

# Answering your legal questions about health care

During the past several decades, major advances in medicine and rising health care costs have led to new and difficult questions about medical care. To be an informed health care consumer, you need a basic understanding of your legal rights regarding medical treatment, advance health care directives, access to medical records, emergency treatment, organ donation, and experimental medical treatments.

## What rights do I have about the medical care I receive?

The legal doctrine of informed consent defines your right to decide whether and how you will receive medical care. Informed consent means your health care provider must appropriately explain the proposed treatment to you and get your permission before treating you.

## Do I have a right to refuse treatment?

Yes. Courts repeatedly have ruled that a competent adult patient has the right to refuse treatment, even if the patient's family or doctors disagree. You are the person who must decide.

## What happens if I am not competent to choose my medical treatment?

If you lack the mental capacity to make an informed decision about medical treatment, another person (a substitute decisionmaker), in conjunction with your physician, ordinarily will decide for you. The substitute decisionmaker could be your legal guardian if a judge has appointed one, a family member, a close friend, or your health care "agent" if you have named one in an advance directive (see below).

## How would someone determine that I was not able to make my own decisions?

When a patient is unconscious, severely brain damaged, highly intoxicated, or for other reasons cannot understand the available treatment options, the patient clearly is incapacitated, or unable to make his or her own decisions. However, if the patient has some understanding of what is happening but judgment is clouded by factors such as fear or mental or physical illness, then determining mental capacity is more difficult. Wisconsin laws on advance directives (see below) define "incapacity" as the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual is not able to manage his or her health care decisions. Usually, the patient's doctor initially determines incapacity, often with input from family members. When the patient's doctor has doubts about the patient's comprehension, he or she often consults with another health care provider with appropriate expertise.

## What is an advance directive?

An advance directive is a written instruction that you make while you are mentally competent. The advance directive states how you want health care decisions to be made for you if you become incapacitated. Wisconsin laws recognize two forms of advance directives – the living will and the health care power of attorney.

A living will (Declaration to Physicians) describes the kind of life-sustaining care you would want if injury or illness leaves you in a terminal condition (dying) or a persistent vegetative state (permanent unconsciousness) with no hope of recovery.

This pamphlet, which is based on Wisconsin law, is issued to inform and not to advise. No person should ever apply or interpret any law without the aid of a trained expert who knows the facts, because the facts may change the application of the law. 8/07



With a health care power of attorney, you appoint someone to be your "agent" to make all health care decisions – not just those involving life support – for you if you lose the ability to make decisions for yourself. You also may include a description of your treatment preferences and special desires in this document, to help guide the person making decisions for you. In this document you also may authorize your agent to admit you to a nursing home or community-based residential facility, and you may indicate your wish to donate body parts after death.

## Why should I have an advance directive?

An advance directive allows you to make your wishes clear to your family, friends, and health care providers while you are still able to do so. The advance directive helps prevent disagreements among your family members about what treatment you should receive if you are incapacitated.

## Should I have both a living will and health care power of attorney?

Perhaps. Some people do not want to ask someone else to decide when and if artificial life support should be withheld. Instead, they want to make those decisions in advance by signing a living will.

A health care power of attorney is more powerful and flexible than a living will. A health care power of attorney can be drafted so that your health care agent has the authority to make a variety of medical decisions for you, as opposed to a living will, which only directs when artificial life support is to be withheld.

## What if I have both a living will and a health care power of attorney?

If you have both a living will and a health care power of attorney, be sure they are consistent. If there is any conflict between the two, the health care power of attorney will overrule the living will.

### **When should I prepare an advance directive?**

Now. While most people first think about preparing an advance directive when they are admitted to a hospital or nursing home, it is a good idea to think about doing so now – while your health permits you to do so.

### **How do I create a living will or health care power of attorney?**

For both the living will and the health care power of attorney, you may use the standard forms created by law and available in courthouses, hospitals, nursing homes, and through the Wisconsin Department of Health and Family Services. *A Gift to Your Family*, a consumer guide developed by Wisconsin legal and medical professionals, also contains forms for creating advance directives. The consumer guide is available from the State Bar of Wisconsin. (Addresses are listed at the end of this brochure.)

You may choose to have an attorney complete the standard forms or write an individualized document for you. In any case, be sure to read the instructions carefully and follow rules about who may serve as witnesses and other requirements about how the document is to be executed. Completing the document incorrectly may invalidate it when it is most needed.

### **Am I required to create an advance directive?**

No. Federal law requires hospitals and other health care facilities to inform patients about advance directives when they are admitted, but health care providers cannot require you to have one. Health care providers cannot withhold treatment or otherwise discriminate against you based on whether or not you have an advance directive.

### **How long does my living will or health care power of attorney last?**

Both the living will and the health care power of attorney last from the time they are created until your death, unless they are revoked or changed.

### **How do I revoke my living will or my health care power of attorney?**

Your living will and health care power of attorney can be revoked or changed, regardless of your mental or physical condition, at any time if you do any of the following:

- tear, burn, obliterate, or destroy the document or direct someone else to do so in your presence;
- write and sign a document canceling the directive (a revocation);
- verbally express your intent to cancel the document in the presence of two witnesses and notify your doctor of the revocation; or
- write a new document.

### **Who can I appoint as my agent in a health care power of attorney?**

Your agent (the person who makes decisions for you) may be any adult except for your health care provider, his or her employees, an employee of a health care facility in which you are a patient or live, or a spouse of any of these providers or employees – unless they also are your relative. Most people name a family member or close friend to be their agent. Be sure that the person you appoint is someone you trust and with whom you feel comfortable discussing your treatment preferences, because that person will have authority to make important decisions on your behalf.

### **Is this person the same as my “attorney-in-fact,” appointed in my durable power of attorney?**

No. A general durable power of attorney, which usually applies to financial matters, is not sufficient to appoint someone to make health care decisions for you. Often, people appoint one agent for health care decisions and another agent to handle financial matters.

### **Can my health care agent admit me to a nursing home?**

Your health care agent can admit you to a nursing home for recuperative care after a hospital stay for up to three months, unless the hospital stay was for psychiatric care. If you live with your agent, he or she may admit you to a nursing home for up to 30 days. However, your agent may admit you to a nursing home for longer periods only if your health care power of attorney document specifically authorizes it and if you are not diagnosed as mentally ill or developmentally disabled at the time of the proposed admission.

### **Where should I keep my advance directive?**

Keep one copy of your advance directive in your physician’s medical record and at the hospital that would treat you. Keep one copy of your advance directive with your other important papers. Let your loved ones and agent know that you have an advance directive and give them a copy, or tell them where to find it. You also may use a wallet card that says that you have an advance directive and where it can be found.

### **What if I don’t have an advance directive**

If you do not have an advance directive, a surrogate decisionmaker, in consultation with your doctor, will make treatment decisions for you, if you are unable to decide for yourself. In some cases a guardian may be appointed. In other cases, your doctor will consult with the person or persons who best know you and what treatment decisions you would make, if you could. The persons making decisions often are a spouse, adult child, adult sibling, or close friend.

### **What if I have a health care power of attorney document from another state?**

A health care power of attorney document that was executed in accordance with the laws of another state is valid and enforceable in Wisconsin. However, the out-of-state document must authorize the designated agent to make the same decisions that an agent designated in a Wisconsin document could make. Also, the limits on a Wisconsin agent’s authority apply as well to agents appointed in out-of-state documents – so that, for example, under either a Wisconsin document or an out-of-state document, your agent could admit you to a nursing home for long periods only if the document specifically authorizes it and you are not diagnosed as mentally ill or developmentally disabled at the time of the proposed admission.

### **How does my health care agent or other decisionmaker decide what to do?**

Your agent or other decisionmaker is to make decisions that conform with what you would do if you had the capacity to decide. Your best protection in having your wishes honored is to communicate them effectively to your agent. Factors that are important for your decisionmaker are:

- your personal, religious, and philosophical views;
- your views about health, illness, medical procedures, suffering, and death;
- the burdens and benefits of proposed treatment; and
- the terms and/or philosophy expressed in your advance directive.

If your wishes are unknown, your surrogate will decide based on what would further your best interests.

### **Who has access to medical information about me?**

Your health care providers have an ethical and legal obligation to keep medical information about you confidential. Without your authorization, your health care professionals may release medical information about you only under certain limited circumstances. Some of those circumstances include:

- reports of child abuse;
- when agencies responsible for licensing and accrediting health care facilities require records to perform their audit function;
- when a court orders disclosure; and
- when records are needed for billing, collection, or payment of claims.

### **If I suffer a medical emergency, will a hospital's emergency department treat me?**

Yes. Hospitals have a duty to treat any patient who requires immediate attention. Most hospitals have procedures to assess all patients who come to the hospital for emergency treatment and either treat them or stabilize and refer patients to an appropriate facility.

### **What happens if I suffer a medical emergency outside of a hospital but I do not wish to be resuscitated?**

Doctors may issue a "Do-Not-Resuscitate" (DNR) order for certain adults who have a terminal condition or who would not likely survive a resuscitation attempt if they had cardiac or pulmonary failure outside of a hospital setting. These patients receive DNR bracelets, which direct emergency medical technicians (EMTs) and emergency room personnel not to attempt resuscitation.

### **Who makes medical treatment decisions about my child?**

Generally, you do. When a patient is under 18, consent to medical treatment is obtained from the parent(s) or legal guardian. In most cases, parental consent poses no problems; parents make judgments on their child's behalf based on their perception of the child's best interests. Exceptions apply in certain limited circumstances. For example, when a child requires immediate medical care and his or her parents are not available, the doctor may proceed to treat the child. Also, for certain types of treatment, such as treatment for venereal disease, the law authorizes patients under 18 to consent to treatment without informing their parents.

### **Are there special precautions for use of experimental drugs and devices?**

Yes. In addition to obtaining the Food and Drug Administration's approval to proceed with research involving a new drug or device, health care providers also must obtain review and approval by an Institutional Review Board (IRB). The IRB is a group of individuals who assure the protection of patients' rights and welfare. If the IRB determines that the risks of the research outweigh the benefits, it can modify or disapprove the research. The IRB also ensures that information given to people who are deciding whether or not to participate in the research is thorough and accurate.

### **How do I arrange to donate body parts after my death?**

You may give all or any part of your body for transplant, therapy, medical or dental education, or research by signing the statement on your driver's license or by stating these wishes in your will or in a separate document. If you later change your mind, you may amend or revoke your decision by signing a statement of amendment or revocation, verbally amending or revoking it in the presence of two individuals, or crossing out or amending the statement on your driver's license or will.

You also may use a health care power of attorney document to donate all or part of your body upon your death. If you do use your health care power of attorney document, any prior documents are revoked.

### **Where can I get more information?**

Alzheimer's Association of  
Southeastern Wisconsin  
6130 W. National Ave., Suite 200  
Milwaukee, WI 53214  
(414) 479-8800  
[www.alzheimers-sewi.org](http://www.alzheimers-sewi.org)

American Association of Retired Persons  
601 E Street NW  
Washington, DC 20049  
(888) 687-2277  
[www.aarp.org](http://www.aarp.org)

American Bar Association  
Special Committee on Bioethics and the Law  
740 15th Street NW, 9th Floor  
Washington, DC 20005  
(202) 662-1694  
[www.abanet.org](http://www.abanet.org)

Center for the Study of Bioethics  
Medical College of Wisconsin  
8701 Watertown Plank Rd.  
Milwaukee, WI 53226  
(414) 456-8498  
[www.mcw.edu/bioethics](http://www.mcw.edu/bioethics)

Elder Law Center/Coalition of  
Wisconsin Aging Groups  
2850 Dairy Dr., Suite 100  
Madison, WI 53718  
(608) 224-0606  
www.cwag.org

State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
(800) 728-7788  
www.legalexplorer.com

State Medical Society of Wisconsin  
Office of the General Counsel  
330 E. Lakeside St.  
Madison, WI 53715  
(886) 442-3800  
www.wismed.org

Wisconsin Department of Health and  
Family Services  
1 W. Wilson St.  
Madison, WI 53702  
(608) 266-1251  
www.dhfs.state.wi.us

Wisconsin Hospital Association  
5510 Research Park Dr.  
P.O. Box 259038  
Madison, WI 53725  
(608) 274-1820  
www.wha.org

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**(800) 728-7788**

**(608) 257-3838**

P.O. Box 7158, Madison, WI 53707-7158

E-mail [service@wisbar.org](mailto:service@wisbar.org)

On the Web at [www.legalexplorer.com](http://www.legalexplorer.com)

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