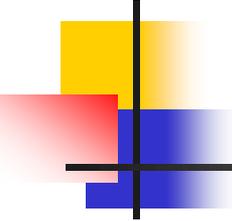


Legal Aspects of End of Life Care

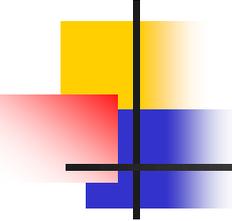
Bruce D. Gehle, JD
Chief Operating Officer
Piedmont Liability Trust
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Outline

- Rules
 - Reconciling Differences of Opinion: Decision-making Authority
 - Advance Directives
 - DNRs and DDNRs
 - Medically Unnecessary Care
 - Death Certificates
- Questions

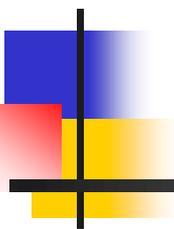
First the Good News: Immunity

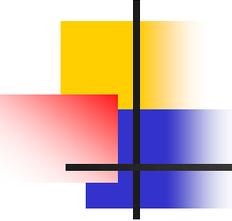


- “Good faith” effort at compliance is all that is required
 - Physicians will not be subject to criminal, civil or professional sanctions regarding withholding or withdrawing health care, unless it can be shown they did not make a good faith attempt at complying with the law.
 - Mere negligence is not enough for liability; your acts would need to be deemed a reckless or intentional violation of the law.

Va. Code § 54.1-2988.

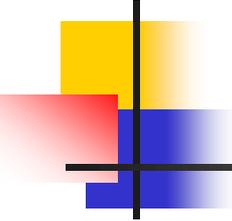
Reconciling Differences of Opinion: Decision-making Authority





Default: Capacity

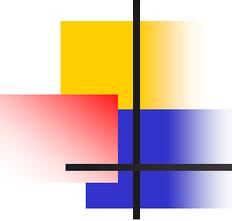
- Patients are legally presumed to have capacity to make their own health care decisions absent a determination that they are “incapable of making informed decisions.”



“Incapable of Making an Informed Decision”

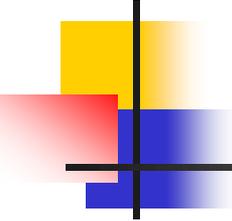
- Patient who is unable to “understand the nature, extent or probable consequences of the proposed health care decision, or to make a rational evaluation of the risks and benefits and alternatives to that decision.”
- Va. Code 54.1-2982

“Incapable of Making an Informed Decision”



- Law Pre-2009:
 - Must be documented by the attending physician and a licensed clinical psychologist or second physician (still applies)
- 2009-10 additional conditions:
 - Second physician or psychologist is a “capacity reviewer” and should not be currently involved in the patient’s care.
 - “Capacity Reviewer”: licensed physician or clinical psychologist who is qualified to assess capacity
 - Must be based on actual visit to patient and assessment.
 - Cannot be “currently involved” in patient’s treatment
 - Exception: if an uninvolved “capacity reviewer” is “not reasonably available”

Surrogate Decisionmaker

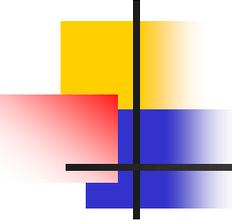


If determination patient is “incapable of making an informed decision,” then:

- FIRST LOOK FOR ADVANCE DIRECTIVE

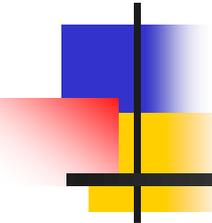
- If no AD, then decision-maker is identified based on hierarchy:

1. Guardian (legally appointed)
2. Spouse (if no divorce action has been filed)
3. Adult child
4. Parent
5. Sibling
6. Other relatives in descending order of blood relationship
7. Certain Qualified Adults (cannot make decisions to withhold life-sustaining treatment)

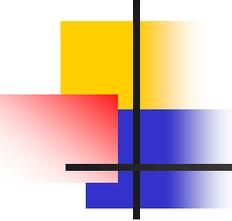


Surrogate Decisionmaker

- Majority Rules
 - No “tie-breaker”
- Among physicians, the attending for the patient decides
- Ethics Consult-can utilize; not binding

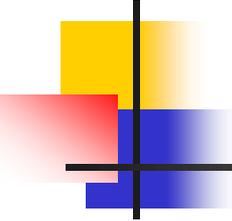


Advance Directives



Advance Directive

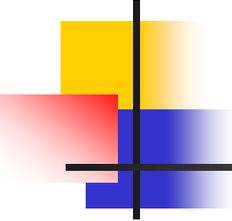
- Written or Oral expressions to govern care after a patient has been determined “incapable of making an informed decision”
- Typically cover:
 - Appointment of a Healthcare Agent
 - AD takes place of “Living Will”
 - Anatomical Gift, Organ or Tissue Donation



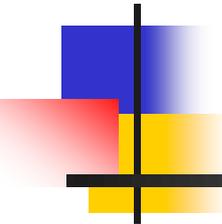
Advance Directive

- Written Advance Directives
 - Signed by declarant in presence of two subscribing witnesses
 - 2009: Can cover *all health care decisions*, no longer just end of life
 - 2009: May specify authorized health care, a health care agent, and any anatomical gift(s)
- Oral Advance Directives
 - May only be made by a patient diagnosed with a terminal illness
 - May specify authorized health care and a health care agent
 - Must be made to a physician, with two witnesses

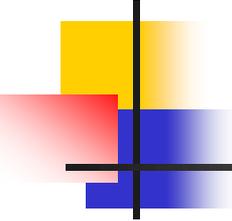
Revoking an Advance Directive



- For a patient to revoke his advance directive, he must be capable of understanding this action and its consequences
- A patient with decisional capacity may revoke the Advance Directive
 - In writing, signed and dated
 - Destruction of the document, or directing another person to destroy it in the patient's presence
 - Oral declaration of intent to revoke
 - Partial revocation is acceptable
- *NEW*: Partial revocation is permitted; remainder of AD remains intact. Va. Code § 54.1-2985.

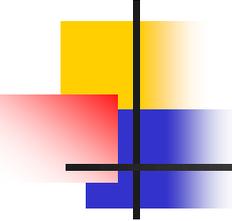


DNRs and DDNRs



DNRs

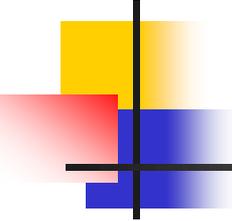
- DNR: order to forego all emergent CPR procedures
- Informed Consent required
 - (note exception on next slide)
- Effective when entered
- Valid during admission
- Need to renew upon new admission
- Not automatically suspended prior to operation or procedure



DNRs

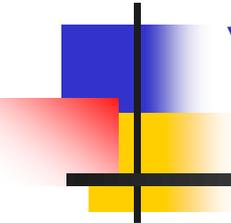
Consent Exception:

- No AD, and
- No surrogate, and
- In opinion of attending physician CPR would be medically futile, then
- Attending physician may enter DNR
- Ethics?
- n.b., UVA policy

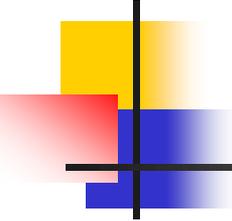


DDNRs

- Valid wherever the patient is: inpt, outpt, ambulance, etc.
- DDNR orders remain effective until revoked
- A patient can revoke a DDNR at any time
 - A health care agent cannot revoke a DDNR that was consented to by the patient, but...
 - A health care agent may revoke a DDNR to which the agent had consented

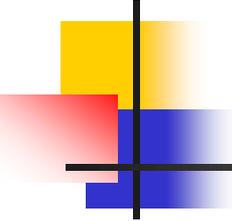


“Futile” Care?



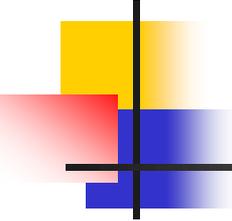
“Futile” Care

- Va. Code § 54.1-2990
- “Nothing in this article shall be construed to require a physician to prescribe or render health care to a patient that the physician determines to be medically or ethically inappropriate.”



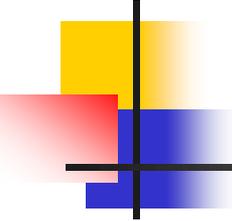
“Futile” Care

- If a conflict between physician and decisionmaker, then
 - Must make “reasonable effort” to inform decisionmaker of your reasons, and if still conflict, then
 - Must make “reasonable effort” to transfer to another physician
 - Decisionmaker has 14 days to effect transfer

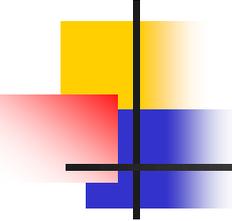


“Futile” Care

- During the 14 days, physician “...shall continue to provide any life-sustaining care to the patient which is reasonably available to such physician...”
- “Life-sustaining care” includes hydration, nutrition, and cardiopulmonary resuscitation
- So, if you feel CPR is medically inappropriate, do you have to resuscitate within the 14 day window?

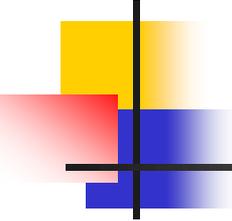


14 days are up, so then...



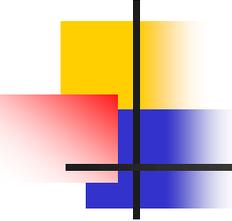
Death Certificates

- If the decedent was a patient of yours or your practice and you are asked to sign the death certificate; make an educated guess and sign it.
- Immunity
- Not conclusive cause of death if a lawsuit or criminal investigation
- <https://www.dhp.virginia.gov/medicine/dcfaq.htm>



Questions

- How to reconcile differences of opinion for withdrawal of care – both among family members and occasionally among providers
- How best to deal with the EPIC auto-revert to full code status with each admission?
- Can the ER or emergency responders withhold CPR based on our clinic documentation of DNR status if surrogate decision-maker is not available?
- Is it legally defensible to avoid telling a patient about a feeding tube (at least where it won't prolong duration nor quality of life in terminal disease)?
- Can Virginia licensed physicians discuss how physician assisted suicide in OR, WA, CA or VT works or any other details about the topic? Can we refer patients to our colleagues in those states for that reason?
- Are there any legal ramifications to the fact that we sign death certificates for hospice patients all the time without physically being present to declare the patient deceased (reliant upon RN assessment)
- Medical Futility. Is the ethics committee consult useful? Are there steps to when approaching a futility decision?

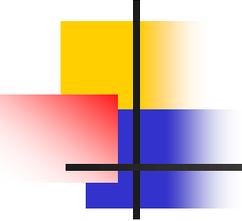


Questions?

Bruce Gehle

bdg5qr@virginia.edu

Piedmont Liability Trust: 296-2100

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- Add objections?
 - Check DDNR, how binding on, e.g., EMS provider?
 - Handouts: Death Certificate from DHP and 2990