AMERICAN BAR ASSOCIATION
COMMISSION ON LAW AND AGING
SENIOR LAWYERS DIVISION
REAL PROPERTY, TRUST AND ESTATE LAW SECTION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

Adopted by the ABA House of Delegates August 12, 2019

RESOLVED, That the American Bar Association encourages all lawyers who provide advance care planning as part of their estate planning services to take into account the following principles:

1. The most important legal component of advance care planning is careful selection and appointment of a health care agent/proxy in a valid power of attorney for health care document. Persons who cannot or do not want to identify a proxy should delineate their wishes in an advance directive.

2. Advance care planning takes place over a lifetime. It changes as one’s goals and priorities in life change through different stages of life and health conditions. Reflection, discussion, and communication with one’s proxy and clinical professionals, along with family, friends, and advisors is essential to having one’s wishes understood and honored.

3. Reflection and discussion should focus primarily on one’s values, goals, and priorities in the event of worsening health rather than on specific treatments or clinical interventions for distant hypothetical situations.

4. Advance care planning decision tools and guides can provide structure and guidance to the process of reflection and discussion and help individuals identify their values, goals, and priorities, and ensure more authentic and useful conversations and advance directives.

5. Instructions and guidance documented in an advance directive should result from the process of information sharing, reflection, discussion, and communication and provide enough flexibility in application to allow surrogate decision-makers to respond to new circumstances and complexities.
(6) Documentation of one's values, goals, and wishes in the form of an advance directive or other record should be shared with one's proxy, loved ones, significant others, and primary/key health care providers, and be included in the medical record, so that they are adequately informed before a crisis arises.

(7) When it is known that individuals are facing a serious diagnosis, such as cancer, or have been told they have a limited prognosis, the focus may then move to specific treatment preferences. In these cases, the client should be advised to confer with their health care provider to create a care plan that aligns with the client's goals, values and preferences. For advanced illness, clients should be advised to inquire about palliative care options and the appropriateness of state recognized portable medical orders such as Physician's Orders for Life Sustaining Treatment (POLST) to ensure that the individual's wishes are translated by medical professionals into actionable medical orders; and

FURTHER RESOLVED, That the American Bar Association encourages lawyers who provide advance care planning as part of their estate planning services to consider greater cross-disciplinary collaboration with the healthcare system and medical providers through congruent advice and practices, greater willingness to reach out to one another, and greater collaboration in joint continuing education.
This resolution derives from a best practices initiative initiated by the Commission on Law and Aging with the American Academy of Hospice and Palliative Medicine, and partners from the University of California at San Francisco Medical School and the UC/Hastings Consortium on Law, Science & Health Policy to undertake this initiative. The initiative was funded by the John A. Hartford Foundation with supplemental funding from the Borchard Foundation Center on Law and Aging.

Under this effort, the Commission interviewed and then brought together a select group of over 30 legal and clinical experts for a day-long forum to shed light on how the approaches to advance care planning (ACP) of lawyers and clinicians differ and how greater alignment of practices could be achieved in a manner that would better ensure patient/client values, goals, and wishes are known and honored near the end of life.

The enumerated principles in this resolution reflect consensus practice guidelines of this interdisciplinary body, applicable to both lawyer and clinician practitioners.

Background

Advance care planning research literature strongly identifies the process of repeated, meaningful discussion among patient and family and health care providers and use of decision aids as critical factors in effective advance care planning. While the existence of an advance directive makes a difference, the real driver for having patients’ wishes known and honored is the conversation before and during any clinical episode. In other words, advance directives documents, in and of themselves, without additional preparation and discussion, have marginal effect on end-of-life decision-making.

This is where the differing approaches between lawyers and clinicians have been out of alignment. Lawyers have tended to see advance care planning primarily as a legal matter, centered on patient autonomy and the creation of legally recognized advance directives. Health care professionals today see it as a clinical matter involving not only patient autonomy, but also pursuit of the patient’s best interests in light of evolving clinical facts, treatment options, often uncertain risks and benefits, and the goal of engaging whatever family unit is involved in the patient’s care. Some commentators have gone as far as to recommend “de-legalizing” advance directives so that they are treated entirely as clinical and not as legal documents.

The divergence in approaches has a historical root. Living wills or medical declarations emerged in legislation in the 1970s and health care powers of attorney in the 1980s.

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2 Joshua A. Rolnick, David A. Asch, & Scott D. Halpern, “Delegalizing Advance Directives — Facilitating Advance Care Planning,” 376(22) N. ENGL. J. MED. 2105-2107 (June 1, 2017).
These laws created a legal transactional template for advance planning that focused on ensuring knowing and voluntary execution of the directive and imposing a multitude of legal formalities, ranging from detailed execution requirements to mandatory language and forms. But research and clinical experience has demonstrated the need for a much more robust and on-going communications approach to ACP, and best practices have evolved.

Since the early legislative enactments, some states have sought to ease up, at least partially, on the legal template applied to advance directives, following the example of the Uniform Health-Care Decisions Act. At the same time in the clinical world, consensus over best practices has changed dramatically. The clinical concept of advance care planning has evolved into an ongoing, holistic, shared communication process about goals of care, priorities, and wishes in the face of serious and eventually fatal illness. The most recent authoritative statement comes from the National Academy of Medicine in its seminal 2015 report *Dying in America* which describes ACP as follows:

> Advance care planning refers to the whole process of discussion of end-of-life care, clarification of related values and goals, and embodiment of preferences through written documents and medical orders. This process can start at any time and be revisited periodically, but it becomes more focused as health status changes. Ideally, these conversations (1) occur with a person’s health care agent and primary clinician, along with other members of the clinical team; (2) are recorded and updated as needed; and (3) allow for flexible decision making in the context of the patient’s current medical situation.<sup>3</sup>

In clinical practice, countless initiatives and protocols have emerged with the goal of supporting patient- and family- centered care, shared decision-making, and meaningful advanced care planning. Many of these initiatives have grown part and parcel with the growth of the discipline of palliative care. In practice, health care systems and professionals as a whole still have a long way to go to catch up to the state-of-the-art concepts and skills advocated by clinical leaders in advance care planning, but the wheels are in motion. In contrast, in the legal profession, less progress has been visible. Yet, of the little research that has been done on who helps with ACP, the studies have found that individuals are as likely or more likely to consult a lawyer than their physician.<sup>4</sup> Thus, the importance of lawyer counseling that will be in alignment with the clinical realities clients will face when they become patients can’t be ignored.

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4 Examples include a 2003 AARP telephone survey of 804 Minnesotan adults found that two-thirds of respondents reported they had talked to someone about their end-of-life wishes; 17% with a lawyer and only 12% with a health care provider [AARP, 2003 Minnesota Advance Directives Survey (December 2004)]. In 2008, the American Bar Association conducted an online, interactive survey through Harris Interactive and found that 81% of adults had talked to someone about their health care wishes; 15% with a lawyer and 16% with a healthcare provider [Harris Interactive Survey for the American Bar Association (April 9-11, 2008)]. Furthermore, a Pew study found that attorneys ranked 2nd behind family members
To explore these issues the ABA Commission interviewed and convened a summit of national experts in law and medicine in 2018. Findings from the summit and from prior interviews of participants suggested that most lawyers tend to view ACP through a legal lens in which the primary result is the production of advance directive documents that are legally valid, appoint a health care agent, and include instructions to guide the decision-maker. The legal forms tend to be based on state statutory forms or other form clearly recognized in the state. In practice, the lawyers generally reported that they customize the basic forms to address a variety of issues, from specific medical treatments and powers of the named agent to family involvement and other personal wishes. Clinicians commonly perceive advance directive forms drafted by lawyers as much too long and legalistic, which they regard as a barrier to their effectiveness.

Lawyers are generally not well-positioned to engage clients fully in that process. The lawyer participants acknowledged that the time frame for discussion of client’s advance directives prior to drafting is relatively short and typically mixed in with larger estate planning matters. Lawyers develop their own style of asking questions to elicit client preferences, but the interview time does not normally allow for fully thoughtful explorations of clients’ goals of care in the context of their health and illness trajectories, clinical options, relationships with health care providers, and relationships within families. Nor are the health and illness dimensions of the client’s circumstances within the expertise of lawyers.

In the clinical world, our clinical experts reported that health care providers are increasingly recognizing the importance of ACP as an essential component of person and family-centered care and palliative care. They are increasingly being urged to begin care planning discussions as part of clinical care throughout the adult life span of the patient. However, the documents most often used in advance care planning – legislatively created living wills and powers of attorney – are somewhat ill-fitted to clinicians’ normal face-to-face care planning and case note mode. At the same time, clinicians too often lack the training and time to hold effective conversations about advance directives. They may also hold misconceptions about key legal concepts of planning, such as legal capacity for decision-making and the roles of surrogates.

Having both legal and clinical doorways to ACP should be a benefit our diverse national population; but if the doors don’t lead to the same place, they may lead to patients’ wishes not being elicited, documented, understood, or honored. In its effort to align clinical and legal approaches, the summit generated three products: eight consensus principles for clinical and legal ACP practice (seven relating to counseling and one related to collaboration between the professions); a counseling checklist for lawyers; and a resource list compiling ACP tools that both lawyers and clinicians can provide to clients or patients to engage them in ACP reflection and discussion. The eight consensus principles constitute the substance of this resolution.

and before members of one’s church or health care providers as the one person they would talk to about advance care planning [PEW Charitable Trusts, Advance Care Planning and End-of-Life Care: Attitudes of Diverse Populations (unpublished survey, 2016), available on request].
Explanation of the Resolution

The resolution encourages all lawyers who provide advance care planning as part of their estate planning services to take into account seven principles that were developed through the John A. Hartford Foundation funded project, under which the Commission on Law and Aging brought together legal and clinical experts together to examine how the advance care planning practices of lawyers and clinicians could be brought into greater alignment, so as to ensure patient/client values, goals, and wishes are known and honored near the end of life.

The principles are not practice standards nor standards of care. They are aspirational in nature and offer directions for enhanced counseling by lawyers who wish to focus more keenly on advance care planning counseling with clients.

- Principle one recognizes that the most important legal component of advance care planning is careful selection and appointment of a health care agent/proxy in a valid power of attorney for health care. The authority of an agent for a person lacking capacity is a function of state statute. Such authorization does not exist at common law. All other aspects of advance care planning involving articulating clients’ wishes are communications tasks. Whether and how that communication is accomplished is up to the client. An advance directive document is helpful but not the only way nor necessarily the best way to communicate wishes about one’s health care priorities and preferences.

- Principle two acknowledges that advance care planning takes place over a lifetime. It changes as one’s goals and priorities in life change through different stages of life and health conditions. This helps put advance directives into context, because they are often considered one-time tasks by clients, a misperception that lawyers can help disabuse.

- Principle three points out that reflection and discussion, which is central to advance care planning, should focus primarily on one’s values, goals, and priorities in the event of worsening health rather than on specific treatments or clinical interventions for distant hypothetical situations. Neither lawyers nor their clients have a crystal ball to tell them what medical conditions and decisions they will ultimately face, nor do they have the medical expertise to dictate specific medical interventions for hypothetical circumstances. But, clients do have the ability to articulate important values, goals, and priorities in their lives that are stable and can inform medical decision-making when they can no longer speak for themselves.

- Principle four recommends the use of advance care planning decision tools and guides that can provide structure and guidance to the client’s process of reflection and discussion. These are tools clients can and should use on their own and with those relations who will be involved in medical decision-making for them. An increasing number of tools are easily available, of no cost, and have been shown to be effective. The tools are used on the client’s own time, not in the lawyer’s office,
so they do not add an additional time burden on lawyers. But lawyers can play an important role in directing clients to the right resources.

- Principle five offers a guiding principle in the drafting of advance directive documents, recommending that instructions and guidance documented in an advance directive should result from the process of information sharing, reflection, discussion, and communication and provide enough flexibility in application to allow surrogate decision-makers to respond to new circumstances and complexities. This principle purposefully comes after principle four, because that is the sequence in which the process ideally works. In other words, before the drafting stage, the client should have done his or her thinking/reflecting/discussing (and ideally with decision tools recommended in principle four).

- Principle six recommends that the documentation of one's values, goals, and wishes in the form of an advance directive or other record be shared with one's proxy, loved ones, significant others, and primary/key health care providers, and be included in the medical record, so that they are adequately informed before a crisis arises. This is important because an all-too-common shortcoming of advance directives is that they are not present or known of at the right time or the right place. Thus, making sure it is visible, known, and accessible is an important goal.

- Principle seven acknowledges that when individuals are known to be facing serious diagnoses and have a limited prognosis, the focus then moves to very specific treatment preferences. This is when it is most important for the individual and health care provider to create a care plan that aligns with the individual's goals, values and preferences. The principle also acknowledges the importance of palliative care options and the use of state recognized portable medical orders such as Physician's Orders for Life Sustaining Treatment (POLST) to ensure that the individual's wishes are translated by medical professionals into actionable medical orders. Lawyers have a role in educating clients about POLST, and ABA policy is supportive of the use of POLST for appropriate patients.

The second resolved clause encourages greater multi-disciplinary collaboration in advance care planning efforts with the healthcare system and medical providers through congruent advice and practices, greater willingness to reach out to one another, and greater collaboration in joint continuing education. Community education programs, in which many lawyers commonly engage, offer an example of this. Presentations on advance care planning and advance directives are substantially enhanced when delivered by a lawyer-doctor team. The education of doctors and lawyers regarding health-care decision making issues represent another opportunity for collaboration.

**Need for ABA Action**

Today, lawyers who do any amount of estate planning work routinely include advance directives in the services provided, and every state and territory has advance directive laws that recognize the appointment of health care agents and the documentation of
medical wishes. The ABA has historically been a supporter of these legal tools of ACP as shown by the description of ABA policy below. The ABA also has a long history of leading the way in defining optimal practices in the field of law. Health care decision-making and planning for future health-care decisions is a matter that every family has struggled with, is struggling with, or will struggle with in the future. Lawyers are playing an important role in helping individuals and families meet that struggle successfully. Thus, the promulgation of consensus guidelines to promote good practices is a proper and necessary role for the ABA.

Related ABA Policy

The ABA has been active in the promotion of health care decision-making rights that promote the individual’s decision-making autonomy, planning, and quality end-of-life care since the 1980s. Key policies include the following:

- 1989. The House of Delegates adopted policies to encourage the use and recognition of durable powers of attorney for health care. (1989AM120)
- 1990. The House adopted a policy to support the right of competent individuals to consent to or refuse suggested medical interventions and to recognize that an appropriate surrogate may exercise this right on behalf of an incompetent individual. (1990MY108A)
- 1990. The ABA also actively supported passage of the Patient Self-Determination Act in 1990, the federal law that promotes information and education on advance directives. (Archived)
- 1994. The ABA adopted a resolution supporting preemption of state law by any advance medical directive prepared for members of the Armed Forces. Such a law was passed by Congress in 1996. (1994AM117)
- 1995. The ABA adopted policy supporting better planning opportunities, including the use of advance medical directives, for people with HIV, AIDS, or other serious eventually fatal illnesses. (1995AM122)
- 2008. The ABA House urged widespread support of protocols such as Physicians Orders for Life-Sustaining Treatment that help ensure that patients’ end-of-life care preferences are translated into visible and portable medical orders. (2008AM103)
- 2012. The ABA adopted policy calling for amending the federal Patient Self Determination Act, to strengthen advance care planning rights and procedures for health care decisions, including providing an opportunity to discuss advance care planning with trained representatives of the health care provider, requiring Health Insurance Exchanges to provide ACP information and assistance, and including ACP in the annual wellness exam for Medicare beneficiaries. (12A106A)
The policy proposed herein is entirely consistent with the above line of ABA policy and furthers the well-established goals of patient autonomy through the articulation of practice principles that enhance advance care planning and help ensure that clients' values, goals, and wishes for care are known and honored.

Conclusion

Advance care planning and advance directives have become an integrated part of the tool kit lawyers use in estate planning for clients. Yet, the evolution of advance care planning from a document-based legal model to a clinical communications model has left legal planning increasingly out of alignment with the clinical decision-making challenges and processes that clients will face. The consensus practice principles set forth in this resolution will align ACP counseling by lawyers with the clinical realities clients face and, thereby, will help ensure that clients' values, goals, and wishes will be known and honored near the end of life. For the reasons stated above, the Commission on Law and Aging requests the House of Delegates to adopt the resolution herein.

Respectfully submitted,

Hon. Louraine Arkfeld
Chair, Commission on Law and Aging
August 2019
1. **Summary of Resolution(s).**
   The resolution encourages all lawyers who provide advance care planning as part of their estate planning services to take into account seven principles that were developed through the John A. Hartford Foundation funded project, under which the Commission on Law and Aging brought together legal and clinical experts together to examine how the advance care planning practices of lawyers and clinicians could be brought into greater alignment, so as to ensure patient/client values, goals, and wishes are known and honored near the end of life.

   The second resolved clause encourages greater cross-disciplinary coordination of advance care planning efforts with the healthcare system and medical providers through congruent advice and practices, greater willingness to reach out to one another, and greater collaboration in joint continuing education.

2. **Approval by Submitting Entity.**
   Approved by Commission on Law and Aging April 26, 2019.
   Approved by the Senior Lawyers Division Council on May 4, 2019.
   Approved by the Real Property, Trust & Estate Law Section on April 17, 2019.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**
   The ABA has adopted several policies enumerated in the report that support advance care planning, advance directives, the right to consent to or refuse treatments, patient direction in health care generally. This resolution is entirely consistent with previous ABA policy and furthers the well-established goals of patient autonomy through the articulation of practice principles that enhance advance care planning and help ensure that clients’ values, goals, and wishes for care are known and honored.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**
   N/A

6. **Status of Legislation.** (If applicable)
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The Commission on Law and Aging will disseminate the ABA-supported principles to bar groups and incorporate into CLE programming.

8. **Cost to the Association.** (Both direct and indirect costs)
   None.

9. **Disclosure of Interest.** (If applicable)
   None.

10. **Referrals.**
    - Standing Committee on the Delivery of Legal Services
    - Standing Committee on Governmental Affairs
    - Standing Committee on Legal Aid and Indigent Defendants
    - Standing Committee on Pro Bono and Public Service
    - Commission on Disability Rights
    - Commission on Domestic and Sexual Violence
    - Commission on Homelessness and Poverty
    - Commission on Hispanic Legal Rights and Responsibilities
    - Government and Public Sector Lawyers Division
    - Section of Administrative Law and Regulatory Practice
    - Section of Business Law
    - Section of Civil Rights and Social Justice
    - Section of Family Law
    - Section of Health Law
    - The Judicial Division
    - Section of Labor and Employment Law
    - Section of Litigation
    - Section of Real Property, Probate and Trust law
    - Section of Science and Technology Law
    - Senior Lawyers Division
    - Section of State and Local Government Law
    - Section of Taxation
    - Section of Tort, Trial and Insurance Practice
    - Solo, Small firm and General Practice Division
    - Young Lawyers Division
    - National Legal Aid & Defender Association

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

    Charlie Sabatino, Director
    Commission on Law and Aging
12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution encourages all lawyers who provide advance care planning as part of their estate planning services to take into account seven principles that were developed through the John A. Hartford Foundation funded project, under which the Commission on Law and Aging brought together legal and clinical experts together to examine how the advance care planning practices of lawyers and clinicians could be brought into greater alignment, so as to ensure patient/client values, goals, and wishes are known and honored near the end of life.

The second resolved clause encourages greater cross-disciplinary coordination of advance care planning efforts with the healthcare system and medical providers through congruent advice and practices, greater willingness to reach out to one another, and greater collaboration in joint continuing education.

2. Summary of the Issue that the Resolution Addresses

Advance care planning research literature strongly identifies the process of repeated, meaningful discussion among patient and family and health care providers and use of decision aids as critical factors in effective advance care planning. Lawyers are not well-positioned to engage clients fully in that process. Lawyers have mainly been drafters of advance directive documents. While the existence of an advance directive makes a difference, the real driver for having patients' wishes known and honored is the conversation before and during any clinical episode. Effective practice principles and techniques have been developed that can be incorporated into the usual workflow of lawyers that can enhance their clients engagement in advance care planning and result in more effective advance directives.

3. Please Explain How the Proposed Policy Position Will Address the Issue

These practice principles developed by clinical and legal experts will change both the conceptual understanding and the counseling practices of lawyers to bring legal practices into greater alignment with clinical realities and ensure patient/client values, goals, and wishes are known and honored near the end of life.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None identified.