Do Not Resuscitate Orders (DNR), or Out-of-Hospital DNR orders.

LAWYERS ON END OF LIFE ISSUES

In attending an excellent session on Pennsylvania’s Orders for Life Sustaining Treatment (POLST) at the 2012 Elder Law Institute, I was struck by the fact that many lawyers do not understand the various documents that we are charged with explaining to our clients. The discussion was lively, but most who commented seemed to be appalled by the existence of POLST documents. As human beings, we bring our personal prejudices into the discussion, which is to be expected. However, as elder law attorneys, we owe it to our clients to educate ourselves to be able to rationally and intelligently explain Healthcare Powers of Attorney and Living Wills to our clients and their families so that they may make informed decisions. We also need to understand POLST and Out-of-Hospital DNR orders since families often come to us to help them understand what to do when the home care agency, personal care home, or nursing home approaches them for a decision on behalf of their loved one.

Prior to 1990, there was no real Advance Directive or Living Will statute in Pennsylvania. However, since 1992, we have had a statutory Advance Directive form, which was further refined in 2007 with a Healthcare Power of Attorney with Living Will. People have the right to decide what type of healthcare they want; however, an issue arises when they can no longer communicate their wishes in a meaningful manner. A Healthcare Power of Attorney names agents that will make decisions for the person when they no longer are able to do so, following the wishes set forth when they were not in a crisis situation. A Living Will indicates to your health care agent and health care providers the choices regarding initiation, continuation, withholding or withdrawal of life-sustaining treatment in the event of an end stage medical condition or permanent unconsciousness. Failure to indicate one’s health care wishes, as well as the failure to name an agent can have disastrous consequences. Nevertheless, studies have shown that many, many people do not have these documents in place. ——Attorneys should be sure that they, their loved ones, and their clients have well drafted documents, accompanied by an explanation of what they are and how they work. However, this is only the first step. Such documents are part of a process since discussions with family members or other named agents are just as crucial as the documents themselves. There is a Mexican proverb that says that the appearance of the bull changes when one is actually in the ring. I might decide today that I do not want any life sustaining treatment in certain circumstances, but if faced with a diagnosis that may result in continuous pain or a medical event that will result in significant limitations, my view of what those particular circumstances might be could change. I also may not be able to communicate my feelings as my disease progresses. Additionally, we are all aware that aging is experienced by each individual differently, and dementia can change the picture entirely. Family members may say that they wish their loved one to be maintained in life no matter what, and often are not able to look at the situation from any viewpoint but their own, another very human trait. A Healthcare Power of Attorney and Living Will should speak for the person, and the agent or agents should uphold the wishes of the person who signed the document.

Some persons need more than a Healthcare Power of Attorney with Living Will, however. Once a diagnosis is made or a medical event occurs that is likely to eventually result in a decrease in capacity, the POLST form exists for the patient and his physician to have a conversation about healthcare wishes,
especially end of life wishes. Similar to a Living Will, this is actually a physician order which the doctor develops in conjunction with the patient. It is portable, meaning it can follow the patient to the hospital, the rehab, the hospice facility or to home. If the patient has requested no life sustaining treatment, Emergency Medical Services (EMS), if called, will honor it. EMS cannot honor a Living Will since it merely lists the person’s wishes, and does not have the effect of a doctor’s order. If EMS is called, he or she has the duty to give treatment, just as medical personnel in an institutional setting are required to treat if there is no physician order indicating that they should not do so. These orders are not for healthy or relatively healthy persons but for those persons for whom no one would be surprised if they died within the succeeding twelve months.

Lawyers may be more familiar with Do Not Resuscitate Orders (DNR), or Out-of- Hospital DNR orders. These can only be written by a physician or certain designated persons, and are usually issued for someone with a terminal illness, specifically to avoid any attempts at resuscitation when outside of a facility. Without this type of identification, medical personnel are required to attempt to resuscitate, attempts that usually prove futile but may be costly financially and emotionally.

We Americans are often unrealistic about death. Due to the amazing advances in medicine and improved living conditions, we seem to think that we and our loved ones can live forever. However, life is always fatal, and most of us would like to have some say in our final hours, maintaining dignity and avoiding pain if possible.

The materials on Pennsylvania’s Order for Life Sustaining Treatment can be found in the 2012 Elder Law Institute Volume One, at Section P. There is an excellent article re-printed with permission in the Elder Law Institute materials, Volume Two, Section Y, titled “Our unrealistic attitude about death, through a doctor’s eyes” by Craig Bowron. Additionally, there are two articles on Advance Directives in the latest NAELA Journal (volume 8, Fall 2012, number 2) for a more in depth discussion on a national level. Education starts with us.

[Editor’s note, the Aging Institute of UPMC Senior Services and the University of Pittsburg have posted substantial material on POLSTS on their website, including reading materials, forms, and a free webinar that was recorded in October 2012. Visit http://www.aging.pitt.edu/professionals/resources-polst.htm to learn more about POLSTS.]

Kathleen M. Martin, Esq. practices elder law with the law firm of O’Donnell, Weiss & Mattei, P.C. Kathy has volunteered to update the text of PBA’s outreach pamphlet discussing advance medical directives which will be released in the near future. Kathy can be reached with questions or comments regarding this article at kmartin@owmlaw.com.