HEALTH CARE DECISION-MAKING

Objectives:

To be able to list the components of informed consent;

To understand the purpose and use of health care directives, both oral and written (advanced directives);

To be able to identify the use of and order of surrogates in New Mexico;

To understand some of the cultural and ethic issues related to advanced directives;

To understand and complete a Values Questionnaire;

To be able to describe the manner in which competent patients can direct their future medical treatment through the execution of an advance directives and living wills.

Overview:

Most laws related to healthcare decision making are enacted at the state level rather than at the federal or local level. Legal guidelines for end-of-life decision making are similar across states but not identical. Healthcare professionals must become familiar with their state’s regulations regarding:

- informed consent
- advance directives and related issues
- order of surrogate decision makers

An important individual right is to have the option of making one’s own health care decisions. The need for making one’s wishes known either in writing (Advanced
Directive) or orally to one’s health care provider is important for the elderly, as well as for all adults and emancipated minors. If an Advanced Directive is not in evidence and the patient cannot communicate, a Surrogate or Agent may act on their behalf – or as if they were the patient.

While everyone should communicate their feelings and beliefs regarding health care decisions, it is especially important to encourage and support such discussions with older patients. Everyone who is competent has the right to information regarding advance directives and should be given the opportunity to choose whether to put advanced directives in place or not.

It is especially important in New Mexico to understand the cultural values and sensitivities around Advanced Directives among the native populations. These populations have not been studied extensively concerning issues of death, dying and approaches such as Advanced Directives and organ transplantation.

Why do we need to especially encourage the elderly to discuss their wishes concerning health care decisions and to consider making an Advanced Directive? Simply stated, the burden of disease and disability is greatest for this population. Deaths of persons 65 and older make up 75% of all deaths in the United States. The life expectancy of those over 65 is less than younger aged adults and the morbidity and mortality from most major diseases is higher as one ages.

Exercise: Calculate your life expectancy and that of perhaps a parent or grandparent. The Alliance for Aging Research (http://www.agingresearch.org/) has a “Living to 100 Healthspan Calculator which was developed by Thomas Perls, MD, MPH. http://www.agingresearch.org/calculator/

Americans at birth have a life expectancy of 77.2 years and at age 65 all Americans have a life expectancy of 18.2 years ((2002). Males and females have a different life expectancy at all ages. Additional information can be found on the Center for Disease Control’s National Center for Health Statistics web site: http://www.cdc.gov/nchs/fastats/lifexpec.htm

---

**Brief Case Studies**

**CASE 1**

A 76 year old man is admitted to the nursing home. Based on your examination, he is capable of making his own decisions. As the patient’s physician, you are asked by the nurse to sign an order for full resuscitation that is signed by the patient’s son.

Would you sign this order?

*No, the patient is decisionally capable and should sign the advance directive himself.*

You now go to the patient’s room to discuss his wishes. He tells you that he does not want to try to restart his heart if it stops, and does not want to be intubated. The patient
says, “I’ve lived a good life, I just don’t think all that stuff is necessary.” His son tells you he would like to keep his father around for a while at any cost.

The nurse asks again for you to sign the patient’s advance directive. What would you do?

*Ultimately the patient’s wishes for Do Not Resuscitate should be upheld. You should also talk with the patient and his son to help the son understand the choices his father is making. The goal of the meeting would be that the son will honor his father’s wishes.*

**CASE 2**

An 82 year old woman is admitted to the hospital for treatment of a stroke. She is drowsy and is unable to speak or communicate through other means. It is unclear what her recovery will be. She is accompanied by her daughter, Sally and the patient’s life-time partner, June. The patient has no advance directive, and has not designated a power-of-attorney for health care decisions.

Following New Mexico law, whom should you ask to make treatment decisions for this patient?

*The significant other makes decisions if there is not a spouse.*

Automatic surrogates are identified in descending order of priority as follows:

1st: Spouse

2nd: Significant other – an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other’s well being.

3rd: an adult child

4th: a parent

5th: an adult brother or sister

6th: a grandparent

7th: an adult friend who knows the wishes of the principal

**Informed Consent**

Three fundamental elements must be present for a patient’s treatment choices to be ethically and legally valid:

The patient’s participation must be voluntary, that is, free of duress, fraud, deceit, intimidation or any other form of restraint or coercion;
The patient's choice must be sufficiently informed. Physicians must communicate to the patient information that might reasonably be expected to affect the patient's choice of treatment. This should include diagnosis, the nature and purpose of interventions, foreseeable risks, probability of success, viable alternatives and their benefits and risks, results expected if nothing is done, limitations of involved health care professionals and facilities and appropriate physician recommendations.

The patient must be a capable decision maker. The patient must be able to mentally and emotionally regard the information provided in order to give legitimate consent to, or refusal of an intervention.

The principal of autonomy does not empower the patient or patient's agent or surrogate to demand or receive forms of treatment that the physician feels are useless or harmful.

It is the attending physician’s responsibility to decide when a person is so impaired in their decision-making capacity that a surrogate is necessary.

**Advanced Directive**

An Advanced Directive is a tool for individuals (principals) to give instructions for health care. It is a legal document which addresses a patient's wishes regarding future life-sustaining medical treatment should the patient be unable to speak for herself or himself due to decisional incapacity. The patient gives someone they name (“agent”) the power to make health care decision for them. They may also give instructions about the kind of health care they do or do not want. In a traditional Living Will, wishes about life-sustaining medical treatments are stated if one is terminally ill. In a Health Care Power of Attorney, you appoint someone else to make medical treatment decisions for you if you cannot make them for yourself. Only the patient or principal can make an advanced directive, not surrogates, substitutes or guardians.

Advanced directives for health care decisions can include both who should make health care decisions for the individual and what decisions should be made. If an advanced directive has been made it must be honored by the surrogate or substitute decision maker unless a court orders otherwise.

According to New Mexico law health care decisions include:

- selection and discharge of health care providers and institutions;
- approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate;
- directions relating to life-sustaining treatment, including withholding or withdrawing life-sustaining treatment and the termination of life support; and
- directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.
If a written advanced directive has not been made or if the patient wishes to revoke his or her advanced directive, an oral directive may be given to a health care provider or a surrogate may be orally appointed. An individual can change advance directives at any time either in writing or by personally informing a health-care provider. The individual’s physician should be informed if there is a change in the directive.

If the patient does not have an Advanced Directive and has not orally made his/her wishes known or identified a surrogate and is not competent to make decisions, New Mexico’s Uniform Health-Care Decisions Act (UHCDA) automatically appoints a surrogate for the individual. Automatic surrogates are identified in descending order of priority as follows:

1st: Spouse

2nd: Significant other – an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other’s well being.

3rd: an adult child

4th: a parent

5th: an adult brother or sister

6th: a grandparent

7th: an adult friend who knows the wishes of the principal

Any health care decision that can be made by an individual or patient can also be made by the substitute or surrogate decision-maker, unless there is court intervention.

Important points:

• Physicians, nurses, and other healthcare professionals are not on the list of surrogates.

• Healthcare decisions are not MEDICAL decisions but rather are MORAL choices. Hence, the people who share the patient’s moral community are selected by state law to act as surrogates.

• Under New Mexico State law, if there is more than one person in a category (such as adult children), consensus of all the individuals in the category is required for decision making. If a member of the category or class are evenly divided in a dispute, then all members (and all individuals having lower priority) are disqualified from serving as agents or surrogates. In such cases a guardianship proceeding may be necessary.

• State law however can only reflect the social "norm" for moral communities. People whose moral intimates or family do not reflect this social ‘norm’ should complete a
A durable power of attorney for healthcare (a proxy directive) to specify the person or persons whom they would wish to make choices for them should they become incapacitated. Examples of moral communities not reflecting the social 'norm' include non-married partners, people with estranged family members, or unmarried elders with no adult children. The New Mexico UHCDA allows a patient at any time (capacitated or not) to disqualify anyone from serving as a surrogate by either signing a statement or personally informing a health care provider.

Healthcare professionals can assist families to make choices based on substituted judgment by "cueing" them better. For example, instead of saying, "What do you want us to do for your mother?" We should be saying, "What do you think your mother would have wanted if she were able to speak for herself?"

New Mexico law allows competent individuals to create a power of attorney using two different mechanisms. The legislature passed a law in 1989 that allows a do-it-yourself power of attorney. This form provides a list of powers for the individual to consider giving the "agent" or "attorney-in-fact" who will act on the "principal's" behalf. Using such a form an individual can build their own power-of-attorney to meet their particular needs and circumstances. This form includes both financial and health care decision-making choices. The individual articles of this form must be initialed and signed in the presence of a notary public. Note: Mentally incompetent individuals cannot make powers of attorney.

In 1995 New Mexico’s Uniform Health Care Decisions Act, UHCDA was passed by the State legislature and this Act has provisions for health care powers of attorney. This written form only includes health care powers and needs to only be signed by the principal, although having the form witnessed and signed by two individuals could avoid numerous validity problems in the future.

The New Mexico Department of Health, Long Term Services Division presented the following guidelines concerning Advanced Directives and Health Care Decisions in 2001:

The physician or health care worker should clarify the individual’s:

- interest in discussing advance directives with others;
- desire to formalize his/her preferences through an advance directives document;
- need for more information;
- understanding of advance directives.

An individual should be encouraged to discuss this topic with his/her physician. Other persons he/she may wish to discuss it with include: extended family members, friends, religious leaders, counselors, and/or other providers. Any discussion of advance directives is voluntary on the part of the individual. No one should be forced to engage in this discussion if not comfortable doing so.

Another important tool to assist individuals in thinking about what is important about their health is the Values History Form, http://hsc.unm.edu/ethics/advdir/vhform_eng.shtml
This form was developed at the Institute of Public Law, University of New Mexico, through a grant from the Ittleson Foundation.

**Role of Physicians in Health Care Decision-Making**

Under New Mexico’s UHCDA, physicians and other health care providers “shall comply” with the patient’s health care instructions, with some exceptions. This means if the patient has an advanced directive (written) or has given oral instructions, or if the patient’s agent, surrogate or guardian gives instructions you shall comply.

You must also insert into the patient’s medical record if you have:

- Any advance health care directives, oral or written or health care powers of attorney;
- Record of the patient having revoked any health care directives, orally or in writing;
- Challenged the patient’s capacity for decision-making or that the patient has recovered his/her capacity for decision-making and any knowledge that the patient has appointed or disqualified a surrogate health care decision-maker.

You should insert a copy of any written directives into the patient’s medical record. If another health care worker has been given information by the patient, family members or surrogate regarding the patient’s health care decisions or other issues concerning such decisions, this information must be given to the patient’s physician and inserted into the patient’s medical record. Such instructions must be honored.

You, as a physician may choose not to comply with the patient’s or surrogate’s health care decisions in only two circumstances:

- Reasons of conscience, if the patient’s instruction is contrary to institutional policy and if the physician has communicated this to the patient and/or decision-maker;
- The patient’s health care decision would impose medically ineffective health-care or treatment and would be contrary to medically accepted treatment.

In such cases the physician must inform the patient and/or decision-maker promptly. If a transfer to a different health care provider is requested, the physician must continue care until the transfer is made and must assist in making the transfer to another provider – unless the patient or decision-maker refuses such assistance.

Physicians may avoid problems in situations where health care decisions are being implemented, especially at the end of life, by having candid, ongoing conversations between patients, caregivers or intended surrogates. This allows both the patient and clinician the opportunity to review and adjust clinical goals and advance directives.

In guardianship and most conservatorship proceedings, the court will order a qualified health care professional to examine the alleged incapacitated person. This can be a physician, psychologist, nurse practitioner or other health care professional whose training and expertise aid in the assessment of functional impairment. A written order must be submitted to the court and in certain circumstances the health care professional must testify in person. The evaluation must contain observations on the person’s ability
to make health care decisions and to manage activities of daily living and financial affairs.

Cultural Values and Beliefs

In a 2001 article, “Treating American Indians/Alaskan Native Elders”, by Dr. Melvina McCabe [http://www.geriatrictimes.com/g011119.html] discussed the treatment needs of American Indian/ Alaskan Native (AI/AN) populations. These populations may have cultural values and beliefs concerning advanced directives and organ transplantation which are different from that of dominant Western cultures. Approaches must be individually tailored for different AI/AN populations and translators should be employed as necessary. Literacy and language barriers may exist. Timing of discussions also varies and the more usual early discussions of issues may not be appropriate for American Indian populations. Discussions in more acute or emergency situations may be more appropriate. Patient Respect is very important in all discussions and interventions. “With respect comes the acknowledgement and acceptance of the patient and their culture, enhanced communication – the building stone for the development of trust – and equality in the patient/physician relationship.”

Medical Student Exercises:

Exercise 1: Completion of Values History Form

a. Locate one of the values history forms on the web or from another source. Center for Health Law and Ethics Institute of Public Law University of New Mexico School of Law 1117 Stanford, NE Albuquerque, NM 87131 [http://hsc.unm.edu/ethics/advdir/vhform_eng.shtml]

b. Complete the instrument to clarify your own values.

c. After you have completed the tool, discuss your values with a family member or whomever you would choose to make decisions for you should you become incapacitated. (If this discussion is not appropriate for religious, cultural or personal reasons, you may do this part of the assignment with a friend or fellow student instead of a family member or surrogate.)


The goal is to obtain personal experience with the process of advance care planning to prepare you to offer guidance and support to patients and their families.

a. Obtain a copy of an advance directive for health care from a clinical site, preferably where you work or obtain your own healthcare, or from a web site providing an
Advanced Directive form for New Mexico residents (http://hsc.unm.edu/ethics/advdir/adv_dir.shtml);

b. Complete the document including obtaining witness signatures;

c. After you have completed the documents, discuss your advance directives with a family member or whoever you would choose to make decisions for you should you become incapacitated. (If this discussion is not appropriate for religious, cultural or personal reasons, you may do this part of the assignment with a friend or fellow student instead of a family member.)

d. Upon completion of this activity, you need to dispose of your advance directives appropriately by either giving a copy to your surrogate decision maker (and possibly to your primary care provider) and filing the original in safe place or by destroying these documents to invalidate them.

**Glossary of Terms and Definitions Related to Health Care Decision-Making:**

**Agent or Attorney-in-fact:** An individual who is given the legal authority, in writing, to act on behalf of the Principal.

**Capacity:** Under UHCDA, capacity means an individual’s ability to understand and appreciate the nature and consequences of proposed health care, including its significant benefits, risks and alternatives, and to make and communicate an informed health care decision. An individual is assumed to have capacity unless a legal process has taken place to determine otherwise. This may have taken place through a legal process under the New Mexico Probate Code to appoint, by court order, a guardian to make health care decisions. It can also take place without a court order with regard to health care decisions under the Health Care Decisions Act.

According to the New Mexico Health Care Decisions Act, section 24-7A-11 NMSA 1978, a lack of capacity must be determined by a team of at least two health care professionals, unless the individual has specified otherwise in an advance directive. One of these professionals must be the primary physician. In the case of an individual with developmental disabilities, one of the professionals must have knowledge and expertise in the assessment of functional limitations. It is advised that prior to beginning the capacity determination process, the individual be informed of the purpose of the assessment and the right to challenge the determination. An individual can then challenge a determination that he/she lacks capacity by informing a health care provider of the challenge. Such a challenge means that the person continues to be presumed as having capacity unless there is a court order that upholds the determination of the two health care professionals.

Except in accordance with these processes, teams must assume that the individual can make his/her own health care decisions and support the individual’s right to do so. A person shall not be determined to lack capacity solely because he/she disagrees with the doctor.
Even if the individual does not have the capacity to make an advance directive, he/she may have strong values about specific health care decisions, and discussions about the individual’s wishes with respect to health care should take place. Understanding the individual’s values, even in a broad sense, will be of great use to a substitute decision maker who later has to make health care decisions.

**Competent:** Individuals who know who they are, where they are, what day it is and what the power of attorney does.

**Competency:** Competency is a legal determination of a patient’s ability to make his or her own decisions in general. Clinicians assess decision-making capacity (clinical assessment of a patient’s ability to make specific healthcare choices); courts determine competency. Some patients who are legally incompetent may still have the capacity to make particular types of healthcare decisions.

**Confidentiality:** Health-care professionals have a legal duty to hold in confidence all personal patient information entrusted to them, unless the patient voluntarily or knowingly waives the right to confidentiality. Certain other specific issues may also cause the physician or health care professional to waive confidentiality, such as suspicion of maltreatment or neglect, infectious diseases, or when innocent third parties may be put in jeopardy (e.g. patient continues to drive when they are cognitively impaired).

Conflicts regarding Health Care Decisions:
- Some states have poorly written statutes;
- Patients may execute documents without fully understanding their significance or consequences;
- The language may be vague;
- A person may change his/her mind without informing anyone, or the prognosis may change;

**Conservator:** A person appointed by the court to manage the financial affairs of an incapacitated person.

**Conservatorship or Guardianship:** Appointed by the court and are restrictive in nature in terms of the effect on the principal. Proceedings are expensive and time-consuming, but may be appropriate if an incapacitated person is being abused, neglected or exploited by family or others.

**Durable power of attorney:** This means the power of attorney stays in effect even if the principal becomes incapacitated.

**EMS “Do Not Resuscitate” Regulations:** If the individual or surrogate decision maker has decided to authorize a "DNR" (Do Not Resuscitate) order and the individual remains at home, the EMS/DNR form (http://omi.unm.edu/dnr.html) must be completed and used because this is the only form that is legally recognized by EMS when you call 911 for a medical emergency. A "DNR" order is only one type of health care decision, and applies only to the limited situation of cardiac or respiratory arrest. EMS DNR forms do not have an expiration date. They may be revoked at any time by destroying them.
If an individual has indicated a preference for dying at home, in addition to the completion of the EMS/DNR form, the local EMS should be notified in advance. EMS should then be called to the home at the time of death and presented with the form.

If the individual dies in the home without appropriate procedures having been completed, the police department, Adult Protective Services, and/or the Division of Health Improvement of the Department of Health will likely have to fully investigate the death. In addition, deaths of individuals who receive publicly funded services are routinely investigated by a variety of regulatory bodies. A death investigation does not mean that any wrongdoing is suspected.

**General power of attorney:** Legal document in which one person (principal) gives another person (agent or attorney-in-fact) legal authority to act on the principal’s behalf.

**Guardian:** Appointed by the court to make personal and health care decisions for a person who is impaired and cannot make decisions for herself or himself.

**Guardian ad litem:** Court appointed representative for an incapacitated person who is named to protect the health and well being of a person or, in certain cases, to pursue a lawsuit for the support of an incapacitated person. This person represents the individual and presents the incapacitated person to the court and makes recommendations regarding the best interests of the individual. The guardian ad litem is usually paid by the incapacitated person’s assets, or the family pays for the service.

**Guardianship:** Appointed by the Court to handle the personal and health care decisions of the incapacitated individual. A Guardianship or conservatorship is used only when absolutely necessary. A guardianship should continue to encourage the person’s independence and should be limited to accommodate the person’s actual mental and physical limitations. In New Mexico, the following persons have priority to be named guardian:
- Guardian previously appointed in another state
- Person previously nominated, in writing, by the incapacitated person
- Spouse
- Significant other
- Adult child
- Parent
- Relative with whom the incapacitated person has resided more than six months
- Person nominated by the incapacitated person’s caretaker.

**Health care decision:** A decision made by an individual or an individual’s agent or surrogate, regarding the individual’s health care.

**Limited power of attorney:** Authorizes a single transaction, such as the sale of property or of certain named assets. It may also authorize someone to pay bills or act on your behalf in specific instances.

**Living will:** New Mexico’s Right to Die Law was replaced by the Uniform Health Care Decisions Act (UHCDA) in 1995, but Living Will documents are still valid if they comply with the provisions of UHCDA. Such documents directed that if a person was ever certified in writing by two physicians, one of whom was the patient’s attending physician,
to be suffering from a terminal illness or irreversible coma, then medical treatment should not be used to prolong life. This was a document in which a person could state in advance that they did not want their life prolonged in such a situation.

Mentally incompetent: One who is not competent usually must have a conservatorship (financial) and or a guardian (health care) appointed by the court to make decisions. This is often necessary in abuse and/or neglect situations.

Principal: The individual who signs the power of attorney

Springing power of attorney: This is a power of attorney (financial or health) that does not go into effect upon signing. It becomes effective only if the principal becomes incapacitated.

Surrogate Decision-Makers: May be appointed orally by principal or becomes automatic if there are no advanced directives. The surrogate makes health care decisions on the patient’s behalf and communicates such decisions to the patient and to the health care professionals.

References/Footnotes

1  The amount a notary can charge for notarizing a document is determined by New Mexico law. A notary can charge $1.00 for each seal or stamp.

2 New Mexico Statutes Annotated, Sections 45-5-501 through 45-5-502 and Sections 45-5-601 through 45-5-617.


Web Sites and Other Information of Interest:

New Mexico Resources

Advanced Directive Forms for New Mexico
http://hsc.unm.edu/ethics/advdir/adv_dir.shtml
http://www.nmbf.com/ADHC.html

City of Albuquerque, County of Bernalillo, Department of Senior Affairs
714 Seventh Street, SW
Albuquerque, NM 87102
http://www.cabq.gov/seniors/
Services to Support Well-Being and Fitness: 505-764-6485
Services to Support Independent Living: 505-764-6400
Services to Support Community and Volunteer Resources: 505-764-6400

EMS Bureau
New Mexico Department of Health
P.O. Box 26110
Santa Fe, NM  87502-6110
http://www.nmems.org/
505-476-7701

New Mexico Health Policy Commission
435 St. Michael’s Drive
Suite A-202
Santa Fe, NM  87505
http://hpc.state.nm.us/
505-827-7500

LREP (Lawyer Referral for the Elderly Program)
505-797-6005
www.nmbar.org

New Mexico Coalition for Advance Directives
2801 Lomas NE
Albuquerque, NM  87106
505-255-6717

New Mexico Human Services Department
P.O. Box 2348
Santa Fe, NM  87503
http://www.state.nm.us/hsd/
800-432-6217

New Mexico Long Term Care Ombudsman Program
Albuquerque Area Office
P.O. Box 1928
Albuquerque, NM  87103-1928
505-841-8051 or 800-432-2080

New Mexico State Medicaid Office
Financial Assistance Bureau
Human Services Department
P.O. Box 2348
Santa Fe, NM  87503
http://www.cms.hhs.gov/medicaid/state.asp?state=NM
505-827-3100
800-432-6217

Rudd, Merri.  Life Planning in New Mexico.
Abogada Press, Albuquerque, New Mexico.  2000.  Your guide to state law on powers of
attorney, right to die, nursing home benefits, wills, trusts and probate.
http://www.edgewiseblog.com/ap/lifeplanning.htm

Senior Citizens Law Office
3117 Silver SE
Albuquerque, NM  87106
505-265-2300
www.geocities/abq/sclo

New Mexico Aging and Long-Term Care Services Department
228 E. Palace Ave., 1st Floor
Santa Fe, NM 87501
http://www.nmaging.state.nm.us/
800-432-2080

TNEEL
Toolkit for Nursing Excellence at End of Life Transition. Version 1.0. Funded by the Robert Wood Johnson Foundation and created at the University of Washington School of Nursing.

Uniform Health Care Decisions Act on the Web
www.michie.com
search – New Mexico
statutes – New Mexico
Statutory chapters annotated
24- Health & Safety, 24-7A-1

Last Revised: April 27