New Virginia Law Tightens Advance Directives, Adds Mental Health Intentions

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FOR NEARLY TWO DECADES, all adults in Virginia have had the right to make their health care wishes known in documents called advance directives, in which they dictate the health care they do or do not want in case they later cannot make their own decisions. These documents have taken two key forms:

- The designation of an agent to make health care decisions for you if you cannot speak for yourself.

- Written instructions — in what is often called a "living will" — about life-prolonging procedures if you have a terminal condition. Life-prolonging procedures are those that will not cure the condition and only prolong the dying process.

On July 1, 2009, Virginia's law changed to expand the types of decisions an individual can make with an advance directive. The changes also address assessment of decision-making capacity; authority of health care agents; situations in which a patient who lacks decision-making capacity protests care recommendations; revocation of documents that express care decisions; and protection of decision makers and providers who act in good faith to carry out patient directions.

The revisions were recommended by the Supreme Court of Virginia's Commission on Mental Health Law Reform to create additional legal authority for individuals to give instructions for their health care, especially if they anticipate losing their decision-making capacity due to dementia or other mental health conditions. The instructions now can address future mental health care, as well as physical health care.

New Decision-making Options and Rights

Under the expanded law, an individual can give instructions in his or her advance directive about all forms of health care — not just end-of-life care, as previously was the case. The directive can apply even if the individual has not named an agent to make decisions for him when he cannot make them for himself. This means that, with an advance directive, a person can now express choices for health care, health care facility admission, maintenance treatments such as dialysis, insulin treatment, or any other health care. *(Code of Virginia §§ 54.1-2983 and 54.1-2984)*

In the interest of public and patient safety, the revised law makes it clear that an advance directive cannot override laws that authorize immediate custody of individuals who may be at risk of harming themselves or others, or judicial orders that authorize certain aspects of mental health care and treatment. *(§ 54.1-2983.3)*

It has always been the case in Virginia that advance directives take effect only when a patient is determined to be incapable of making informed decisions, as determined by his own physician and a second physician who personally has examined the patient. The law now specifically requires that the second physician be one who is not involved in the patient's care, unless an independent physician is not reasonably available. Also, to ensure that the decisions of patients who regain the ability to make informed decisions are honored, the revised law provides that a determination of a patient's regained capacity for decision making requires only one physician to document the finding, in writing. *(§ 54.1-2983.2)*

Generally, Virginia's law does not authorize any treatment under an advance directive that the patient's provider and decision maker know the patient does not want. However, because a patient's condition may cause him to say things he does not mean or that are inconsistent with his previous statements, the expanded law creates two limited exceptions to this policy. The exceptions allow the patient's previously expressed wishes to be carried out in the event the patient protests *after* having been determined to be incapable of making an informed decision. Both of these exceptions contain several safeguards to protect the interests of the patient. *(§ 54.1-2986.2)*

First, an individual may make certain choices in an advance directive that are binding, even if he objects to those choices later, during a time that he has lost his capacity to make decisions for himself. An individual with recurring mental illness, dementia, or other condition that intermittently affects awareness, judgment, or ability to understand circumstances now can direct that he wants his advance directive followed even if he later, while incapacitated, objects to the instructions in the directive. For an individual to make directions that bind over his later objection, his physician also must verify in writing that the individual understands this decision. Even then, the treatment must be medically appropriate and cannot involve withholding or withdrawing life-prolonging procedures.

The second exception prevents decision-making stalemates stalemates in situations in which the patient does not exercise the option to expressly instruct providers on what to do in the event of a later protest. Before the revisions to the

law, there was no specified mechanism for situations in which a patient who is incapable of making informed decisions protests a physician's treatment recommendation made during the patient's incapacity, even if the treatment recommendation would be consistent with the patient's previously stated wishes or the recognized best interest of the patient, as determined by his health care agent or other legally designated decision maker. Providers have been reluctant to proceed in these situations without a court order. The time required to get an order delays care, may result in the patient not receiving the care he originally requested, and adds considerable costs. The revised law allows the patient's agent or other decision maker to authorize the recommended treatment even if a patient who has been determined to be incapable of making an informed decision protests it.

In a second scenario, if the patient objects to a treatment recommendation otherwise allowed in his advance directive, the agent whom he has named in his advance directive (but no other decision maker) can authorize the recommended treatment over his protest. In either case, the treatment recommendation must not involve withholding or withdrawing life-prolonging procedures, and the treatment must be found to be ethically acceptable by an ethics committee or two physicians who are not involved with the patient's care. Ultimately, these provisions allow decision making by someone who knows the patient personally, while providing safeguards that appropriately limit the decision maker's authority in light of the patient's protest.

Regardless of these exceptions, if a patient without decision-making capacity protests the general authority of his agent or other decision maker, then under most circumstances those decision makers no longer will have authority to make decisions. Decisions then must be made under other provisions of the advance directive or other laws, and might require seeking authority from a court.

As under previous law, an individual can revoke an advance directive in writing, orally, by destroying the document, or by directing someone else to destroy it in his presence. The revised law makes it clear, however, that only intentional purposeful actions will revoke an advance directive. For example, if an angry patient tears up his advance directive and does not understand the nature and consequences of his actions, the physical destruction of the advance directive is not a revocation. The directions stated in the advance directive would continue to apply until it is clear that the patient is capable of understanding the significance of his actions as constituting a revocation of the document. *(§ 54.1-2985)*

The revised law also clarifies the rules on the revocation of durable do-not-resuscitate (DDNR) orders, which are issued by physicians to ensure that a patient's desire to forego cardiopulmonary resuscitation is honored by emergency medical personnel and other licensed providers outside of a hospital or nursing home. The change clarifies that only the individual who consented to the DDNR order may revoke it; thus, an authorized decision maker cannot revoke a DDNR order if it was issued based on the request and consent of the patient himself. With this change, a family member cannot demand resuscitation against a patient's wishes when the patient suffers a heart attack, for example. The law now also clarifies that physicians cannot revoke DDNR orders, but they may rescind the order in accordance with accepted medical practice, as is the case with any physician order. *(§ 54.1-2987.1)*

Virginia's health care decision-making law has always protected providers and decision makers from liability if they follow the law in good faith by seeking patient consent as they carry out treatment decisions. However, the revised law has filled gaps that existed in that protection. *(§ 54.1-2988)*

Any individual who has an advance directive may want to create a new document to take advantage of these new decision-making opportunities. If he chooses not to do so, his legally valid advance directive created under previous law continues to be valid. For individuals who create new advance directives, it is helpful to know that advance directives in Virginia need not be on a specific form, written by an attorney, or notarized. They simply must be signed by the individual and two adult witnesses. Nevertheless, to assist all Virginians in creating an advance directive, a free form based on the model suggested under Virginia's law *(§ 54.1-2984)* is available at http://www.vsb.org/site/public/healthcare-decisions-day.

Implementation Resources

Ultimately, advance directives are a powerful tool to accomplish many important health care goals. They help ensure that a patient's wishes are honored; they provide guidance and relieve the burden on family members who might otherwise be left to guess about a patient's health care wishes; and they serve as an opportunity to provide improved care to patients because health care providers are better informed about patients' wishes. Unfortunately, for several reasons — including reluctance to talk about our own mortality and confusion about legal requirements and ways to obtain these documents — it is estimated that no more than one-third of all Americans have empowered themselves through advance directives. In an effort to demystify this topic and the process for creating advance directives, free resources are available at http://www.vsb.org/site/public/healthcare-decisions-day.