 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.

(3) 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 § 489.100 of this part (Definition), § 489.102 of this part (Requirements for providers), and § 489.104 of this part (Effective dates).

(4) The patient has the right to have

| | |
|-------------------------------------|--|
| CMS Manual System | Department of Health & Human Services (DHHS) |
| Pub. 100-07 State Operations | Centers for Medicare & Medicaid Services (CMS) |
| Provider Certification | |
| Transmittal 37 | Date: October 17, 2008 |

SUBJECT: Revise Appendix A, "Interpretive Guidelines for Hospitals"


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

| HOSPITAL INTERPRETIVE GUIDELINES-PATIENTS' RIGHTS | | |
|---|--|---|
| TAG NUMBER | REGULATION | GUIDANCE TO SURVEYORS |
| A 750 | §492.13 Condition of participation: Patients' rights. A hospital must protect and promote each patient's rights. | Interpretive Guidelines: §492.13. These requirements apply to all Medicare or Medicaid-participating hospitals including short-term, psychiatric, rehabilitation, long-term, children's and alcohol-drug, whether or not they are accredited. This rule does not apply to psychiatric facilities for individuals 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) <u>Standard: Notice of rights</u> (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. | This regulation requires that whenever possible, the hospital inform each patient of his or her rights in language that the patient understands. The hospital has the responsibility to establish policies and procedures that effectively ensure that patients and/or their representatives have the information necessary to exercise their rights under the Act. This responsibility includes and is not limited to providing all notices required by statute and regulation regarding patients' rights. For example, the patient must be given notice of the rights afforded to him/her by the provider agreement, including the right to an advance directive and notice of non-coverage (see 42 CFR part 489), as well as the rights listed in this CoP. Depending on other factors, the hospital may have existing mechanisms for notifying patients of their rights. The hospital may decide it is most effective to bundle the patients' rights and advance directives notice with these existing notices. |

Education

Staff
To ensure compliance

Community
To ensure reflection
To ensure documentation



TITLE 16
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.

- 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”

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 health-care 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.”

Surrogate material COI



Contradict advance directive




Dorothy Livadas

In re Guardianship of Albert Barnes (Minn. Prob. Feb. 4, 2011)




Court: Your own personal issues are “impacting your decisions”


“Refocus your assessment”




Barbara Howe
Daughter Carol Carvitt



Limits of Good Faith





USC University Hospital



More than a hospital. An academic medical center.

USC University Hospital has established its place as one of the nation's preeminent academic medical centers. Part of Terer California, and located just minutes from downtown Los Angeles, USUHR is a private, 411-bed research and teaching hospital staffed by the faculty of the renowned Keck School of Medicine of the University of Southern California.

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

| | | |
|--|--|--|
| <p>CYNTHIA L. CARDOZA,</p> <p style="padding-left: 40px;">Plaintiff and Appellant,</p> <p style="text-align: center;">v.</p> <p>USC UNIVERSITY HOSPITAL et al.,</p> <p style="padding-left: 40px;">Defendants and Respondents.</p> | | <p>B195092</p> <p>(Los Angeles County Super. Ct. No. BC338034)</p> <p style="color: red; font-weight: bold; font-size: 1.2em;">August 2008</p> |
|--|--|--|

| | | | | | |
|---|--|---|--|--|--|
| <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17</p> | <p>Scott B. McFall, State Bar No. 80396 Donald Ornelas Jr., State Bar No. 207430 AGAJANIAN, McFALL, WEISS, TETREULT & CRIST LLP 346 North Larchmont Boulevard Los Angeles, California 90004 Telephone: (323) 993-0198 Facsimile: (323) 993-9509</p> <p style="text-align: center;">FILED LOS ANGELES SUPERIOR COURT</p> <p style="text-align: center;">REC'D</p> <p style="text-align: center;">DEC 15 2009</p> <p style="text-align: center;">FILING WINDOW</p> <p>Attorneys for Defendant, USC UNIVERSITY HOSPITAL erroneously sued herein as USC SCIENCE HOSPITAL</p> <p style="text-align: right;">FEB 07 2010 JOHN A. CLARKE, CLERK <i>M. Faune</i> BY MARIA FAUNE, DEPUTY</p> <p style="text-align: center;">SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES - CENTRAL DISTRICT</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 60%;"> <p>CYNTHIA L. CARDOZA,</p> <p style="padding-left: 40px;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>USC SCIENCE HOSPITAL, DR. FRED WEAVER, KECK SCHOOL OF MEDICINE, DR. MICHAEL LEKE, DR. DOUGLAS HOOD, BOBBY G. MILES,</p> <p style="padding-left: 40px;">Defendants.</p> </td> <td style="width: 5%; vertical-align: top; border-left: 1px solid black; border-right: 1px solid black;"></td> <td style="width: 35%;"> <p>CASE NO.: BC338034</p> <p>[PROPOSED] JUDGMENT RE: USC UNIVERSITY HOSPITAL'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION</p> <p>DATE: December 9, 2009 TIME: 8:30 a.m. DEPT.: "33"</p> <p style="text-align: center; font-weight: bold; font-size: 1.1em;">File by Fax</p> </td> </tr> </table> | <p>CYNTHIA L. CARDOZA,</p> <p style="padding-left: 40px;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>USC SCIENCE HOSPITAL, DR. FRED WEAVER, KECK SCHOOL OF MEDICINE, DR. MICHAEL LEKE, DR. DOUGLAS HOOD, BOBBY G. MILES,</p> <p style="padding-left: 40px;">Defendants.</p> | | <p>CASE NO.: BC338034</p> <p>[PROPOSED] JUDGMENT RE: USC UNIVERSITY HOSPITAL'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION</p> <p>DATE: December 9, 2009 TIME: 8:30 a.m. DEPT.: "33"</p> <p style="text-align: center; font-weight: bold; font-size: 1.1em;">File by Fax</p> | |
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Good faith immunity is not immunity **from suit**

It is a fact question to be resolved at trial

Educate

Surrogates



EMANUEL
MEDICAL CENTER
Technology to Heal. Compassion for Life.

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



London Health Sciences Centre


**Making Medical Decisions
for Someone Else:
A How-To Guide**



The American Bar Association
Commission on Law and Aging


Making Medical Decisions
For Someone Else

A New Hampshire Handbook



Are you, or will you be, responsible for managing the health care of someone else? This handbook can guide you through the decisions you may have to make and provide resources for more information.

**Sometimes, you
need to **replace**
surrogates**



**Widener
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