

Advance Planning Basics: An Overview for Advocates

David Godfrey, JD, Director, ABA Commission on Law and Aging

Sarah Galvan, Managing Director, Elder Rights, Justice in Aging

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- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Agenda

- Reasons why adults should be encouraged to engage in advance planning
- Overview of common advance planning tools
- Review common advance planning issues and where to refer the person for advice
- Share models for legal aid and pro bono programs

Advance Planning Redefined

- Advance planning is planning for the support that a person may need if an illness or injury in the future causes them to ask for help with health care, personal, and financial decisions.
- Advance planning is much more than end-of-life health care decisions, or crisis management of personal and financial matters.
- It is planning for decision supports to assist in the persons' life, based on their wishes, goals, and values.

Discussion Case 1

- Nearly 20 years ago, just before retiring, Nadia went to a lawyer and signed a will, living will, and durable power of attorney. The documents rest quietly in a safe deposit box that only Nadia knows about.
 - What are the flaws in this plan?

Reasons to Engage in Advance Planning

- Injury or illness can result in anyone needing support in decision-making and carrying out health care decisions.
- Without advance planning, decisions may be made based on what is perceived as being best for you, or what the other person would do, not on your wishes, values, or goals.
- Advance planning provides a preference for who will support and assist the person
 - Some areas require legal authority
 - Wishes, values, and goals should be known by the chosen supporters
 - There are options for pre-designation that should be done
- Can help avoid more restrictive measures, such as guardianship

Legal Impact of Various Tools

Document	Health	Money	Explanations
Health Care Power of Attorney	Yes	No	Limited to authority granted in document
Designation of surrogate or proxy	Yes	No	Health care decisions only
Living Will	End of life	No	May include naming of surrogate or proxy
Default surrogate	Yes	No	May not be the best supporter
Values Survey	N/a	N/a	Guide support, but lack legal impact
Medical Order on Life Sustaining Care	At end of life	No	Created by health care providers, for persons with serious illness
Financial Power of Attorney	No (unless included in text)	Yes	Statute and document define authority
Joint Account Holder	No	Yes, but only that account	Cautions on inheritance, and liens
Representative Payee	No	Yes, but SSA only	Limited to SSA Should pre-designate
VA Fiduciary	No	Yes, but VA only	Selection by VA
Trusts	No	Yes, but trust assets only	Can be costly to set up, and must be properly managed to be effective
Supported Decision Making	Possible	Possible	May lack legal authority to act, unless other documents are present
Guardian/Conservator	If ordered	If ordered	Failure to plan, or when plans fail

Planning Failure

- More people fail to plan than those who have plans that fail to meet their needs.
- The result can be:
 - Confusion on how to support the person
 - Disagreement between family or friends on how to support the person in decision-making
 - A lack of needed legal authority to give consent when the person is unable to do so
 - Leading to avoidable Guardianship and Conservatorship filings

Planning for Health Care Decisions

Health Care Decisions

- Few decisions are more personal than the health care a person wants or does not want to receive.
- Illness or injury can result in the person needing support in giving informed consent, but the person should always be included in the process unless they ask not to be.
- The law in all states recognizes the appointment of a health care supporter in advance of the need for support with health care choices.

When to Plan

- Every adult should consider engaging in planning for the unexpected illness or injury that might leave them in need of support for health care choices.
- Plans should be revisited or updated when:
 - There is a major change in health
 - An injury or diagnosis
 - Once every 10 years
 - Any time there is a change in family relationships (births, deaths, marriage/divorce)
- When faced with a serious illness or injury, wishes and priorities often change.

How to Begin Health Care Planning

- Think about what is important.
- Do they want everything that medical science can provide? Something less? The minimum necessary?
- What is the tolerance level for pain?
- What is the tolerance level for discomfort?
- How much does the person want to know about their medical condition?
- What is a good day for the person?

Values Tools

- [The Conversation Project](#)
- [Five Wishes](#) (may have a charge)
- [Go-Wish](#)
- [Prepare for Your Care](#)
- [ABA Advance Care Planning Tool Kit](#)
- [Advance Planning and Dementia](#)

Values

- What are the person's personal beliefs or values about health care?
- Do they feel compelled to seek care and treatment?
- Is living as long as possible important to them?
- Is an extra month of life in discomfort important to them?
- Is an extra month of life if they are unconscious important to them?
- Do they have religious or ethical views that shape their choices?

Goals

- Goals change with time; this issue requires an ongoing conversation with others.
- Strong life goals include
 - Family events
 - Holidays
 - Milestone dates
- Health care providers will sometimes ask about “goals of care.” What they want to know, is where do you want to be, and what do you want to be able to do, 30, 60, 90 days from now.

Discussion Case 2

- In 2000, Mina tripped and fell down a flight of stairs. She refused surgery to stabilize injuries to her spine. Today she lives alone and has great difficulty getting around. Yet, she refuses to seek medical care. She understands that doctors would likely be able to relieve her pain and improve her quality of life, yet she steadfastly refuses to seek medical care.
 - In a few words, how would you describe her values.

Assisting Clients With Selecting a Supporter For Health Care

- Engage in ongoing “conversations” about wishes, values, and goals.
- It is critical that the person’s supporters agree to support them based on the person’s wishes, values, and goals.
- If a person can’t agree to support them in this way, they may want to select another person as a health care supporter.

Default Health Care Agents (Supporters)

- 46 states and the District of Columbia have statutes naming someone to support health care decision-making when needed
 - Most are a family hierarchy
 - A handful leave it up to the health care provider or social services to select from close family
- Even in states where the laws don't exist
 - Standard medical practice is to accept informed consent from the nearest available family member(s)

Faults with Default Health Care Agents

- May not be the person the adult most trusts to support them on health care decision-making
- May result in a class of persons supporting health care decision-making who may not agree with how to do so
- Preference is given to birth and martial family
 - Often does not reflect the family situation of adults today
- Determining who is the health care supporter may be delayed at critical times without something in writing

The Biggest Fault

- The default health care agent chosen to support the person in health care decisions, or giving consent for care, may not know what is important to the person and may not know the wishes, values, or goals.
- It is hard on the supporter
 - and may result in care the person does not want or not receiving care that they do want.

Naming a Health Care Supporter

- All states recognize pre-designating a health care supporter(s)
- Many states do this in a **Durable Power of Attorney for Health Care**, or designation of surrogate form
 - May also be called: an agent, proxy, surrogate
- The goal of advance care planning should be for this person to support the person in making choices
 - And when that is not possible, to keep the person informed and make the choices based on the person's wishes, values, and goals.

Scope of Durable Power of Attorney for Health Care

- The supporter named can:
 - Collaborate with the person and health care providers to provide informed consent to treatment or withhold/withdraw consent.
 - Have access to health care information
 - A good idea to include HIPAA authorization, though the agent can consent to the release if the patient is deemed unable to consent.
 - Consent to placement, admission, or discharge
- Who can serve?
 - State laws place limits on perceived conflicts of interest on those who might profit from the choices made.

What Form to Use

- Use a state-specific form
- The signing requirements vary
- A few states have specific wording that is required
- Free forms are available in every state
- Some legal aid or pro-bono projects help
 - Health Care Powers of Attorney are an easy pro-bono project because the involvement is simple and limited.
- Non-lawyer advocates can provide forms, but should not offer legal advice
- If the person wants to modify the form, they should consult an attorney familiar with the law in the state

Health Care Instructions or Living Will Directives

- Specific directions on end-of-life health care
- Life sustaining treatment
- Artificially provided nutrition and hydration
 - Permanently unconscious
 - Death is near
- Standard forms
- Answers can be confusing
 - Many states have forms with explanations
- Directions are focused on end-of-life only

Medical Orders on Life Sustaining Care

- All states now have a system to create durable medical orders on medical care for persons who are seriously or terminally ill.
- The form provides specific medical orders about medical care the person wants or does not want.
- Intended for when death would not be unexpected within 6 to 18 months.
- Created by health care professionals authorized in state law or regulation.
- Rapidly replacing Living Will Directives
- Advocates role is to make clients aware of this option.
- If the health care providers don't mention them, ask.

Health Care Decision-Making and Decision Supports

- The person-centered and person-driven model of decision-making is the ideal model for helping a person with health care.
- If there is a written agreement, it can include
 - Who the preferred health care supporter is
 - What the person wants help with
 - What the person wants to know
 - What their wishes, values, and goals are
 - How they want the discussion to be shaped
 - When the person wants to not be involved

Role of a Health Care Supporter

- Help with making appointments
- Transportation
- Accompany to appointments as appropriate
- Participate if the person asks, or is unable to ask
- Ask questions
- Seek explanations that the person and the supporter can understand on diagnosis, treatment options, possible outcomes, and recommendations
- Always consult with the person and inform the person

Check List for Advance Health Care Planning

- ✓ Careful selection of agent and back up agent
- ✓ Assure that it meets state requirements
 - ✓ If the person lives in two states, they may need to do two directives
- ✓ Encourage documenting values and goals
- ✓ Encourage discussing values and goals with loved ones

Planning for Financial Decisions

Money Basics: Income

- Put everything on direct deposit that you can
- When a person experiences a serious illness or injury, checks stack up and go uncashed.
- SSA, VA, and other government benefits require direct deposit
- Virtually all pensions offer it (most require it)
- Defined Contribution Plans – distributions can be automatic

Representative Payees

- Benefits Payable through the Social Security Administration.
- Determination by Social Security that the person needs assistance in managing benefits.

Important Big Change on Representative Payee

- Beneficiaries can pre-designate who they trust to serve as Representative Payee.
- Is now asked for when beneficiaries sign up.
- Can be done online or by calling.
- Should periodically review or update.
- Select the designated Representative Payee as a financial supporter.

Money Basics: Bills

- Arrange direct and automatic payment on bills when needed
 - Can minimize need for writing checks.
 - Credit and debit cards are replacing cash.
 - Credit cards can be paid automatically.
 - Likely still will not cover everything.

Monitoring and Oversight

- Both direct deposit and automatic payment require basic monitoring and oversight.
- Income and accounts should be monitored to verify that income is received and that the amount is as expected.
- Banks are increasingly offering “Read Only” access to online statements.

Monitoring Bills

- On automatic payment, a notice is sent (usually by email) that a statement has been generated.
- Unless an objection is made it is paid as agreed.
- Access to email and/or online accounts allows a financial supporter to review if the bill appears to be for the right amount and review credit card statements to check for unauthorized charges.
- Set up separate email just for bills being monitored by the financial supporter.
- Some vendors allow back-up notice.

Power of Attorney

- A Power of Attorney is a document that appoints an agent to transact business on behalf of the grantor.
- The acts of the agent legally bind the grantor.
 - The same as if they signed themselves.
- Authority granted is based on statute and document.
- Durability – presumed in nearly all states.
- Effective date is state specific – but in nearly all states it is when signed unless the document says otherwise.

Support via a Power of Attorney

- Careful selection of the supporting agent is essential.
- Should be selected and instructed in the role of a financial decision supporter.
 - Always consult with the person
 - Explain in a way the person can understand
 - Offer options
 - Make a recommendation
 - Allow the person to make a choice
 - Help with carrying it out as asked or needed

Why Would You Need a Power of Attorney?

- Access to some information and many transactions require legal authority
- Grants legal authority
- Risks with a Power of Attorney
 - Misuse by the agent
 - Careful selection and oversight
 - Document not being honored
 - Model act has enforcement provisions
 - Get the document approved before it is needed

Creating A Power of Attorney

- Increasingly, states have statutory standard forms, intended as a do-it-yourself option.
- States have specific signing formalities that must be honored.
- Questions should be answered by an attorney.
- Changes should be reviewed by an attorney.
- If the state does not have a standard form.
 - Some public service programs develop them.
 - Good short-term pro-bono projects because the work is limited in scope.

Ability to Create A Power of Attorney

- At the time the document is signed the grantor needs to understand:
 - That the document is naming someone who can legally sign on their behalf.
 - That the signature of the agent is the same as the person signing themselves.
 - The kinds of transactions the document authorizes.
 - That the document can be revoked or amended at any time the person wishes to change it.
 - That unless the document says otherwise, it will continue in effect as long as the person is alive.

Revocation of a Power of Attorney

- State statute may specify how to revoke
- Best practice:
 - In writing
 - Notice to agent and any business that may be honoring
 - Some jurisdictions record revocation in public records
- When can a person revoke (ability)
 - Most courts agree to a lower standard of ability to revoke than to create.
 - Can describe the document and the agent
 - And says they want to revoke it or stop the agent
 - Document the statements

Discussion Case 3

- Ryan downloaded a Power of Attorney form from the internet, hand wrote in his brother's name, and crossed out three paragraphs in the document. He signed it but didn't not have any witnesses or a notary sign it. His brother is trying to use the POA to get five years worth of bank statements for Medicaid application.
 - What are the most likely challenges?

Bank Accounts

- Joint Accounts – Common between family members
 - Allow any account owner to withdraw all assets
 - Can be subject to claims against any account owner
 - Most create a right of survivorship (inheritance)
 - Are the default at most financial institutions
- Authorized signer – rare, often has service charges
 - Like a business account, the signer does not own the account, only has the authority to transact business
 - Does not eliminate risk of misuse

Trusts

- A trust is a legal entity created to own assets and managed by the trustee for a specific purpose.
- There are many kinds of special purpose trusts.
- Living Trusts are funded during life.
 - The trustee manages the assets in the trust
 - May be used to manage assets during life
 - Trustee is a fiduciary owing special duties
 - Statutes and the terms of the trust dictate what can happen
 - Are often used as an estate planning tool, assets are distributed according to the terms of the trust

Working with Financial Institutions

- Banks operate under unique rules
- Balance account holder rights and privacy while trying to protect against exploitation.
- If using a power of attorney, take it to the bank before it is needed and ask them to review it and put it on file.
- Many financial institutions have their own forms, or want specific language.
- Broker dealers, often have specific requirements.

Check List For Financial Planning

- ✓ Direct Deposit
- ✓ Online/Direct Payment
- ✓ Selection of trusted agents
- ✓ Authorized signer on accounts
- ✓ Power of Attorney
- ✓ Oversight—records accessible by third parties

What to do With the Plan?

- Share copies with everyone named in the documents.
- Health care—share copies with all providers (make lots of copies.)
- Ask that a copy be included in medical records.
- Provide copies to family and friends who are not named but might be involved.
- In some areas Powers of Attorney can be, or may be required to be entered into the public records.

Models for Providing Advance Planning Services

Legal Assistance

- Legal assistance providers have many priority legal issue areas for older adults
 - Goal is to provide holistic services to meet a full range of legal needs
- Advance planning can be one part of a holistic approach and there are good models for engaging with pro bono partners or utilizing clinic models
 - Maximize legal assistance resources to handle a variety of cases

Model: Pro Bono Partnerships

- Volunteers of Legal Service: Senior Law Project (NY)
 - Partners with pro bono attorneys to provide wills, powers of attorney, and other essential life planning documents that help clients avoid homelessness, ensure that their dying wishes are fulfilled, and receive care and services to support aging in place.
 - Information available in Spanish
 - Also have a decision-making tool for life planning for client education: “Planning for Your Future” .



Model: Medical-Legal Partnership Law School Clinic

- UC Hastings: [Medical-Legal Partnership for Seniors Clinic \(MLPS\)](#)
 - Students assist clients in legal issues related to health, such as advance health care planning, estate planning, and public benefits.
- Learn more about MLPs and older adults at the [National Center for Medical-Legal Partnership](#)



Model: Legal Clinics

- Houston Wills & Estate Planning Clinic
 - Collaboration with Department of Neighborhoods, Houston Volunteer Lawyers, and Lone Star Legal Aid
 - The clinics are staffed by volunteer lawyers who prepare wills and other estate planning documents such as simple wills, medical power of attorney, HIPAA releases, declaration of a guardian, living wills and durable power of attorney.
 - Process requires screening interview and for some documents, two meetings

Referrals

- [ElderCare Locator](#)
- [National Academy of Elder Law Attorneys](#)
- [LawHelp](#) (state-based online resources)

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