

ADVANCE DIRECTIVE NEWS

No Clear Directions: The Doctor's Dilemma

By Ellen G. Makofsky

Every day hospitals are faced with the predicament of the critically ill patient who suffers from dementia and has no advance directive in place. Advances in modern medicine have swelled the population of those in demented states suffering from a variety of serious ailments and lacking the capacity to direct their own health care. New York State requires that physicians have "clear and convincing evidence"¹ of a patient's wishes before withholding treatment. Without an advance directive, or cogent direction from the patient, physicians are compelled to do all they can.



According to *The New York Times*, a recent government study established that only 35 percent of people with severe cognitive impairment have an advance directive. Cognitively impaired New Yorkers fall below the national average because only 26 percent of them have advance directives.² This creates the doctor's dilemma.

Dr. Lewis R. Goldfrank, the director of Bellevue Hospital's emergency room in New York City, articulated his dismay. He said, "They send these patients to us to treat and we do them a disservice. We do things for them I wouldn't do for my own mother. The problem is, we don't know how to die in America."³ Dr. Gregory Mints, who practices at Bellevue Hospital, was graphic in his discussion of a patient in a persistent vegetative state who lacked an advance directive and was repeatedly sent to Bellevue for treatment of chronic infections. "He can't communicate . . . For all practical purposes, he is dead. Rats you know, die of kidney failure. Humans die of heart attacks. That's the common way we die. We have the technology to fix the heart, so as a result we rot. We just rot away. These people come here and, in many cases, we have to torture some of them."⁴

I was recently appointed Court Evaluator in a guardianship proceeding where the AIP underwent bypass surgery and among the other complications that occurred, the man became ventilator dependent. Prior to the surgery the AIP lived in an adult home. He had a history of schizophrenia. He lacked the cognitive ability to direct his own care. The AIP had many physical woes and a question regarding the

insertion of a feeding peg came up. The hospital initiated the guardianship proceeding because there was no family member involved in his care and no advance directive to provide insight as to the AIP's wishes.⁵ The hospital petitioned to have a guardian appointed so that, among other things, someone would be empowered to direct the AIP's health care. Eventually a guardian was appointed. Research was done to determine if the AIP had ever executed an advance directive or whether anyone could present clear and convincing evidence of the man's wishes. Nothing could be found. This left the appointed guardian with no ability to later order the feeding peg removed. The AIP was eventually transferred to a nursing home on a ventilator and with a feeding peg. He will continue to receive his doctor's best efforts to keep him alive. Some of the treatment will be painful, some treatment will strain what dignity the man has left, and most of the treatment will be futile as he drifts in and out of a nether world.

What to do? We already counsel our clients about the importance of executing advance directives such as living wills and health care proxies. Many of us speak at forums to educate the public on these issues. Hundreds of us participate in the New York State Bar's Decision Making Day and yet so many New Yorkers still lack the basic documents to effectuate a health care plan. As elder law attorneys we must do more. We must advocate for change. New York currently requires the stringent "clear and convincing evidence" standard for health care decision making while other states use a substitute decision-making standard. Modern medicine has changed and is capable of providing a kaleidoscope of medical interventions never imagined years ago. Legislation also needs to change so that New York can move from yesterday to today. Think of the clients you have and the health care decision-making issues you address in your office and write your legislator.

Endnotes

1. *In re Eichner (In re Storar)*, 52 N.Y.2d 363, 438 N.Y.S.2d 266 (1981); *In re Westchester County Medical Center On Behalf of O'Connor*, 72 N.Y.2d 517, 534 N.Y.S. 2d 886 (1988).
2. Kleinfield, *Patients Whose Final Wishes Go Unsaid Put Doctors in a Bind*, N.Y. Times, July 19, 2003, at B2, col. 1.
3. Kleinfield, *supra*, at B1, col. 5.
4. Kleinfield, *supra*, at B2, col. 4-5.
5. The feeding tube was subsequently inserted prior to the appointment of a guardian.