

CAPACITY, CONSENT, ADVANCE DIRECTIVES, AND GUARDIANSHIPS

NRHP QI Network Training
Friday, April 22, 2022
11:00 a.m. – 12 noon

Presenter: Linda J. Garrett, JD
LiCON Risk Manager



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Agenda

1. Capacity
2. Consent and Informed Consent
3. Advance Directive for Healthcare
4. Guardianship

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Capacity



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Capacity **Capacity to Make Medical Decisions - Defined**

- Three kinds of capacity are necessary
 - **Legal** – non-conserved adult, emancipated minor or other situation permitting minor consent (under age 18)
 - **Physical** – is able to communicate decision (it may be through interpreter, signing, gestures or written word if speech not possible)
 - **Mental** – has ability to understand and make a decision; often referred to as “competency”

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Capacity **Legal Capacity: Minors**

- Change of status
 - Emancipated
 - Living Apart from Parents for at least 4 months/Married/Mother (NRS 129.030)
- Nature of Medical Condition
 - Minor in danger of suffering a serious health hazard if healthcare not provided; care can be consented to by minor who understands nature and purpose of proposed care and its probable outcome and voluntarily requests it (NRS 129.030)
 - Family planning, pregnancy related care, abortion, contraception (42 CFR 59.5(a)(4); NRS 442.255; NRS 129.030; Glick v. McKay, 937 F.2d 434 (9th Cir. 1991)
 - Sexually transmitted diseases (NRS 441A.310)
 - Substance use disorder (drug and alcohol abuse) (NRS 129.050)

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Capacity **Competency to Make Medical Decisions - Defined**

- “For purposes of consent, **competency** is defined to mean an ability to understand the nature and consequences of the subject of consent. As such, mental incompetency is not limited to those who have been legally declared incompetent. It includes those who, **in the opinion of the attending physician**, are either permanently (e.g., mentally deficient, senile) or temporarily (e.g., head injury, alcohol or drug abuse) incapable of giving consent. Absent contrary evidence, it may be assumed that the patient presenting for non-emergency treatment is competent. NHA Consent Manual

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Capacity

Capacity to Make Medical Decisions - Defined

- Provider and staff who know the patient have a better idea about their general ability to understand than someone who has just “met” the patient
 - Psychiatric evaluation is not needed
- Remember, saying “yes” or “no” to medical care does not require patient to be able to do math problems!

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Consent

Lack of Capacity – may be permanent or temporary

- Examples
 - Person who is conserved – usually permanent, but not always
 - Person who is under the influence of drugs or alcohol, or pre-op medications
 - Person who is unconscious but expected to regain consciousness
 - Person who is in excruciating pain or emotional distress

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Consent

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Consent

Consent to Care

- "Every competent adult has the fundamental right of self-determination over his or her person and property. Individuals who are unable to exercise this right, such as minors and incompetent adults, have the right to be represented by another who will protect their interests and preserve their basic rights." (Nevada Hospital Association Consent/ HIPAA Manual)
- A person with "capacity" has a right to say "yes" or "no" to medical care (NRS 449A.112)
 - Only exception: L2K where a person is a danger to self, others or gravely disabled due to a mental health condition

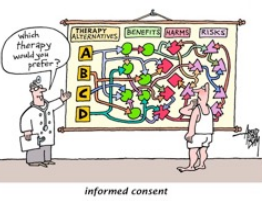
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Consent

Informed Consent

- Consent should be informed (both "yes" and "no")
- Informed consent/refusal: review general medical situation, benefits, risks and alternatives



informed consent

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Consent

Informed Consent – Nevada Law

- If patient says "no thanks" to recommended care (or is simply non-compliant) or wants to leave "AMA," patient should be told the specific consequences of refusing the care so that the refusal of care is also "informed"
 - Also note: Nevada law specifically permits patients with a terminal condition to refuse life-sustaining care even if it means the patient will die sooner (life support must be continued in case of pregnant patient until probable that fetus has developed to point of live birth)

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Consent

Informed Consent – Nevada Law

- Physician providing treatment should disclose information that “a reasonable practitioner in the same field of practice would disclose.” (NRS 41A.110; Smith v. Cotter, 107 Nev. 267 (1991))
- Informed consent is conclusively established when the physician obtains the patient’s signature on a written statement that
 - explains in general terms the procedure,
 - explains alternatives, and
 - explains that there may be risks and the general nature and extent of those risks (NRS 41A.110; Allan v. Levy, 109 Nev. 46 (1993))

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Consent

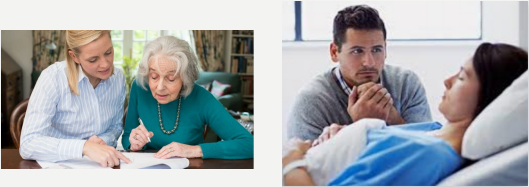
Implied Consent in an Emergency

- Implied consent:** consent may be implied when in the exercise of medical judgment, the procedure is reasonably necessary and any delay in performing the procedure could cause death, disfigurement, impairment of faculties, or serious bodily harm, and the patient is not able to provide consent and a person authorized to consent is not readily available (NRS 41A.120).
- Provider should document 1) that patient couldn’t consent, and 2) the reasonable efforts that were made in the time available to ascertain if a person authorized to give consent was available.
- Emergency care for a minor when a parent/legal guardian cannot be located is also permitted (NRS 129.040)

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Advance Directives/ Powers of Attorney for Health Care



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Advance Directives **Advance Directives for Healthcare**

- **Patient Self-Determination Act (PSDA) of 1992**, 42 CFR 489.100 and 489.102 - Federal law
 - Requires Medicare/Medicaid participating hospitals and other entities to provide patients with info regarding their rights under state law to formulate advance directives concerning health care decisions.
 - "Advance Directive" – while patient **STILL HAS** mental and physical capacity, patient can tell doctor in advance what his wishes are, and they will be honored (despite other wishes of family, for example).
 - Info about the PSDA must be in 12-point type or larger, and given to each patient on or before every admission to the facility.

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Advance Directives **Advance Directives for Healthcare**

- **Different names for Advance Directives**
 - **"living will"** – a document that applies to your preferences for certain kinds of health care and is "in effect" while you are still alive (it describes things that will happen while you are still "living" not after you're gone)
 - **"health care declaration"**
 - **"directive to physicians"**
 - **"health care directive"**
 - **"medical directive"**

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Advance Directives **ADs re: Life Sustaining Treatment**

Nevada Uniform Act on the Rights of the Terminally Ill
(NRS 449A.400- 449A.481)

- Gives patients with a terminal condition the right to refuse life-sustaining treatment and execute an advance directive to ensure that right to refuse once they become incapacitated and are unable to communicate their wishes about what they want and do not want; options include:
 - **Declaration** re: Withholding or Withdrawal of Life-Sustaining Treatment (NRS 449A.415; 449A.433-449A.436)
 - **Do Not Resuscitate** Orders (NRS 450B.420), aka "EMS-DNR's"
 - **POLST** – (NRS 449A.500-449A.581) - Physicians Orders for Life Sustaining Treatment

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Advance Directives

Durable Power of Attorney for Health Care (DPAHC)

- **Durable Power of Attorney for Health Care Decisions** (NRS 162A.700-162A.865) (“durable” because it “endures” after you lose capacity)
 - any adult (or emancipated minor) can execute a DPOA-HC or DPAHC
 - no one ever needs to go to Court
 - many “power of attorneys” or “POA’s” only give agent power to sign documents, pay bills, and engage in financial transactions

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Advance Directives

Durable Power of Attorney for Health Care – continued

- **DPAHCs – continued**
 - names an “agent” who will speak for you
 - limits on certain procedures such as sterilization, abortion, experimental treatment, convulsive treatment, placement in mental facility etc.
 - can also include specific treatment directives
 - including Declaration re: limited instructions for future life-sustaining treatments

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Advance Directives

DPAHC – Form

- Form available at NVLivingWill.com (you can fill it in online!)
 - Agent cannot be healthcare provider or employee of facility
 - Agent cannot be a witness
 - Two witnesses or notary required (at least one witness cannot be related to patient)
 - Ends when patient dies, revokes DPAHC verbally or in writing, or on stated expiration date

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Advance Directives

Alternative format at FiveWishes.org

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Advance Directives

Advance Directives - Summary

- Read all advance directives carefully
- Once patient loses capacity it is too late to execute an advance directive
- Normally NOT operative UNTIL patient loses capacity
- DPAHC does not convey powers to make financial decisions
- Advance Directives that are lawful in other states will be recognized in Nevada
- Nevada had a Registry since 2007 (NRS 449A.724)

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Guardianships/Conservatorships

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Guardianships

Conservatorships & Guardianships – Generally Involve the Court

- Court decides whether an adult has capacity or not, and if not, whether to appoint a conservator for the adult.
- In the case of guardianships (for minors), the Court decides whether parent(s) or another adult will have responsibility for minor child (including medical decision-making).
- Court Orders can be broad, or narrowly drawn, for example, as to financial matters only, but not medical care, or vice versa.
 - Essential that you get a copy of the Court Order to know who “patient representative” and extent of their powers.

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Guardianships

Conservatorships & Guardianships – Generally Involve the Court

- If you have a patient who has lost the ability to make healthcare decisions, and there is no Advance Directive, talk with Adult Protective Services or the Public Guardian’s Office so that a petition can be filed.
- Alternatively, if a procedure is recommended for the patient, even though situation is not (yet) an emergency, you can seek a court order to provide the care.

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Guardianships

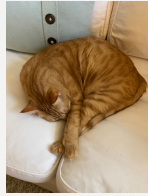
Guardianships/conservatorships – termination?

- Guardianships generally end when minor turns 18.
- Often conservatorships reflect a permanent situation, e.g., dementia or Alzheimer’s Disease.
- But, if person regains capacity they can petition the Court to set aside conservatorship.
- Only the Court can do this (parties can’t agree among themselves to set it aside).
- Make sure everyone knows that needs to know (clinical staff, billing office, front desk) about guardianships/conservatorships or change in status for patients who receive services at your facility.

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QUESTIONS



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