

# LEGAL PRESCRIPTION FOR DOCTORS

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## ADVANCE HEALTH CARE DIRECTIVES

Advance directives are statements by competent patients that indicate who should act as surrogate or what interventions they would accept or refuse in case they should lose decision-making capacity. Advance directives respect patients as persons by allowing their preferences and values to guide care even when they can no longer make informed decisions. While patients are still competent, they give informed consent or refusal. In addition, advance directives allow patients to relieve stress on family members who must make decisions for them.<sup>1</sup> A competent patient naturally means a mentally and legally competent person (at least eighteen years old).

Advance directives are a mechanism by which competent individuals plan for medical decision making at a future time when they might no longer possess decision making capacity. That is, they are directives to others about how to make health care decisions issued in advance of the need to actually make such decisions.<sup>2</sup> The hallmark of advance directives is that they are a kind of *anticipatory* medical decisionmaking. This stands in contrast to the usual medical decisionmaking process, which is *contemporaneous*.<sup>2</sup>

Generally speaking advance directives are embodied in a *health care power of attorney* or *living will* or in *both*. In a health care power of attorney (or health care proxy) almost any health care contingency may be addressed and the person executing it can write out a personalized set of instructions for his “deputy.”<sup>3</sup> Living wills (or declarations), on the other hand, are far more limited in scope. They typically are pointed instructions for doctors to discontinue heroic medical treatments in terminal situations and to allow a “natural” death.<sup>4</sup>

Advance directives have four general and interrelated purposes:<sup>5</sup>

- [1] Preserving autonomy – the most important purpose of the advance directive, from the declarant’s perspective, is to provide a means of exercising some degree of control over medical care if one lacks the capacity to do so at the time that treatment decisions need to be made.
- [2] Avoiding recourse to the judicial process – another purpose of advance directives is to avoid some of the more serious procedural problems associated with making decisions for patients who lack decisionmaking capacity, primarily by forestalling recourse to the judicial process.
- [3] Immunity from civil and criminal liability – the third general purpose of advance directives, and perhaps the most important from the perspective of health care providers, is to provide immunity from civil and criminal liability.
- [4] Reducing medical cost – some suggest that widespread use of advance directives would help to lower the costs of providing medical treatment to those who are not likely to benefit significantly from it. It is not clear, however, that it costs less to treat patients near the ends of their lives who have advance directives than to treat those who do not.

When do directives take effect? Usually upon the onset of decisional or communicative incapacity. Directives typically are not invoked if a patient has sufficient ability to (1) weigh treatment alternatives *and* (2) render informed consents.<sup>6</sup>

Advance directives, realistically won’t work in most emergency situations. In a life and death situation it would be absurd to waste precious seconds just to inquire and locate a purported advance directive. Face it: if in doubt, emergency response teams are going to treat first and ask questions later.<sup>7</sup> The black-letter law is that in a bona fide medical emergency, neither the informed consent nor the simple consent of the patient need be obtained. It is said that in such situations consent is implied,<sup>8</sup> although the better explanation is

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that physicians are privilege to render treatment in the absence of consent.<sup>8</sup>

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