

ADVANCE MEDICAL DIRECTIVES

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1. Introduction/Scope.

The purpose of this discussion is to provide Medical Command (MEDCOM) judge advocates with a brief overview of advance directives. The legal foundation for an individual's right to die a natural death involves the application of the right to refuse medical treatment and the application of the right of privacy under the U.S. Constitution or a Fourteenth Amendment liberty interest. Since the legal foundation for advance directives is well established in both state and federal law, an in-depth study of the history and development of these rights is of limited use to MEDCOM judge advocates. Therefore, this legal foundation is discussed only briefly. Likewise, Do Not Resuscitate (DNR) orders are discussed only briefly. Other topics more remotely related to advance directives are beyond the scope of this discussion and; therefore, are wholly omitted. These topics include surrogate decision making for incompetents, active/passive/voluntary euthanasia, and mercy killings.

2. Definitions.

a. The term "advance directive" is the generic name for a document that reduces to written form an individual's preferences regarding the acceptance or rejection of medical treatment *under certain medical conditions* in the event that he/she subsequently becomes unable to make decisions or express his/her wishes. An advance directive permits the individual to decide in advance whether or not to die a natural death, without the application of heroic measures or advanced medical technology, given a particular set of circumstances.⁴

b. A durable health care power of attorney (DHCPOA) allows a patient to appoint a proxy or agent to authorize or withhold medical treatment, even life-sustaining treatment. So long as a principal is properly verified as being incompetent, an agent

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⁴ See, e.g., Legislative Findings, The Natural Death Act, Revised Code of Washington (RCW) § 70.122.

with a DHCPOA may allow the principal to die in a wider range of circumstances than those to which the advance directive applies. For this reason, judge advocates asked to draft a DHCPOA should ensure that the client understands the agent's authority, the circumstances under which this authority will be exercised, and the kinds of decisions that may be made with DHCPOA. Clients should be encouraged by judge advocates to discuss these issues with his or her physician and family before signing a DHCPOA. Once informed, a client may be unwilling to make an end-of-life decision and dictate in advance the circumstances under which they would prefer to die without medical intervention. In other words, they may not be willing to sign an advance directive. However, this same client may wish to give a close family member or friend the authority to make this end-of-life decision. A DHCPOA is useful for this purpose.

c. State statutes authorizing durable health care powers of attorney use careful and precise definitions when describing the circumstances under which a person's agent is authorized to make these decisions. These definitions dealing with competency vary from state to state. Generally, a patient is "incompetent" or "incapacitated" if they are unconscious or too ill to decide or communicate their health care decisions.⁵

d. The terminology used to describe the instrument involving end-of-life decisions also varies from state to state. Terms used in statutes and professional literature include "living will," "advance directive," "medical directive," "terminal care document," and "directive to physicians."⁶ As defined in paragraph 2a above, this article will use the term advance directive. Many state laws provide a suggested form; others mandate the use of their statutory form.⁷ The trend, however, is to combine the patient's advance directive decisions and a DHCPOA into a single document.⁸ As mentioned, judge advocates should

⁵ See Natural Death Act, TEX. HEALTH AND SAFETY CODE, § 672.005(5). Incompetence usually requires the certification of at least the attending physician and another physician or clinical psychologist. See Virginia Natural Death Act, VA. CODE § 54.1-2982.

⁶ Orders and Withdrawal of Life-Sustaining Treatment, The Army Lawyer, April 1989, at 7.

⁷ This discussion does not provide a list of state advance medical directive statutes nor a comparison of the different statutes. As discussed, such a list and comparison is of limited use to MEDCOM judge advocates, whether practicing in a medical center or as a legal assistance attorney. A good discussion on differences between the states on critical issues such as definitions may still be found in The Living Wills Guide, The Judge Advocate General's School, JA 273 (1991). As explained at note 22, *infra*, TJAGSA no longer publishes JA 273.

⁸ See, e.g., National Defense Authorization Act for Fiscal Year 1996, recognize as valid any advance medical directives prepared for eligible military members notwithstanding state laws to the contrary); Maryland Health Care Decisions Act, MD. HEALTH-GENERAL CODE ANN. § 5-601 (Supp. 1998); Natural

not assume "one size fits all." With the passage of the military advance medical directive (ADVANCE MEDICAL DIRECTIVE) provision,⁹ judge advocates have a responsibility to tailor an ADVANCE MEDICAL DIRECTIVE to meet the desires of a fully informed client.

e. The preferences found in such documents usually address the initiation, continuation, or withdrawal of life-sustaining treatment in the event of a qualifying condition, such as a "terminal illness."¹⁰ Many states add to the definition of terminal illness, or to a separate definition, a second qualifying condition. This condition involves severe brain damage with no hope of recovery. The severity of condition must be to an extent that the patient is unconscious of his or her surroundings. Taking a definition from the medical community, many laws use the term "persistent vegetative state" to describe this condition involving permanent unconsciousness.¹¹

f. When signing an advance directive, clients may know that they do not want to be kept alive if they have a terminal illness, such as cancer, or if they are determined to be permanently unconscious. But knowing these qualifying conditions alone is not sufficient, especially if the client is executing a military ADVANCE MEDICAL DIRECTIVE. Clients need to be informed that they can accept certain kinds of "life sustaining procedures" and reject others.¹² State law often provides

Death Act, TEX. HEALTH AND SAFETY CODE ANN. § 672.003(a) and (d); Virginia Natural Death Act, VA. CODE § 54.1-2982.

⁹ 10 U.S.C.A. § 1044C (West 1998).

¹⁰ For example, under Texas law a "terminal condition" means an incurable or irreversible condition caused by injury, disease, or illness that would produce death without the application of life-sustaining procedures, according to reasonable medical judgment, and in which the application of life-sustaining procedures serves only to postpone the moment of the patient's death. Natural Death Act, TEX. HEALTH AND SAFETY CODE ANN. § 672.001(9).

¹¹ Although advance medical directive statutes have basic similarities, fundamental differences do exist regarding what condition qualifies for an advance medical directive to be used. Texas does not include severe brain damage as a qualifying condition. See Id. In contrast, Maryland defines a persistent vegetative state to mean a condition caused by injury, disease, or illness:

(1) in which a patient has suffered a loss of consciousness, exhibiting no behavioral evidence of self-awareness or awareness of surroundings in a learned manner other than reflex activity of muscles and nerves for low level conditioned response; and

(2) from which, after the passage of a medically appropriate period of time, it can be determined, to a reasonable degree of medical certainty, that there can be no recovery. MD. HEALTH-GENERAL CODE ANN. § 5-601(e).

¹² The Army defines life-sustaining medical treatment to include the following;

a. Cardiopulmonary resuscitation (CPR): treatment to restore breathing and heartbeat. It may include pushing on the chest, electric shock to the chest, and the insertion of a tube from a breathing machine down the throat.

b. Dialysis: treatment to clean the blood by a machine when the kidneys do not function.

precise definitions and lists the medical technology available to prolong life. The rejection of food and water by artificial means is more controversial than other medical treatments. Therefore, state laws specifically exclude or include the provision of food and water (or "nutrition and hydration") in the definition of life-sustaining procedures.¹³

3. Legal Bases for Advance Directives.

a. An advance directive permits an individual, to a varying degree depending on state law, to refuse unwanted medical treatment under certain conditions. This right runs contrary to the Hippocratic oath taken by doctors and, often, the wishes of family members. Notwithstanding, this right has been said to have two distinct legal bases.

(1) The first basis is the right of self-determination. Courts have long held that adults of sound mind have the right to determine what shall be done with their own body. Recognition of the right to protect one's own bodily integrity developed into the doctrine of informed consent. The development of that doctrine clarified and confirmed that the right to an informed consent includes as a necessary corollary the right to refuse treatment.¹⁴

(2) The second legal basis for withdrawing or withholding life-sustaining treatment is the right to privacy. The United States Supreme Court has found a right to privacy to be implicit in our Constitution, and numerous state courts have held that a constitutional right to privacy includes the right to refuse treatment.¹⁵

c. Being placed on a ventilator or breathing machine.

d. The provision of food and water, or nutrition and hydration, and medication through tubes.

e. The administration of pain medication.

¹³ Texas appears to implicitly include food and water, since such is needed to sustain a vital function. TEX. HEALTH AND SAFETY CODE ANN. § 672.002(6). Maryland, however, addresses the issue directly.

(1) "Life-sustaining procedure" means any medical procedure, treatment, or intervention that:

(i) Utilizes mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function; and

(ii) Is of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition, persistent vegetative state, or end-stage condition.

(2) "Life-sustaining procedure" includes artificially administered hydration and nutrition, and cardiopulmonary resuscitation. MD. HEALTH-GENERAL CODE ANN. § 5-601(m) (Supp. 1998).

¹⁴ WASH. REV. CODE § 70.122.010.

¹⁵ Cruzan v. Director, Missouri Department of Health, 110 S.Ct. 2841 (1990).

b. The seminal case on the right to refuse unwanted medical treatment is Cruzan v. Director, Missouri Department of Health.¹⁶ A majority of the U.S. Supreme Court held that a competent person has a constitutionally protected "liberty interest" in refusing unwanted medical treatment. The Court recognized many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy; however, the Court emphasized that it has never rendered such an opinion and stated its belief that this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.¹⁷

4. Witnesses, Delivery to Physician, and Revocation of Living Wills.¹⁸

a. Unless the advance medical directive was prepared in a military legal assistance office, look to the law of the state in which the hospital or health care facility is located for specific formalities that must be followed before the directive may be determined to be valid.

b. State statutes that permit advance directives have various formal requirements that must be followed to ensure the legal sufficiency of the document. Typical formalities of execution for advance directives include requiring that the person making the advance directive be a competent adult at the time of execution, that the document be signed by the declarant in the presence of two witnesses not related to the declarant and who would not be a beneficiary of his estate, and that the witnesses themselves sign the advance directive. Another requirement might be that a witness may not be the attending physician or an employee of the attending physician, that a witness may not be a patient or a staff member in a health facility in which the declarant is a patient, and that a witness may not be any person who has a claim against any portion of the estate of the declarant at the time of the execution of the advance directive. Other requirements might include that a witness must not be financially responsible for the medical care of the declarant, and that witnesses must be over a certain age.

c. Under the law of most states, in order for the advance directive to be of practical value, the advance directive or a copy of it must be made part of the declarant's medical record.

¹⁶ Id.

¹⁷ Id. at footnote 9.

¹⁸ Since Congress did not proscribe a "federal form" in promulgating 10 U.S.C. § 1044c, the formalities required by state law in this section may be adopted where prudent to meet the desires of particular clients. Judge advocates providing legal assistance should at the very least be familiar with the law of the jurisdiction in which the medical center is located or where their clients are likely to seek medical care.

Further, the custodian of the records must forward a copy of it to the health facility when the withholding or withdrawal of life-support treatment is contemplated. If the declarant is incapacitated, then the advance directive is to be honored by the declarant's family and attending physician as the final expression of the legal right to refuse medical treatment. How binding this can be on the attending physician and other health care providers is discussed in more detail below. If another person has been appointed to make these medical decisions for the declarant in a separate document (DHCPOA), then that person is to be guided by the advance directive and any other clear expression of the declarant's wishes. A physician, health facility, or health personnel acting in good faith with the advance directive will not be subject to civil or criminal liability.

d. Revocation of the advance directive can be accomplished by being canceled, defaced, obliterated, burned, torn or otherwise destroyed by the declarant or by some person in the declarant's presence and at the declarant's direction. Further, revocation may be made by the declarant's written declaration expressing an intent to revoke and signed and dated by the declarant; this is effective only upon communication to the attending physician by the declarant or by a person acting on behalf of the declarant. Once communicated, the attending physician will record in the medical record the time and date when received. An oral revocation is possible if communicated to the attending physician by the declarant or by a person acting on behalf of the declarant. Once received, the attending physician will record in the medical record the time and date. Under Washington law it is possible for a declarant to revoke an advance directive at any time, in any of the above methods, "without regard to the declarant's mental state or competency." Further, there is no criminal or civil liability for failure of anyone to act on a revocation unless that person had actual or constructive knowledge of the revocation. If a declarant is comatose or cannot communicate with the attending physician, under Washington law the directive shall remain in effect for the duration of the comatose condition or until such time as the declarant's condition renders him/her able to communicate with the attending physician.

5. Military Advance Medical Directives.

a. Because the states adopted different forms and procedural requirements such as the foregoing, the Legal Assistance Division, The Judge Advocate General's School, U.S. Army (TJAGSA), drafted proposed legislation for a military advance

medical directive.¹⁹ This effort resulted in Congress creating a military medical directive.²⁰ This legislation requires the states to recognize an advance medical directive executed by persons eligible to receive legal assistance under 10 U.S.C §1044 without regard to their own laws.²¹

b. The passage of § 1044c is significant for several reasons. First, the need for judge advocates to be familiar with the advance directives laws of states outside the one in which they are located has been greatly diminished.²² Second, Congress did not provide a required or even suggested form to be used as a military advance medical directive. This means that clients eligible for legal assistance from the Armed Services have the widest latitude to exercise their personal autonomy and control end-of-life treatments. Third, judge advocates have a greater responsibility to inform clients of the choices to be made and tailor a military advance medical directive to meet the client's intentions. Although judge advocates no longer must be concerned with changes in state law or matters such as whether a Texas advance directive will be accepted in North Carolina, judge advocates should still become familiar with statutory forms of the state in which they are located.²³ The law of the "home" jurisdiction and surrounding jurisdictions can provide a familiar template for a military advance medical directive. A standard form that has been developed in this office is at Appendix A.²⁴

¹⁹ For a detailed discussion of the background to the military advance medical directive, See Arquilla, New Legislation on Advance Medical Directives, *Lampighter* (Spring 1996).

²⁰ 10 U.S.C.A. § 1044c (West 1998).

²¹ *Id.*

²² After the passage of § 1044c, TJAGSA put an end to updating and republishing *The Living Wills Guide*, TJAGSA, JA 273 (1991). This publication gave legal assistance attorneys a citation to a state's living will law, if any, as well as summary of the differences between these laws. Familiarity with certain differences in laws of different state laws was necessary before the passage of 10 U.S.C. § 1044c to ensure that a living will that followed one state's statutory form would be sufficient in another state. The mobile nature of military life meant military clients had to continuously have their living wills reviewed and the laws of the new jurisdiction explained. Since now these clients may execute a military advance medical directive, these reviews and explanations are no longer necessary. The military advance medical directive must be accepted and followed regardless of any particular state's laws as to substance or formality.

²³ Since JA 273 is no longer available, quick access to living will laws are available on the Internet. A not-for-profit organization-Choice in Dying-provides a free state specific advance medical directive package that can be downloaded from its site: www.choices.org/ad.htm.

²⁴ The LAAWS office provides a sample military advance medical directive with its Patriot program. This office used this HotDocs form provided by the LAAWS office and made addendums using favored language from the statutory forms of Maryland and surrounding states: Pennsylvania and Virginia. Maryland's form is recommended for its detailed definitions and decision-making favoring patient autonomy. A standard form with broad powers and definitions greatly favoring patient autonomy serves both the purpose of educating a client and

6. Advance Medical Directives in Army Medical Records.

Army policy currently permits the filing of advance directives in Health records, Outpatient Treatment Records, and Inpatient Treatment Records.²⁵

7. Physician's Responsibility to Comply with Advance Medical Directives in a Military Treatment Facility.

A military advance medical directive (advance directive and DHCPOA), if properly executed, will be the final and authoritative expression of the patient's decisions regarding withholding or withdrawing life-sustaining treatment. Every effort must be made to ensure it is complied with by the medical treatment facility. Although a health care agent or family member cannot require a particular physician, nurse or other health care provider to participate in effectuating an advance directive, the language in AR 40-3 coupled with the new federal advanced directive legislation, make it unlikely that these individuals will have to resort to litigation to ensure compliance.

7. Conclusion.

Because Congress has provided for a military medical directive, MEDCOM judge advocates no longer have to speculate in what state a client's advance directive may be effectuated. MEDCOM judge advocates must keep abreast of current developments in Army regulation to ensure such rules do not conflict with 10 U.S.C. § 1044c. However, more so than before, an Army legal assistance attorney must know the issues that each client must decide before signing an advance medical directive, such as the following: whether a persistent vegetative state should be a qualifying condition, whether a determination regarding the existence of a terminal illness should be by one or two doctors, and whether life sustaining procedures include providing food and water by artificial means.

making a document that can be easily modified. Unwanted provisions may be deleted.

²⁵ AR 40-66.

ADVANCE MEDICAL DIRECTIVE

PREAMBLE: This is a military Advance Medical Directive prepared pursuant to Title 10, United States Code, Section 1044b and 1044c, and executed by a person authorized to receive legal assistance from the military service. Federal law exempts this Advance Medical Directive from any requirement of form, substance, formality, or recording that is prescribed for Advance Medical Directives by laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States. Federal law specifies that this document shall be given the same legal effect as an Advanced Medical Directive prepared and executed in accordance with the laws of the State concerned.

This Declaration is being made on _____

I, JOE SAMPLE, Social Security Number 123-45-6789, a domiciliary of the state of West Virginia, a member of the United States Armed Forces, currently in Frederick, Maryland, pursuant to Military Orders, being of sound mind, willingly and voluntarily make known my desires to be followed if I become unable to participate in decisions regarding my health care. I make this statement as a directive:

I acknowledge that death is a part of life. It is a reality like birth, growth and aging. I am using this advance medical directive to convey my wishes about medical care to my doctors and other people looking after me at the end of my life. It is called an Advance Medical Directive because it gives instructions in advance about what I want to happen to me in the future. It expresses my wishes about medical treatment that might keep me alive. I want this to be legally binding.

If I cannot make or communicate decisions about my medical care, those around me should rely on this document for instructions about measures that could keep me alive.

If I should have an incurable or irreversible condition that will cause my death within a relatively short period of time, it is my desire that my life not be prolonged by administration of life-sustaining procedures.

If my condition is terminal and I am unable to participate in decisions regarding my medical care treatment, I direct my attending physician to withhold or withdraw procedures that merely prolong the dying process and are not necessary to my comfort or to alleviate pain.

I do not want medical treatment that will keep me alive if I am near death from illness or injury with no reasonable prospect of recovery, even if treatment is provided. In that instance, I do want medicine and other care to make me more comfortable and to take care of pain and suffering, even if such treatment makes me die sooner.

If there is a reasonable prospect of recovery, this directive shall **not** take effect;

Please indicate whether you want nutrition (food) or hydration (water) medically supplied by a tube into your nose, stomach, intestine or veins if you suffer from a terminal condition and there is no reasonable prospect of recovery even if treatment is provided. (Initial only one statement for tube feeding and initial only one statement for hydration).

TUBE FEEDINGS ALLOWED _____ I want artificial feedings (such as tube feedings)	NO TUBE FEEDINGS _____ I do not want artificial feedings (such as tube feedings).
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HYDRATION ALLOWED _____ I
want hydration (water)

NO HYDRATION _____ I do
not want hydration (water)

OTHER EXTREME CONDITIONS

If my attending physician and a second physician determine that I am in a **persistent vegetative state** (which means I have suffered a loss of consciousness, with no behavioral evidence of self-awareness or awareness of surroundings in a learned manner, other than reflex activity of muscles and nerves for low level conditioned response) and from which to a reasonable degree of medical probability that there can be no hope of significant recovery, I may indicate below that I consider such a condition intolerable and I want my health care providers and agent to treat my intervening life-threatening conditions the same as they would the terminal conditions appearing on the preceding page. (Place initials showing whether you agree with this statement).

I agree _____ Treat persistent vegetative state the same as a terminal condition discussed above, and withhold medical care in the same manner as stated above.	I disagree _____ Do not treat persistent vegetative state the same as a terminal condition, if this were to occur, continue to provide care.
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I have thought about this advance directive carefully. I know what it means and want to sign it.

HEALTH CARE POWER OF ATTORNEY This gives another person the power to make health care decisions for me.
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I, JOE SAMPLE, Social Security Number 123-45-6789, a domiciliary of the state of Alabama, a member of the United States Armed Forces, currently in Frederick, Maryland, pursuant to Military Orders, being of sound mind, do hereby appoint my wife, SUE SAMPLE, presently of 1234 Meadow Lane, Frederick, MD 21702, as my agent to make health care decisions for me if and when I am unable to make my own health care decisions. This gives my agent the power to consent to giving, withholding or stopping any health care, treatment, service or diagnostic procedure. My agent also has the authority to talk with health care personnel, get information and sign forms necessary to carry out those decisions.

If the person named above as my agent is not available or is unable or unwilling to act as my agent, then I appoint my son, SAM SAMPLE, presently of 1234 Meadow Lane, Frederick, MD 21702 to serve as my agent to make health care decisions for me if and when I am unable to make my own health care decisions.

By this document I intend to create a Medical Durable Power of Attorney which shall take effect upon my incapacity to make my own health care decisions and shall continue during that incapacity. My agent shall make health care decisions as I may direct below or as I make known to him or her in some other way. If I have not expressed a choice about the health care in question, my agent shall base his/her decisions on what he/she believes to be in my best interest.

I have discussed my wishes with my Health Care Proxy and my Alternate Health Care Proxy, and they have each agreed to act for me.

I have chosen two witnesses, neither of the witnesses is a member of my family, and neither of the witnesses will inherit from me when I die. Neither of my witnesses has been appointed as health care proxies.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE PURPOSE AND EFFECT OF THIS DOCUMENT.

IN WITNESS WHEREOF, I sign, seal, declare, publish, make and constitute this as and for my Advance Medical Directive and Durable Power of Attorney for Health Care, in the presence of the witnesses and the Notary Public witnessing it at my request on this date, _____.

JOE SAMPLE

We certify that the above instrument was on the date thereof signed and declared by JOE SAMPLE in our presence and that we, in his presence and in the presence of each other, have signed our names as witnesses thereto, JOE SAMPLE to be of sound mind at the time of signing.

_____ **Residing**
at: _____

WITNESSES FULL NAME

_____ **Residing**
at: _____

WITNESSES FULL NAME

STATE OF MARYLAND

COUNTY OF FREDERICK

Subscribed, sworn to and acknowledged before me by **JOE SAMPLE**, and subscribed and sworn to before me by _____ and _____, the witnesses, on _____.

NOTARY PUBLIC

My Commission Expires: _____