The information contained in Ethics Center publications is current as of the date of publication. However, health care ethics is a dynamic field in which best practices and thinking are constantly evolving. Therefore, some information in our publications may become outdated or may be superseded. We note these instances when they occur, and we encourage users to consult additional authorities on these topics.

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LEGAL BRIEFS

Advance Directives: VA vs. Non-VA Forms

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Patients receiving care in VHA facilities have the legal and ethical right to accept or refuse any medical treatment that is recommended to them by their care provider. That right extends to patients who subsequently lose decision-making capacity. The Patient Self-Determination Act (PSDA) of 1990 requires health care entities receiving Medicare reimbursement to provide written information to patients, on admission, regarding their rights to accept or refuse medical treatment and to express their wishes concerning future medical care in an advance directive. While the PSDA is not directly applicable to VA, VHA policy is consistent with the Act's requirements.

Advance directives are the tools used to allow patients to express and document future treatment preferences should they lose decision-making capacity. However, the use of different advance directive forms can be confusing for patients and providers. For example, veterans frequently present to VHA facilities with advance directives that were created on state-authorized or other non-VA forms. Which directives can be accepted by VHA providers? The answer: VHA policy permits patients to use VA or state-authorized forms. Even if the patient presents with written instructions that are not on a VA or state-authorized form, clinicians and surrogates can use that information as evidence of a patient's prior wishes. The goal is to respect and give effect to patients' wishes.

VHA policy on advance directives is published in VHA Handbook 1004.2, entitled *Advance Health Care Planning*, dated July 6, 1998. The directive describes the different methods available to patients to express their health care plans and preferences, and the duties of VHA employees to assist patients in doing so. The term advance directive is defined in the VHA Handbook as "specific written statements made by a patient who has decision-making capacity regarding future health care decisions." That information is then available to instruct the patient's surrogate and care providers about the patient's wishes when the patient can no longer make decisions or participate in decision making.

There are two types of advance directives: living wills, also known as instructional directives, and durable powers of attorney for health care (DPAHCs), also known as medical powers of attorney or health care proxies. A living will is a written statement of the patient's wishes regarding the use of specific types of treatments, such as the provision or withholding or withdrawal of life-sustaining treatment. A DPAHC is a form used to designate an individual as a patient's health care agent, i.e., someone formally authorized to make medical decisions on the patient's behalf. When the patient's physician determines that

the patient has lost decision-making capacity and documents that determination in the patient's medical record, this activates the health care agent's authority. In the absence of specific prior instructions from the patient, health care agents are required to base their decisions on substituted judgment, i.e., their knowledge of what treatment and other choices the patient might have made given their knowledge of the patient's general values and preferences. If the agent does not have enough information to act from substituted judgment in a particular instance, then the agent in conjunction with the clinical team must make a decision about what would serve the patient's best interests given the circumstances.

Advance directives can be documented using the VA form or a state-authorized form. The VA Living Will and Durable Power of Attorney for Health Care (VA Form 10-0137) is found in Appendix C of VHA Handbook 1004.2 and may be reproduced locally. Local facilities may supplement the VA form so that patients can further describe their values and treatment preferences. State-authorized advance directives are living wills or DPAHCs approved for use under state law. State laws that address advance directives vary. Some states require particular formats or procedures, such as the number of witnesses and whether the forms have to be notarized. Other states have less specific requirements regarding the content of the advance directive form. VHA providers should confer with their local Regional Counsel's office to determine if the patient's advance directive meets state law requirements. If the advance directive does not meet state law requirements and is not on an official VA form, it can still be used as evidence of the patient's prior wishes.

VHA encourages use of the VA advance directive form, which allows patients to express their wishes concerning end-of-life care, to designate a durable power of attorney for health care, and to list other treatment preferences all in one document. Use of state-authorized forms that satisfy state law requirements is also permitted, but specific instructions cannot be implemented if they conflict with VHA policy. For example, state law in Ohio requires that health care agents only have authority to withdraw artificial food and fluid if the patient expressly authorized it elsewhere on the advance directive form. In addition, the patient's physician must formally diagnose the patient as being terminally ill or in a permanent state of unconsciousness. This limitation conflicts with VHA policy, which permits all surrogate decision makers to make such decisions on behalf of a patient using substituted judgment or a best interests analysis. There is no requirement under VHA policy for a written pre-authorization from the patient or a diagnosis of a terminal illness. In this case VHA policy would allow the health care agent designated by the patient on a state-authorized form to refuse or withdraw treatment notwithstanding the state law limitation on the scope of the health care agent's authority.

In addition to written advance directives, VHA Handbook 1004.2 also describes how patients can express their wishes with respect to future health care

decisions if they are admitted to care while critically ill and loss of decision-making capacity is deemed imminent. If the patient is not physically able to sign a form, or the appropriate form is not readily available, the patient's verbal or nonverbal instructions must be documented in the medical record by a member of the clinical team and co-signed by another member of the team who witnessed the patient giving instructions. The health care team should rely upon these instructions if the patient loses decision-making capacity as determined by the patient's physician. If the patient subsequently regains that capacity, the patient should be asked to confirm his or her prior instructions by formally completing an advance directive.

In summary, any advance directive that is completed according to state law requirements and is consistent with VHA policy should be respected. In cases where state law provisions conflict with VHA policy, VHA policy is determinative within VA facilities. Local facilities should create programs that encourage advance care planning and provide education to patients and clinicians about how to properly use advance directives.

To learn more about the advance care planning process, see the Best Practices article in this issue of **news@vhaethics**.