

**“Wrongful Living” Liability: Medicine and Law
Collide Over End-of-Life Decisions
by
Waldene Drake, RN, MBA**

On television shows, medical life-saving is both noble and dramatic, not to mention entertaining. So how could saving a life give rise to malpractice liability? A growing number of patients and families appear ready to sue their physicians for failure to obey advance directives.

The issue is consent to treatment, a requirement that the law has always imposed on the practice of medicine. The law has traditionally protected the right of the individual patient to refuse recommended medical treatment, including life-sustaining measures. Providing treatment without actual or implied consent is a battery. Failure to obtain an informed consent may constitute professional negligence.

So-called “advance directives,” designed to satisfy the legal requirement for consent, fall into two major categories. The California Natural Death Act (a.k.a. “living will”) allows a competent patient to instruct healthcare providers in advance about his or her wishes regarding withholding or withdrawing life-sustaining treatment. A second approach, the Durable Power of Attorney for Healthcare (“DPAHC”), allows the patient to designate a surrogate decision-maker to act in the patient’s stead. Both envision situations where the patient lacks the competence to decide, but where providers require an informed consent to withhold or withdraw life-sustaining treatment.

Given the training and traditions of medicine, physicians are expected to err to the side of providing, not withholding, treatment. The legislature, however, views willful violations of the Natural Death Act as a misdemeanor and created criminal penalties for such actions. In a more positive vein, the legislature granted immunity to medical providers who, in good faith, follow a Durable Power of Attorney for Healthcare or a Declaration under the Natural Death Act. Thus, a physician who withholds or withdraws life-sustaining treatment in reliance on an advance directive is protected from criminal prosecution, civil liability or administrative censure.

The bottom line is that physicians need to discuss end-of-life issues with their patients and to thoroughly explain the options. Has the patient indicated a preference regarding life-sustaining measures? Does the patient or family hold strong opinions regarding death and dying based on religious or cultural beliefs? Does the patient understand the objectives and limitations of Advance Directives? Has the physician been provided a copy of the advance directive? Physicians must document both the substance of the discussion and the patient’s wishes. More and more patients are executing advance directives in an attempt to shield their families from catastrophic medical expenses at the end of life. To ignore advance directives not only frustrates a patient’s expectations but also may expose the physician to adverse legal consequences.