End of Life Decisions

What is the role of the Client, Attorney And Doctor in dealing with Directives to Physicians and the Patient

A Practical Approach

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South Bay Bar Association

Presented by:

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Publications & Lectures. Mr. Rice has published numerous articles which have been published in the Tax Developments Journal, Journal of Tax Practice and Procedure, Journal of Taxation, the Estate Planning Journal, Practicing Law Institute, University of Southern California Tax Institute, UCLA Tax Institute, California Tax Lawyer, Los Angeles Lawyer, Association of Certified Family Law Specialists, the Daily Journal and Tax Notes. Has drafted numerous papers for presentations to the IRS and Treasury concerning substantive changes to the Tax Code and the Treasury Regulations thereunder and has testified before the IRS, Department of Treasury, House Ways and Means Committee and Senate Finance Committee. Mr. Rice has also lectured before the Internal Revenue Service, USC Tax Institute, Annual UCLA Tax Institute, American Bar Association, Annual Meeting of the California Tax Bar and California Tax Policy Conference, HELP, South Bay Bar Association, Beverly Hills Bar Association, Loyola Law School, California Society of CPAs, Orange County Society of CPAs, Estate Planning Counsels of Los Angeles, South Bay and San Fernando, Dean Whittier, Jewish Federation Council, Anti-Defamation League, Kaiser Permanente, Miller & Company, California State Bar Educational Institute, Annual California State Bar Meetings, the Los Angeles County Bar Association, COSMA, and before various Elder Care Groups sponsored with the Los Angeles County Bar Association in conjunction with the Los Angeles County Board of Supervisors.

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Advanced Health Care Directives and End of Life Decisions

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Living Will

- The living will in some states called "instructions" or "declaration" states a person's desires regarding life-sustaining or prolonging treatment. No surrogate or agent is appointed and most States, including California do not recognize them as legally binding.

Durable Power of Attorney For Health Care

- The durable power of attorney for health care names someone's relative or friend to make medical decisions when the patient can no longer do so. The agent also known as the attorney in fact is allowed to decide all medical decisions unless it is limited.

Advanced Health Care Directives

- California's new Health Care Decision Law, effective July 1, 2000, combines the durable power of attorney for health care and the instructions for health care decisions into one document called the Advanced Health Care Directive. This document does NOT authorized anyone to make legal or financial decisions for the client.

Are Previous Directives Still Valid?

Any previous advance directive such as a Durable Power of Attorney for Health Care or a Natural Death Act that was valid as of July 1,2000 is still valid. However, if the client has already executed one of these documents, make sure it has not expired and that the forms are still consistent with the client's wishes.

What is a "POLST"

- "POLST" or Physician Orders for Life-Sustaining Treatment, became part of California Law in 2009. POLST is intended to complement an AHCD, particularly for those who are seriously ill or have been diagnosed with a terminal illness. When a client (patient) completes a POLST form, it means that the end-of-life health care wishes have been translated into actionable physician orders. Thus, POLST can held ensure that health care wishes are implemented without delay.

What is the Advanced Health Care Directive ("AHCD")

- It allows for the appointment of an agent who is over the age of 18. In choosing the agent, you should advise the client to choose someone with the same values and beliefs. It is advisable to choose someone who lives in the area. The client needs to discuss this documents with his or her agent. See Probate Code Sections 4600-4806.

Federal Protection

- The Patient –Self Determination Act ("PSDA"), 42 USC Section 1395cc(f) requires providers, Medicare Advantage Plans, and prepaid or eligible organizations participating in Medicare or Medi-Cal program to follow the Advance Health Care Directives.

Out of State Forms

- California recognizes and enforces a written AHCD or PACH that meets the requirements of the law of California or the State of origin. Probate Code Section. See Probate Code Section 4676(a).

Capacity

- Under the Due Process in Competence Determinations Act ("DPCDA") a person lacks the capacity to make a decision unless the person has the ability to communicate the decision verbally, or by any other means, and to understand and appreciate the following matters:

Capacity

- The rights, duties and responsibilities created by or affected by the decision.
- The probable consequences for the decision maker and, when appropriate, for the persons affected by the decision.
- The significant risks, benefits and reasonable alternatives involved in the decision.

Capacity

- On capacity issues, it is a good idea to get a letter from the client's physician.

Who Cannot Act as an Agent

- A health care agent cannot be the client's supervising health care provider or the operator of a community or residential care facility where the agent is receiving assistance. Nor can the agent be an employee in a residential, community or health care facility in which the client is receiving care unless that person is a relative, spouse or co-worker.

Should There be More than One Agent?

Generally it is a preferable to have one person named at a time to act as the agent or attorney in fact. If your client doesn't want to hurt someone's feelings and there are two good choices, suggest to the client that those individuals assist him or her in deciding who should be listed first.

Agent's Authority

- Probate Code Section 4617 provides:
  - "Health Care decision" means a decision made by a patient or the patient's agent, conservator, or surrogate regarding the patient's health care, including the following:
    - Selection and discharge of health care providers and institutions.
    - Approval or disapproval of diagnostic tests, surgical procedures and medications; and
    - Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.
- The client has the right to limit the agent's authority in this area.

Agent's Authority

- Probate Code Section 4683(b) provides in pertinent part as follows:
  - The agent may also make decisions that may be effective after the principal's death, including the following:
    - (1) Making a disposition under the Uniform Anatomical Gift Act.
    - (2) Authorizing an autopsy under Section 7100 of the Health and Safety Code.
    - (3) Directing the disposition of remain under Section 7100 of the Health and Safety Code.
    - (4) Authorizing the release of the records of the principal to the extent necessary for the agent to fulfill his or her duties as set forth in this division, i.e., release medical records.

Agent's Authority

- An agent has priority in making health care decisions over a conservator of the person, even if the conservator has been given medical consent powers. See Probate Code Sections 2356(e), 4685.
- The agent can petition the court for an order to require persons to honor the AHCD and the court can award attorneys fees.

Agent's Authority

- Health care providers and institutions that intentionally violate the Health Care Decisions Law is subject to liability for damages, including reasonable attorneys fees. Because the remedies under this section are cumulative and not exclusive the agent can seek a permanent injunction against the conservator, health care professionals and providers against taking any action not directed by the agent. As to conservators, the agent may want to petition for instructions in the conservatorship. See Probate Code Sections 4742, 4766, 4751 and 2359.

Limitations on Agent

- Can place the client (principal) in a secured-perimeter facility without court intervention and having to resort to the Lanterman-Petis Short (LPS) Act. However Health and Safety Code Section 1569.698(b)(7) and 22 Cal Code Regs. Section 87705(l(4)(A) seem to imply that a conservatorship may be needed if the principal objects and want to leave the facility.
- With that exception cannot place a principal in a mental health treatment facility and cannot order certain treatments such as convulsive treatments, psychosurgery, sterilization or abortion.
- Allowing the Agent to participate in assisted suicide, euthanasia, or mercy killing.

Coordinating the AHCD with the DPOA

- When the two agents differ, it is important to coordinate each agent's responsibilities in the respective documents. If the client wants the AHCD to have primary decision making authority about health care costs, the document should be drafted with this in mind. If preservation of assets is important, perhaps the DPOA should control. The attorney should include the principal's goals in both documents.

HIPPA and the AHCD

- At times the agent may need to act prior to a decision on incapacity and may need records. The easiest way to resolve this is to draft a separate HIPPA release form naming the agent(s).

Withholding or Withdrawing Medical Treatment

- Artificially Administer (Withdraw) Nutrition and Hydration.
- Dispose of remains and autopsy
- If the agent has been charged with murder or manslaughter in connection with the death of the decedent, looses the right to control the remains.
- Authorize Autopsy
- Anatomical Gifts
- Dialysis

Choice of Where the Patient Dies

- The AHCD should address where the patient would like to die if possible. Years ago most patients died at home, which is a far cry from what happens now. If the patient is going to be put on hospice, this should be discussed with the client (patient) or agent, but should be made known to the agent in the AHCD.

Funeral Arrangements

- It is important for the client to address the type of funeral they want, albeit religious or non-religious. They may even want to name a specific religious institution or priest or rabbi, etc. they want officiating at their funeral. It is important that they discuss how they want their body disposed of, whether by cremation, burial or otherwise. If they want a burial services, it is important for them to purchase their plots or if cremation, arrange for it in advance. If they want cremation and have children, it is a good idea that they discuss this with their children.

Who Should Get a Copy

- The Agent.
- The Primary Care Physician.
- Hospital.
- May want to register with a service.
- Tell the client that they should not place it in a safety deposit box.

Physician Orders for Life Sustaining Treatment ("POLST")

- POLST are physician order forms on which a patient indicates preferences regarding end-of –life care such as resuscitative measures and other life –sustaining treatment. The primary purpose of POLST is to ensure that patients receive end-of-life care consistent with their preferences. This should be used as an addition to the AHCD.

POLST

- The POLST began with a seven community pilot project in 2007 and as of January 1, 2009, it became law. See Probate Code Sections 4780-4785.

POLST

- POLST does not replace the AHCD, it merely supplements it with physician approval, and puts the requests in action. However, there is nothing in the law that requires anyone to review the AHCD to see if the two are consistent.

POLST

- It can be used in the ambulance, hospital , SNF, etc. regarding the patient's wishes.
- It must be signed by the physician and patient or their representative.
- The POLST must be followed. If there is something on the form in which the doctor disagrees, he or she should discuss this with the bioethics and legal department of the hospital.

POLST

- POLST should be used with those with a terminal illness or approximately 1 year of life remaining. How does a doctor know?
- Can be signed by third party even when there is no AHCD. A legally authorized health care decision maker (not defined anywhere) can sign and the latest document signed, prevails. *Cobbs v Grant*, 8 Cal 3d. 2929, 244 ((1972) is often cited which holds that a parent can make a decision for a child and there is *dicta* where the court states that the patient's closest relative may decide.
- POLST can be revoked at any time.
- POLST should be included with the patient's chart.

POLST

- Nursing homes require that the Ombudsman be present for the signing of an ACHD, but does not require it for a POLST.
- POLST is to supplement not replace and ACHD. In a CANHR survey, 73% of the Ombudsman reported that POLST was used in place of an ACHD.

POLST

- In California 73% of surveyed Ombudsman reported that the residents of nursing homes were told that POLSTs were mandatory.
- Despite the fact that physicians are suppose to explain the form, in SNF, it is estimated that 57% of all POLSTS are completed by admission coordinators and business managers.

Comfort Needs near the end of Life

- Physical Comfort
- Mental and Emotional Needs
- Spiritual Issues
- Practical Tasks

Physical Needs

- Pain – dependency should not be a factor!
- Breathing problems (dyspnea)
- Skin irritation
- Digestive Problems
- Temperature sensitivity
- Fatigue

Mental and Emotional Needs

- Complete end-of-life care also includes helping the dying client/patient manage any emotional and mental distress. Should a counselor be engaged or the use of anti-depressants?

Spiritual Issues

- Peoples nearing the end of life may have spiritual needs as compelling as physical concerns
  - Finding meaning in their own life and settling disagreements with others.
  - Speaking to their minister rabbi, priest or Muslim cleric.

Practical Tasks

- Where is the client/patient going to live?
- Where does the client/patient want to die?
- Who will take care of the pets?

Caretaker – Questions to Ask

- Since there is no cure what will happen next?
- Why are you suggesting this test or treatment?
- Will the treatment bring physical comfort?
- Will the treatment speed up or slow the dying process?
- What can I expect to happen in the coming days or weeks?
- When should I expect to inquire about hospice care?
- Who pays for the care? Will it be insurance, Medicare or will I need to qualify for Medi-Cal?

Caretaker Questions to Ask?

- How long is the person expected to live?
- What kind of end-of-life care is needed?
- Where would the person who is dying want to have his life end? (at home or in a facility)
- Where is the best place to get the care?
- Who will pay for the care?
- Who can visit and when?
- Is there any chance that ICU treatment can reverse the dying process, or instead draw it out with quality of life?

Dementia – When is the Final Stage

- Being unable to move around on one's own.
- Being unable to speak or make oneself understood.
- Needing help with most, if not all, daily activities.
- Eating problems such as difficulty swallowing or no appetite.

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