
Attorneys as Healthcare Advocates: The Argument for Attorney-Prepared Advance Healthcare Directives

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Keywords: Advance care planning, Advance Directives, Medical-Legal, Law, End of Life

Abstract: Attorneys regularly prepare advance healthcare directives for their clients. However, attorneys, lacking medical knowledge, are often considered ill-equipped to prepare such documents. While recognizing and respecting the fact that advance healthcare directives pertain to decisions about medical care, this article proposes that attorneys who prepare advance healthcare directives nevertheless provide a valuable service.

I. Introduction

Advance healthcare planning documents allow individuals to preemptively make and record end-of-life healthcare decisions. Frequently, such advance care planning documents are prepared not by doctors but by attorneys.¹ In fact, individuals may be more likely to discuss their end-of-life healthcare plans with an attorney than with a physician.² Critics, however, object to attorney-prepared advance directives, arguing that they are a service “which only a clinician can provide.”³ This article will address how attorneys who provide advance healthcare planning services can and do provide value to their clients.

Critics of attorney-prepared advance healthcare documents argue that “[s]oliciting the advice of a

lawyer to complete what is fundamentally a medical directive is like getting advice from your doctor about completing your taxes,” on grounds that attorneys lack the medical knowledge to properly complete such documents and therefore may fail to properly reflect the client’s end-of-life healthcare preferences and needs.⁴ However, clinician-prepared advance directives receive similar criticism for failing to accurately predict future patient needs and ensure that patients receive desired healthcare treatment at the end-of-life.⁵ Advance healthcare directives are inherently speculative in nature. Whether prepared by an attorney or a physician, such documents attempt to plan for an uncertain future and may not accurately reflect the client’s desires or be suited to the client’s specific medical circumstances when relied upon. Specific treatments selected in the document may ultimately be incompatible with each other, unavailable, or medically impossible to follow.⁶ Moreover, clinicians may disregard such instructions entirely in the face of family objections, or the patient’s end-of-life healthcare instructions may not be adequately entered into the patient’s medical record.⁷

Nevertheless, some form of advance healthcare planning continues to be viewed as valuable. Such planning provides an opportunity for patients and families to reflect on their values and goals, before a medical crisis. Patients who engage in such planning report greater satisfaction with their care and it may improve the relationship between the patient and their family at the end-of-life.⁸ Moreover, where advance care planning occurs, surrogate decisionmakers as well as clinicians report a decrease in distress when making end-of-life healthcare decisions for the incapacitated principal.⁹ Attorneys can help to inform

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and engage the public in end life healthcare preparation, and increase accessibility to advance healthcare planning, providing a valuable service to their communities

II. The Value of Attorney-Facilitated Advance Healthcare Planning

Various planning methods exist to prepare for end-of-life healthcare. However, advance care planning of the type often ascribed to attorneys is of a type that emphasizes the completion of documents and forms. This has been disparaged as a “legal approach” that is “disappointingly ineffective in improving the care

selects an agent help clinicians to clearly and easily identify the person responsible for making decisions for an incapacitated patient. A clearly identified agent with decision-making power can adapt to changing medical circumstances, and reevaluate decisions depending on the patient’s condition as the patient’s medical needs change.¹² Moreover, the appointment of an agent can curtail arguments and power struggles among family members in a time of crisis by making clear who holds decision-making authority. Indeed, at least one court has admonished attorneys to ensure that their clients select “a responsible and trustworthy individual to serve as an agent” noting “an all-too-

Attorneys are well suited for the task of helping the client select the best agent to advocate for and protect the client’s interests. Selection of an effective agent requires consideration of multiple factors including the availability and reliability of the agent. In addition, the agent must be able to understand medical information provided, and act upon that knowledge accordingly. The agent must be able to communicate with the client’s medical team and family members, and manage the emotional toll that comes with making medical decisions for a loved one. Selecting the right agent requires a careful balancing and weighing of the client’s interpersonal relationships and family dynamics.

people near the end-of-life receive and in ensuring that this care accords with their informed preferences.”¹⁰ Despite such shortcomings, however, attorneys who prepare advance healthcare directives can and do provide value to the clients whom they serve by: (a) assisting the client in selecting the healthcare agent best suited to the task of promoting the client’s wishes; (b) ensuring that the client shares and discusses their wishes with their agent, family, and physician, to increase the likelihood of the clients end of life wishes being followed; and (c) ensuring that advance care planning documents comply with applicable law to protect clients against the possibility of the documents being ineffective when needed most.

A. The Value of Attorney-Facilitated Advance Healthcare Planning: Selection of the Healthcare Agent

Even those who challenge the utility of written advance healthcare directive forms acknowledge the critical importance of selecting a healthcare agent and documenting that agent choice in a written advance directive.¹¹ Advance directives in which the patient

familiar scenario playing out in guardianship courts, as disgruntled siblings are challenging with greater and greater frequency advance directives on the basis of an alleged breach of fiduciary duty on the part of the family member designated as attorney-in-fact.”¹³

Attorneys are well suited for the task of helping the client select the best agent to advocate for and protect the client’s interests. Selection of an effective agent requires consideration of multiple factors including the availability and reliability of the agent. In addition, the agent must be able to understand medical information provided, and act upon that knowledge accordingly. The agent must be able to communicate with the client’s medical team and family members, and manage the emotional toll that comes with making medical decisions for a loved one. Selecting the right agent requires a careful balancing and weighing of the client’s interpersonal relationships and family dynamics.

Attorneys routinely dedicate hours to each individual client, through exhaustive conversations and detailed inquiries that yield such information about the patient’s particular relationships and socio-eco-

conomic circumstances.¹⁴ Clinicians, however, may not have the time to dedicate to such in-depth inquiry of each individual patient's life circumstances to help the patient identify the most appropriate healthcare agent. Yet as a standard practice, attorneys, particularly those providing estate planning services, who regularly draft advance healthcare directives, necessarily obtain from their clients detailed information about family relationships and family structure before preparing any estate documents. The conscientious estate planning attorney must delicately inquire, in detail, into the client's personal life to prepare an estate plan distributing the client's assets upon their death. The purpose of such intrusion into the client's personal life is to understand all the dynamics of the family in order to employ the most appropriate estate planning tools whether that be a will, trust documents, or otherwise.

In order to proficiently prepare an estate plan, the attorney learns which family members are trustworthy, dependable, organized, financially responsible, or improvident. The attorney learns where the client's parents and children live, their occupations and lifestyle, and how close or distant they are to the client — geographically and emotionally. Existing or potential family tensions and conflicts are identified. The attorney learns which family members relate well to each other, and who cannot work together, and about the mental and physical wellbeing of the client's family members, including which family members may have special needs or disabilities, or which family members may have drug or gambling addictions that must be accounted for. In reliance on this information, the attorney can prepare special needs trusts or spendthrift trusts, or make decisions about how to preserve a client's eligibility for certain government health benefits, through re-titling or redistribution of the client's assets. Moreover, in addition to the client's family and financial circumstances, the attorney also learns about the client's religious preferences, as well as precise funeral and burial wishes, down to details such as the name of the funeral home, house of worship, or cemetery in which the client wishes to be laid to rest.

Comprehensive information of this sort is necessary to counsel the client about how to best protect and distribute their assets in an estate plan and to ensure that the client's wishes are honored. Information of this sort is equally important for a client when selecting a healthcare agent who must be ready, able, and available to make crucial healthcare decisions at a critical time. For example, a healthcare agent who lives too far away may be unreachable in a time of medical cri-

sis. An unreliable or indecisive relative, even though that relative may have a close personal relationship with the client, may prove ineffective, unable make decisions when needed. A family member inclined to dispute with others may make it difficult to reach consensus and resolution when end-of-life decisions must be made, leading to the increased possibility of court involvement. Equipped with thorough information about the client and their family at the outset, the attorney is well-placed to help the client identify the healthcare agent best suited to advocate for the client who cannot do so on their own.

B. The Value of Attorney-Facilitated Advance Healthcare Planning: Planning across the Adult Lifespan

Advance healthcare planning is considered most beneficial when it occurs multiple times over the course of the client's life.¹⁵ The Institute of Medicine Report, *Dying in America* advocates for such a "life cycle model" of advance care planning as most effective, given that decisions one makes in early adulthood or good health may differ drastically from decisions made at an older age or in sickness.¹⁶ Under such a "life cycle model", in which individuals engage in advance care planning discussions multiple times over the course of their life, the danger of an outdated advance care planning that is not conducive to the client's evolving circumstances is reduced. Moreover, this "life cycle" approach helps to "normalize" such discussions to "avoid the emotional burden sometimes experienced by patients, families, and loved ones who have not adequately prepared for making end of life care decisions."¹⁷

Such regular review of end-of-life plans over the client's adulthood already occurs as a standard legal practice among attorneys in the field. It is customary for estate planning attorneys to advise clients to return and update their estate plans upon the occurrence of any significant life event such as marriage or divorce, birth of a child, a medical diagnosis, death of a spouse or other family member, or an out-of-state move. Each of these "milestone" life events can impact the client's end-of-life healthcare choices in addition to their overall estate plan.¹⁸ These life events present an opportunity for the attorney to reconnect with the client and fully revisit the entire estate plan and advance care documents in light of the progress of time and changed circumstances. For example, with respect to clients who move or retire out-of-state, state-specific requirements for witnessing or notarizing may apply, or the death of a spouse may raise questions about which of the client's children will assume the role of healthcare agent(s).¹⁹ The ability of attorneys to

encounter clients at these regular life intervals allows for advance healthcare planning to be conducted early and often throughout the stages of adulthood.²⁰

C. The Value of Attorney-Facilitated Advance Healthcare Planning: Compliance with Applicable Law

State statutes often impose obligations and restrictions on the healthcare agent's exercise of decision-making authority for an incapacitated patient. The advice and counsel of an informed attorney can be crucial for ensuring that advance directives are compliant with applicable law. For example, in Alaska an agent cannot withhold or withdraw life sustaining procedures unless "clearly expressed" in a writing or, where no writing to the contrary exists, such a decision is in the patient's best interests.²¹ In Pennsylvania, the absence of written authorization to withhold or withdraw artificial nutrition and hydration "may be overcome by previously expressed wishes of the principal to the contrary" or if, after consideration of the agent's "values and preferences," the agent concludes the principal clearly would not want such treatment.²²

The assistance of an attorney to explain such statutory requirements can provide context for the client when emphasizing the importance of clearly expressing their wishes, preferences, and goals to those tasked with making end-of-life healthcare decisions in uncertain or unforeseen circumstances. A well-prepared healthcare agent with knowledge of the client's goals and objectives, is better able to support the client at the end-of-life, and can adapt more readily to the reality of the patient's medical circumstances as they change in a manner that a static advance directive form alone cannot.²³

Attorneys are also well-positioned to help the client understand the ramifications of failing to prepare advance directives including, for example, the application of default state surrogacy laws that may apply if the client chooses not to select a healthcare agent. The attorney can clarify the effect of divorce on agent selection, plan for multiple agents, children, or blended families to participate in the end-of-life decisions of an incapacitated parent, and prepare for the unavailability of the agent through selection of alternate agents. Moreover, the attorney can inform the client about the nature of intrusive guardianship proceedings that can occur as a result of intractable end-of-life family disputes, which can cause "embarrassment, hurt and feelings of indignity as well as the loss of power and control over ... person or property."²⁴

In addition to the foregoing services, the estate planning attorney ensures that the client has the requisite level of capacity to complete advance directive documents, to forestall any legal challenges of that nature. Ensuring that the client has the requisite capacity to complete the advance directive document at the time it is signed, can help to avoid any assertions that the patient lacked the capacity to complete the document, or that the client was the subject of undue influence at the time the document was drafted.²⁵ Finally, the attorney is also responsible for proper execution of the documents in accordance with state statutory requirements which may require a witness and notary, given that improper execution of advance directive documents risks rendering them invalid.²⁶

III. Attorney-Facilitated Advance Healthcare Planning: Potential Areas for Improvement

Although attorneys offer benefits to clients seeking advance healthcare planning, some areas of improvement may exist. Attorneys, for example, must take care not to reduce advance care planning to simply the preparation of written documents without engaging the client in broader goal setting and conversation with family. Rather, taking steps to ensure that the agent and family are informed of the client's plans, and are equipped to act on the client's behalf when needed, protects the client's interests. Training to prepare attorneys to provide effective advance healthcare planning, along with increased collaboration with medical professionals may have the potential to improve such deficiencies, and enhance advance healthcare planning legal services

A. Overreliance on Written Documents

End-of-life planning conducted by an attorney differs in its objectives, to some degree, when compared to advance care planning conducted by a physician. Both professions seek to ensure quality end-of-life care and surrogate decision making that accords with the patient's medical needs and goals. Attorneys seek also to protect and safeguard their client's legal interests at the end-of-life, reduce the likelihood of family conflict, and avoid the need for guardianship proceedings. For attorneys, the written legal document in the form of an advance directive is viewed as critical to protect those interests.²⁷

However, attorney-facilitated advance care planning is criticized for overemphasis on the written document rather than on encouraging clients to explore and discuss end-of-life objectives, and set general goals for end-of-life healthcare treatment.²⁸ Specifically, the type of attorney-facilitated advance care planning that

is criticized consists of a single client meeting which is terminated — in many cases, prematurely — with the execution of the written advance directive document.²⁹ Once the client's wishes have been memorialized in writing, the advance care planning process is considered complete. The client then leaves with their documents, only to store them in a file cabinet with other legal paperwork until the time of need arrives. No subsequent discussion of the documents occurs between the client and agent, physician, family, or trusted friends. Indeed, they may all be unaware that the advance healthcare directive even exists. They may have no knowledge of their loved one's overall goals, preferences, or motivations, all of which have been ostensibly captured in a cold, static document that lacks the warmth and depth that human interaction and conversation affords.³⁰

Moreover, attorney-prepared documents are criticized for overly-complicated language that may be difficult to interpret by the clinician, client, and agent.³¹ In addition, advance directives prepared by attorneys who lack medical knowledge, risk devolving into checklists from which the client simply selects from an assortment of treatment preferences. Without consultation with a medical professional to provide context and consideration of what the patient's existing or future health circumstances might warrant, treatment choices selected may be incompatible with each other and with the patient's needs.³²

Nevertheless, for attorneys, the written document itself does serve an important purpose. The written advance directive document, when drafted well, provides a physical, portable record that can be referred to in any subsequent dispute. It can “facilitate communication among members of the health care team.”³³ It continues to be available when the client becomes unable to make or communicate decisions, and it can provide guidance, reassurance, and support for the difficult decisions the agent and the clinician must make. The written document allows the client to grant an agent the legal authority to make decisions on the patient's behalf. It encapsulates and provides a tangible record which can be referenced in the event of disagreement. It is relied upon in legal proceedings to determine who bears decision making authority for an incapacitated patient.³⁴ Finally, when drafted in a manner that complies with constitutional requirements and state statutes, the written document can prevent court involvement in the nature of guardianship or conservatorship actions, or other governmental intrusion into healthcare decisions.³⁵ Yet, written advance directives alone do not comport with evolving advance care planning methodologies which encour-

age discussion of the client's goals and values with others. Rather, to be most effective, the client must involve family members and others in an ongoing conversation about the client's end-of-life values and preferences.³⁶

B. Involving the Healthcare Agent, Family and Others in the Planning Process

End-of-life healthcare planning conducted by attorneys is criticized for involving only the client and for not integrating broader conversations with the agent, family and loved ones.³⁷ The perception persists that “although most lawyers urge clients to share documents with family and health care providers, few have routine practices designed to assist clients in doing so.”³⁸ Engaging the client's loved ones offers “opportunities to create shared meaning and strengthen relationships.”³⁹ Absent these broader and recurring conversations, attorney-prepared documents on their own may fail to integrate the client's specific medical need and the client's relationships into the overall care plan.

The manner in which attorneys provide advance care planning services is well suited to promote family involvement and discussions with loved ones, as standard practice. Estate and end-of-life planning conducted by attorneys usually occurs as a series of conversations and meetings. From the first client meeting, the attorney is well-positioned to encourage the client to commit to discussing their end-of-life healthcare goals with family, caregivers, friends, as well as their physician, as a prerequisite to completion of the document.

For clients who commit to having such conversations with loved ones before the written directive is ultimately prepared by the attorney, the attorney can provide direction, support, and resources to help the client conduct such conversations. Initiating such conversations with family members can be difficult for clients, and family members may be unwilling to discuss their loved one's death. Preparing the client with information, resources, and tools to help the client broach the subject of their end-of-life goals and preferences with their family and others may help to ease discomfort.⁴⁰ Throughout this process, recognition of and sensitivity to the client's religious, cultural, and spiritual values, is imperative for the advance care plan to respect and reflect each individual client's needs.

To support the client in this process of engaging their family and friends in end-of-life conversations, the attorney can direct the client to any of the ubiquitous, evidence-based internet resources available

to help facilitate such conversations with family.⁴¹ Websites which promote reflection and encourage engagement in selecting care preferences are valuable resources. However, the experience of completing an advance directive form on the internet can seem impersonal. The support of and interaction with an attorney-facilitator can counter a sense of detachment and isolation that may accompany the experience of completing end-of-life care documents online, alone, on a computer screen.

The client, supported by their attorney and equipped with resources, can engage third-party stakeholders such as family members as well as the physician in the advance healthcare conversations. If the client consents, and keeping confidentiality obligations in mind, the attorney can involve the agent and family members in the attorney-client advance care planning meetings. Whether or not the attorney is present when such conversations with loved ones occurs, and even if the conversations are not ultimately documented in an advance directive, such reflection and conversation with family in advance, is beneficial. It may ease some of the shock and distress that can later arise when end-of-life has never been discussed and is only considered at a loved one's deathbed for the very first time. "[W]hile it is never too soon to initiate these conversations, putting off these conversations until days before patients' deaths is inhumane and distressing to the dying and their families."⁴²

After the client has shared and discussed their goals with their family as well as their physician, the attorney is in a better a position to pursue the next step of preparing an advance directive document to memorialize the client's healthcare wishes. Thereafter, and over the course of the client's lifetime, the attorney can continue to meet with the client to review and update the document, as the client's circumstance change. Recognizing once again that attorneys are not clinicians, specific medical treatment choices are best left to medical professionals within whose bailiwick related end of life documents such as the POLST form and in-hospital resuscitation orders also fall. Attorneys and their clients must be clear that the attorney-prepared advance directive document serves as a basis for ongoing discussion with a medical professional, and must instruct the client to regularly review the document with their physician, in order to reflect the client's particular medical circumstances and needs.

C. Distributing the Advance Healthcare Directive Documents

Critics of attorney-drafted advance care directive forms contend that such paperwork does not find its way to the client's physician or healthcare agent, and rather

than being made part of client's medical record, the document is instead filed and forgotten once the client leaves the law office. Such attorney-prepared documents fail to fulfil their intended purpose because they are never exchanged with agents and medical providers and therefore may be unavailable when needed.⁴³ For this reason, some recommend instead that these documents be completed exclusively in a healthcare setting, so that they can be immediately made part of the patient's file.⁴⁴ However, the failure to properly include an individual's healthcare wishes in the medical record, is not a problem unique to attorneys. Even when advance healthcare planning occurs in a medical setting, the patients' directives may not be entered into the patient's medical record.⁴⁵ Healthcare facilities, clinicians and lawyers alike must all take steps to better ensure that such documents are adequately included in the medical record and relied upon when needed.

As already emphasized, as a first step, attorneys must instruct their clients to discuss their advance healthcare wishes with a physician before recording them in an advance directive. Clients and attorneys must then ensure that the documents are shared with the client's physician, agent, family and friends. Of course, simply because the attorney directs the client to provide the advance directive document to their physician and discuss it with their agent and family does not mean the client will do so. "Even if lawyers encourage patients to discuss the documents with clinicians and family members, such engagement may not happen."⁴⁶

For attorneys, an option may be to mail or otherwise distribute copies of the completed advance directive document directly to the medical records office and/or to the client's physician, if the client consents. Assistance by the attorney in this way ensures that the client or their agent is not solely responsible for making certain that the document is included in the client's record. Similarly, the attorney can also provide copies of the advance directive directly to the healthcare agent, with the client's consent, including instructions as to their use, when they are to take effect, and explanation of the duties of the healthcare agent. Taking steps to provide the document directly to the relevant parties may decrease the likelihood of the document not being utilized if the client forgets or neglects to share the document on their own.

D. Attorney Training and Skill Development

Medical professionals, commendable for their candor, have concluded that physicians very often "lack training, communication skills, and confidence regarding the initiation of end-of-life conversations," and have,

“poor skills in conducting advance directives discussions.”⁴⁷ Physicians and medical students report “feeling unprepared or uncomfortable with broaching the topic of death with their patients and families” and uncertain about “how to initiate or proceed with these discussions.”⁴⁸ If physicians struggle with lack of preparedness to discuss death, it can only be expected that attorneys experience similar difficulty when drafting living wills or other advance directives for clients struggling to make future healthcare decisions in light of uncertain diagnoses and myriad treatment options.

The struggles that physicians encounter in conducting end-of-life conversations have been attributed, in part, to an inadequacy in medical education in preparing physicians for such conversations. In medical education “dealing with death is not uniformly considered a basic medical skill.”⁴⁹ The medical profession has thus identified a clear need for and commitment to investment in training, in an effort to improve the efficacy of advance healthcare planning.⁵⁰

In the same manner that physicians struggle with lack of preparedness in this domain, it can only be expected that lawyers preparing advance healthcare directives experience similar difficulty discussing end-of-life healthcare decisions with a client. Just as medical schools have not adequately prepared doctors to hold end-of-life conversations and more training is required, law schools may not be adequately preparing lawyers for the reality of end-of-life planning. Such skills are likely to only be developed by attorneys on-the-job, through trial and error, in a piecemeal fashion. For the many students who enter the ever-popular practice of estate planning, the legal profession may need to better equip them as future practitioners for the reality that they are expected to prepare clients for healthcare decisions at the end-of-life.

“[S]tudies have established that physicians can be taught the communication skills needed to provide good end of life care.”⁵¹ Attorneys seeking to help clients document these healthcare decisions in advance directives may similarly benefit from additional, profession-specific skills training to most effectively assist clients who wish to memorialize their end-of-life decisions, and to guide clients through the process of advance care planning. Facilitator trainings that have been considered helpful for improving advance care planning effectiveness in the healthcare setting include intensive small group trainings, simulations, and classroom modules “focused on achieving competency in facilitating [advance care planning] conversations through video demonstration, instructor role modeling, role-play exercises, and feedback on competency.”⁵²

While trained attorney facilitators cannot and should not usurp the role of medical and other professionals, they can serve as a valuable resource to those seeking to prepare for end of life. Although various approaches exist to encourage individuals to conduct end-of-life planning, successful interventions include those that incorporate “direct interactions” between the patient and the professional facilitating the conversation.⁵³ Some scholarship indicates that when such direct interactions occur over multiple visits and where the advance care planning facilitator is trained, improvement in the documentation of advance care plans results.⁵⁴ Studies that showcase the effectiveness of direct facilitated end-of-life discussions have utilized clinicians, nurses, social workers, and hospital chaplains among others, as advance care planning facilitators.⁵⁵ Future studies about the effectiveness of direct attorney-facilitated interactions may help to improve the role of the lawyer as facilitator.

End-of-life conversations that are poorly conducted by uninformed facilitators run the risk of hindering the client’s goals, obstructing medical treatment, and escalating family conflict. The assistance of trained, skilled, and informed attorney-facilitators may reduce the likelihood of legal documents that, when needed, may be ineffective at best, or obstructive at worst, with respect to accomplishing the client’s goals. To help lawyers engaged in advance care planning improve their skills, the American Bar Association has created guidelines for lawyers to utilize in practice. The ABA Advance Directives Counselling Guide for Lawyers, created by a multidisciplinary team of medical and legal professionals, seeks to “assist lawyers and health care professionals in formulating end-of-life health decision plans that are clearly written and effective.”⁵⁶ The document provides important guidance and resources to attorneys preparing advance healthcare directives. The extent to which the document is utilized in practice by estate planning attorneys however, remains unknown, and further research as to the use and effectiveness of the document in improving attorney-facilitated end-of-life conversations might prove insightful.

IV. Opportunities for Medical-Legal Partnership

Advance healthcare directives fulfil their intended purpose when the client’s decisions are honored after the client becomes incapacitated. However, attorneys who prepare advance directives may never know if the documents served their intended purpose when the client is dying. The attorney does not join the client at the bedside. Our legal system affirms and respects the fact that end-of-life healthcare choices should be

left to patients, their families, and their physicians.⁵⁷ Although attorneys are not physically present at the bedside, their representation continues, however, through the advance directive document drafted by the attorney to protect the interests of the individual who no longer has the capacity to protect their interests on their own.

Clinicians complain, however, that “legal advance directives are often incomprehensible, are too lengthy, or contain specific treatment wishes which are not pertinent to the clinical situation at hand.”⁵⁸ If clinicians struggle to interpret and implement perplexing instructions in attorney-prepared advance directives, patient goals may be impeded. Yet if the attorney-drafted document is unclear, the attorney who drafted it may never know. If physicians or the healthcare agent struggle to interpret, or fail to apply the document because of gaps, errors, or inadequacies in the language, or family arguments erupt about its meaning, the deficiencies in the advance directive document may never come to the attention of the attorney who drafted it. Rather, such disputes are often resolved through internal protocols within healthcare facilities which may include medical team meetings, family meetings, social worker consultations, or the intervention of clinical ethicists and hospital ethics committees. Such internal dispute-resolution is likely to occur without the attorney ever realizing that a disagreement is occurring or that the dispute is exacerbated by the attorney’s own ineffectiveness as an advance care planning facilitator. Only if court proceedings are ultimately initiated might the attorney who prepared the advance directive become involved in the ensuing guardianship proceedings.

Thus, if an advance directive fails to achieve its desired purpose, the attorney who prepared the document is often deprived of the opportunity to learn from and improve their advance planning methods to better serve future clients. The fact that internal dispute-resolution exists in hospitals and nursing homes to resolve end-of-life disagreements without court intervention does not absolve attorneys from the obligation to conduct effective advance care planning documents that clinicians can rely upon.

“To ensure that [advance care planning] efforts are effective, evidence-based, and legally recognized, it is important that the medical and legal communities engage with one another to align their approaches.”⁵⁹ Collaboration with medical professionals may help attorneys better understand how to draft meaningful and effective documents. Legal professionals working together with medical professionals to address deficiencies and better understand the needs of each profession in the preparation of advance directives offers

“potential to improve practice among lawyers and clinicians by establishing a shared understanding of the goals of [advance care planning] and to clarify the appropriate role of lawyers and clinicians.”⁶⁰

Medical-legal collaborations and training programs have the capacity to benefit the legal profession and the public by informing attorneys about which advance care planning practices are most helpful to patients and clinicians, thereby improving the efficacy of attorney-facilitated advance care plans. Similarly, through such partnerships, healthcare professionals may gain from the expertise that legal professionals offer. Medical students, clinicians, and healthcare professionals who rely on advance health care directives may benefit from information about attendant legal requirements and obligations, as well as the constitutional and statutory rights of the patient and healthcare provider, and the possible legal outcomes where advance directives fail or do not exist.⁶¹ Medical-legal partnerships have the capacity to help both professions enhance their knowledge, skill, and understanding with respect to the preparation, documentation, interpretation, and application of advance care planning documents.

Advance healthcare directives allow individuals to identify trusted, capable, and informed advocates to act as healthcare agents and protect their interests. They reduce the likelihood of individuals falling to the mercy of default surrogate decisionmaker statutes or court-appointed guardianships. They offer a means to avoid inter-family disputes that can spill over into legal proceedings leaving vulnerable clients at the mercy of the judicial system. Competent, well-trained professionals working together to provide advance care planning services through interdisciplinary partnerships can help to promote end-of-life health care that accords with client wishes.

V. Attorneys as Healthcare Advocates

A. Increasing Public Awareness about Advance Care Planning

Although advance directives are widely considered beneficial, only every third American has completed an advance directive.⁶² Access to knowledgeable, informed lawyers trained to draft advance directive documents can serve to increase availability of and public access to end-of-life planning services. Certainly, advance healthcare directive documents can be prepared exclusively with a clinician or online. Yet even among these and other advance care planning alternatives, the individualized service of an attorney — who can act as a full-service facilitator, and who can ensure that the client engages all the appropriate parties, including the agent and the physician, in

the advance care planning process — remains a viable option.

As advocates for advance care planning, attorneys can encourage the public to document, share, and discuss end-of-life goals and preferences. However, in so doing, attorneys must be cognizant of and responsive to the fact that their professional skills differ from those provided by medical professionals, and ensure that each client consults with a qualified medical professional to further discuss and develop their advance healthcare plans. Nevertheless, by helping to “normalize” advance care discussions, by making advance care planning more widely available, and by offering an alternative means by which individuals can begin to engage in end-of-life healthcare conversations and prepare documents, attorneys provide value.⁶³

and minority individuals are not having timely [end-of-life] conversations with their physicians, and as a result are dying in places and ways that do not reflect their wishes.”⁶⁶ A need exists for greater outreach to communities with low rates of advance healthcare planning. One potential opportunity to reach underserved populations is through law school clinical programs that provide legal services to the public. Such programs can help to address disparities in end-of-life healthcare planning among vulnerable and disadvantaged populations by making advance care planning services more readily available as a *pro bono* offering.

Clinics offering medical-legal services or estate planning services are a particularly popular offering at law schools. These educational and service programs often provide — as part of their services — prepara-

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*B. Attorneys as Catalysts for Health Care Equity:
The Example of Law School Clinics*

The COVID-19 pandemic has highlighted healthcare disparities that disproportionately affect minority and low-income populations.⁶⁴ A clear need exists for all individuals, but particularly those who are most vulnerable, to identify a healthcare agent of one’s own choosing and discuss end-of-life treatment goals in the event of a medical crisis.⁶⁵ Advance directives serve as a means to empower individuals to retain some degree of autonomy and have a voice in their own healthcare treatment. A well-informed healthcare agent serves as an advocate on behalf the patient who cannot represent themselves — an advocate who understands and can honor personal and family needs and deeply-held values, traditions, and beliefs to best promote and protect the patient’s goals.

Economically vulnerable and minority populations are less likely to have completed advance directives with the result that “poorer, younger, less-educated,

tion of advance healthcare directives for the clients they serve. Such clinics increase access and availability to advance healthcare planning, by offering free services to underserved populations. Law school clinics also offer an opportunity to train the next generation of attorneys to help clients prepare effective end of life plans. Through law school clinics, with careful supervision and instruction, students work alongside professionals to provide direct client services, allowing the student to observe best practices, learn from experience, and develop their skills as future practitioners, while at the same time serving the public.⁶⁷

Law school clinical programs integrate into the curriculum instruction about the applicable law, but also instruction about effective client communication, discussions about public policy and notions of justice, and the role of an attorney as an instrument of that justice.⁶⁸ “[C]linics are the law school sites within which the cognitive, skills and civic dimensions are purportedly iterative and integrated, where students

learn and deploy legal skills and encounter the real-life ethical challenges of working directly with clients to diagnose and treat their legal problems.”⁶⁹ Law school clinics, which often serve culturally diverse, underserved populations as well as economically disadvantaged clients, incorporate examination and reflection of cultural, moral, and religious considerations inherent in the practice of law.⁷⁰ By integrating instructive and reflective exercises into the curriculum throughout the course of the clinical program, clinics seek to nurture and promote respect, awareness, and sensitivity to the diversity of client experiences.

Law school clinics additionally offer an opportunity for interdisciplinary collaboration through partnerships with other university departments. Such partnerships with other professional schools such as medicine or nursing programs, have the potential to improve the skill of the next generation of advance care planning professionals. “By recognizing lawyers as powerful allies in addressing some of the root causes of systemic health inequities, medical legal partnerships can expand institutional and professional boundaries and help students learn new ways to practice law and medicine together. ... Working together to overcome potential barriers to serving health-and justice-related interests not only improves teamwork but also teaches students how much they have in common with each other.”⁷¹

Such partnerships offering advance healthcare planning training, supervision, and education have the potential to improve the skills of advance care planning of future professionals, who learn and implement best-practices for providing advance care planning services to the public. In addition, they have the potential to empower vulnerable populations by encouraging preparation for end-of-life care well before a medical crisis occurs, and offer a resource to underserved populations seeking to receive advance care planning services.

VI. Conclusion

Discussions of end-of-life meet at the intersection of medicine, law, ethics, religion, social work, and philosophy. The breadth of the domains that end-of-life conversations encompass is reflective of the profoundness of the subject matter. Advance care planning must be conducted with awareness and respect for the human dignity of the individual facing profound questions about their own mortality. Attorneys must be prepared to effectively and compassionately respond to each client’s needs in a manner receptive and responsive to the cultural and spiritual values of the client.

Attorneys can and do play an important role in providing such end-of-life healthcare counsel, a service

that is an integral part of any comprehensive estate plan. Through an advance healthcare directive, the agent can authorize admission of the client to a nursing home or hospice facility, or support the client’s wish to remain at home. The agent can prevent the need for judicial proceedings and court-appointed guardians to provide external oversight. Healthcare directives are more than a mere ‘add-on’ to wills, trusts, financial powers of attorney, and the various asset protection tools that estate planners employ. Various components of the estate plan as a whole are reliant on the health status of the client and on the permissions granted in the healthcare directive. Advance directives govern fundamental decisions about the healthcare of the person on whose life the estate is based, and around whom the entire estate plan is centered.

Critics of advance care directives often point to the fact that most people do not prepare them as a reason warranting their abandonment.⁷² However, comparably few U.S. adults prepare any type of estate plan including a last will and testament, trust documents, or financial power of attorney.⁷³ The fact that low numbers of adults prepare any estate planning documents, including advance healthcare directives, is not reason enough to abandon their use. Skilled and informed attorneys who provide estate planning and advance directive services provide value by increasing the availability of such documents and encouraging clients to at least begin to consider the end-of-life healthcare wishes.

Advance healthcare planning involves “a complex inter-play” between patients, surrogates, communities, clinicians, health systems, and policy.⁷⁴ The role and value of legal professionals who empower individuals to advocate for themselves through an advance healthcare plan, cannot be discounted. Attorneys who provide facilitated advance care planning services in keeping with evolving best practices provide value to the healthcare profession, to families, and to the clients whom they serve. Even among the many options available for preparation of advance healthcare plans, attorneys who offer facilitated advance care planning assistance can deliver a trusted and meaningful service.

Note

The author received a grant from the McElhattan Foundation during the conduct of the study.

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