REQUEST FOR GOVERNOR'S EXECUTIVE STANDBY ORDER TO FACILITATE ADVANCE CARE PLANNING DURING COVID-19

ISSUE: Clarifying the Application of California Law Inhibiting Advance Care Planning for Health Care Providers, Patients, and Families

We request that Governor Newsom issue an Executive Order that includes guidance on advance health care directives (AHCDs), Physician Orders for Life-Sustaining Treatment (POLST), and power of attorney for the care of a minor child (POA).

Similar actions were approved recently by Governor Cuomo for New York citizens in Executive Order 202.14.

> **Current California law does not provide sufficient guidance to consumers, clinicians, and others as to how to complete these advance care planning (ACP) documents remotely. Such clarification would help preserve adherence to shelter in place orders, relieve burden to consumers and those trying to help them with ACP documents, and help ensure these documents are available when needed and helpful to patients, their families, and their health care providers.**

Amid the COVID-19 pandemic, the threat of a sudden serious illness and potential hospitalization has dramatically increased for millions of Californians. Health care experts and consumer advocates are encouraging consumers, their families, and health care providers to plan ahead and discuss treatment goals for both COVID and non-COVID related serious illness. Nine in ten Californians surveyed by the California Health Care Foundation (of all races, ethnicities, and income levels) have said they want as much information as possible about their serious illness care.

Conversations around serious illness and the completion of documents such as AHCDs and POLST can help prepare consumers and families for medical decisions across a range of settings (hospitals, nursing facilities, and home) during this time of crisis.

> **An advance health care directive** is a legal document used to share your values, goals and wishes regarding treatment in the case of serious illness. It can also be used to designate

another person (an agent) whom you trust to make medical decisions for you. To be valid, an AHCD requires the individual's signature and the signature of two qualified witnesses. If the individual resides in a skilled nursing facility, California also requires the signature of the facility's patient advocate or ombudsman.

POLST (Physician Orders for Life-Sustaining Treatment) is a medical order signed by both a patient or their decision-maker and a physician, nurse practitioner or physician assistant that specifies the types of medical treatment the patient wishes to receive toward the end of life. It is designed for people who are already seriously ill or nearing the end of life. The completed POLST form (usually printed on bright pink paper) travels with the patient between health care settings. In recent years, options for electronic POLST form completion have been developed and POLST registries for the storage and retrieval of POLST forms have been piloted, but neither option is currently available statewide.

These advance care planning documents and the conversations around them help ensure that the patient's voice is not lost, provide important information to health care providers about the patient's treatment goals – particularly if certain care is unwanted, provide comfort to surrogate decision-makers who can know they are accurately representing the patient's wishes, and enable parents to ensure their children can be taken care of by others according to their instructions if they are hospitalized or in mandated isolation from them.

While COVID-19 creates urgency around having these conversations, it also creates logistical challenges for consumers and clinicians working to create or update AHCDs or POLSTs. Social distancing and telehealth make it harder for clinicians to obtain patient signatures on such forms, and make it harder for consumers to obtain signatures from witnesses or notaries, or to receive help completing forms. Very sick patients who are in most need of assistance with care planning are also those for whom these challenges are the most burdensome.

GOALS

- Reduce barriers for patients, families, and providers who wish to engage in advance care planning while practicing social distancing. Advance care planning supports patient-centered care. During the pandemic, advance care planning is more likely to occur in community-based settings (e.g. outpatient telehealth visits, patient homes, or care facilities) rather than hospitals or doctors' offices.
- Avoid an approach that risks creating fear from various community stakeholders regarding undue influence and abuse during a public health crisis where rationing by health systems is already a concern.
- Avoid an approach that creates uncertainty about advance directive or POLST validity once emergency orders are lifted.
- Avoid upheaval in the life of child as a result of their custodial parent's illness, hospitalization and/or forced isolation.

REQUEST

We request that Governor Newsom issue an Executive Order that does the following with respect to advance care planning (ACP) documents. ACP documents include advance health care directives (AHCDs) and Physician Orders for Life-Sustaining Treatment (POLST).

1) Clarify that California Probate Code §4673(a)(2) permits any adult to obtain a patient's signature on an AHCD during a phone or video visit by signing on their behalf. California Probate Code permits others to sign for a patient when it is "at the direction of" the patient and "in their presence".
2) For individuals who would like to obtain notarization, clarify that California Civil Code §1189(b) permits e-notarization for advance directives in California where the e-notary is otherwise duly licensed and authorized by another state.
3) Waive digital signature authentication requirements at California Probate Code §4673 (b)(1-7).
4) Clarify that for residents of skilled nursing facilities, the patient advocate or ombudsman may conduct witnessing under California Probate Code §4675 via phone or video visits with the resident.
5) Clarify that a patient or legally recognized decisionmaker's signature on a POLST may be obtained by a treating physician, nurse practitioner, or physician assistant in the same manner as an advance directive as described in #1 above.
6) Instruct health care providers to honor ACP documents that are consistent with the above guidance and otherwise appear valid and consistent with the individual's known wishes.
7) Instruct local emergency services agencies (LEMSAs) medical directors to update LEMSA policies directing EMS personnel to honor ACP documents that are consistent with the above guidance and otherwise appear valid and consistent with the individual's known wishes.
8) Instruct the California Department of Public Health (CDPH) to issue an All Facilities Letter (AFL) to all licensure categories – including but not limited to hospitals, nursing homes, hospices, and home health agencies – informing the licensed facilities of the Executive Order.
9) Clarify that Probate Code § 4123 allows a parent (principal) to designate an agent through a power of attorney to act as an attorney-in-fact on behalf of the principal with regard to property, personal care, or any other matter.
10) Clarify that Probate Code § 4460 authorizes a parent to use the statutory form power of attorney provided for by Probate Code §4401 to empower an agent as an attorney-in-fact over issues of personal and family maintenance, including the authority for the physical care of the principal's child; Probate Code § 4460 specifically recites that the principal may empower the agent to provide housing, food, clothing, education, medical, dental, surgical care, hospitalization, and financial decision-making for the child of the principal.

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BACKGROUND

Legal Mechanisms/Constraints

Executive Standby Orders: The Governor has authority to "make, amend, and rescind orders and regulations necessary" to effectuate the California Emergency Services Act. Cal. Gov't Code § 8567 (West). Such authority (and thus orders) lasts for the duration of the state of emergency. The Governor may not have the authority to substantially revise existing law.

Crisis Standards of Care: More nuanced guidance around modifications to ACP documentation procedures during the pandemic may also be appropriate in crisis standards of care guidance issued by California Department of Public Health and other authorities. Such guidance currently does not exist, or we have been unable to locate it. Cal. Dep't. of Pub. Health, Standards and Guidelines for Healthcare Surge During Emergencies: Foundational Knowledge (2008). Guidance at this level may help provide uniformity across health systems, but ACP documentation protocols may also be appropriate at the individual health system level. Cal. Health & Safety Code § 1797.153 (West).

Background Regarding Proposals

As further background to these proposals, we provide the below summary of existing California law, the challenges it creates, and our proposed solutions:

Proposal 1**:** Clarify that California Probate Code §4673(a)(2) permits any adult to sign AHCDs "at the direction of" the patient via a phone or video visit.

California Probate Code § 4673 provides the execution requirements for advance directives. Subsection (a)(2) provides the requirements for patient signing of an advance directive as follows:
The advance directive is signed either by the patient or in the patient's name by another adult in the patient's presence and at the patient's direction.

- ----->Barrier: Patient is too frail or otherwise lacks ability to physically or digitally sign on their own and caregivers are unable to assist them in person due to social distancing.
- ----->Proposed solutions:
  - ----->Clarify that "in the patient's presence and at the patient's direction" can include via telehealth or other video visit, such as through Zoom. This would enable case managers, social workers, caregivers, or attorneys who are unable to be physically present with patient to sign at their direction.
  - -----> If such clarifications are too nuanced for an executive order, suggest CDPH issue guidance

Proposal 2: Clarify that California Civil Code §1189(b) permits e-notarization for advance directives in California where the e-notary is otherwise duly licensed and authorized by another state.

California Probate Code § 4673 permits a notary acknowledgement in lieu of two witnesses for physical advance directives, and requires it in the case of electronic advance directives (in lieu of two witnesses).

------> Barrier: Notarization

California currently does not recognize the option of e-notarization and requires notaries to be physically present to notarize advance directives. The Secretary of State has issued the following guidance in response to COVID-19:

California Law does not provide the authority for California Notaries Public to perform a remote online notarization. The personal appearance of the document signer is required before the notary public. However, California citizens who wish to have their documents notarized remotely can obtain notarial services in another state that currently provides remote online notarization. California Civil Code 1189(b) provides that any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the law of the place where the acknowledgment is made.

The civil code cited falls under provisions relating to transfers of real property and it is not clear that this applies to advance directives. Advance directives historically occupy a unique legal position relative to other documents. For instance, federal legislation authorizing digital signatures on contracts specifically exempts testamentary documents such as advance directives. We have written to the California Secretary of State for clarification and their response was merely a restatement of existing guidance without reference to advance directives.

------> Proposed Solution: Clarify that California Civil Code 1189(b) permits e-notarization of advance directives in California where the e-notary is otherwise duly licensed and authorized by another state.

Proposal 3: Waive digital signature authentication requirements at California Probate Code §4673 (b)(1-7).

California Probate Code § 4673(b)(1-7) requires that digital signatures on electronic advance directives meet the following standards:

(1) The digital signature either meets the requirements of Section 16.5 of the Government Code and Chapter 10 (commencing with Section 22000) of Division 7 of Title 2 of the California Code of Regulations or the digital signature uses an algorithm approved by the National Institute of Standards and Technology.

(2) The digital signature is unique to the person using it.

(3) The digital signature is capable of verification.

(4) The digital signature is under the sole control of the person using it.

(5) The digital signature is linked to data in such a manner that if the data are changed, the digital signature is invalidated.

(6) The digital signature persists with the document and not by association in separate files.

(7) The digital signature is bound to a digital certificate.

----->Barrier: Many individuals would not be able to comply with digital signature authentication requirements at § 4673 (b) (1-7). For instance, signing a PDF using certain Adobe Acrobat features at home may not comply with these standards.

-----> Proposed Solution: Waive digital signature authentication requirements at § 4673 (b) (1-7). Permit patient to "sign" by alternate means, such as directing another individual to sign on their behalf during a phone or video visit, or by providing acknowledgement via email or other communication. The latter guidance on specific documentation may need to come from CDPH.

Proposal 4: Clarify that for residents of skilled nursing facilities, the patient advocate or ombudsman may conduct witnessing under California Probate Code §4675 via phone or video visits with the resident.

California Probate Code §4675 requires:

(a) If an individual is a patient in a skilled nursing facility when a written advance health care directive is executed, the advance directive is not effective unless a patient advocate or ombudsman, as may be designated by the Department of Aging for this purpose pursuant to any other applicable provision of law, signs the advance directive as a witness, either as one of two witnesses or in addition to notarization. The patient advocate or ombudsman shall declare that he or she is serving as a witness as required by this subdivision. It is the intent of this subdivision to recognize that some patients in skilled nursing facilities are insulated from a voluntary decisionmaking role, by virtue of the custodial nature of their care, so as to require special assurance that they are capable of willfully and voluntarily executing an advance directive.

(b) A witness who is a patient advocate or ombudsman may rely on the representations of the administrators or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the patient if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the patient.

----->Barrier: Visitation at nursing facilities has been restricted and even the ombudsmen may not be able to access patients without special authorization. Older adults in nursing homes are at very high risk of hospital transfer, and for severe COVID-related illness. Quality advance care

planning in this population would be beneficial and video or telephone access to ombudsmen for purposes of executing advance directives would be helpful.

------->Proposal Solution: Permit patient advocate or ombudsman to provide AHCD witnessing by video or phone. The patient advocate or ombudsman should provide oral authorization during the video or phone call, with confirmation in writing following the visit by email or postal service. Documentation of all witnessing/notarization must be kept in resident's chart and stapled to resident's advance directive immediately upon receipt. This level of guidance may be too detailed for an Executive Order and could be issued by CDPH.

Proposal 5: Clarify that a patient or legally-recognized decisionmaker's signature on a POLST may be obtained by a treating physician, nurse practitioner, or physician assistant in the same manner as an advance directive as described in #1 above.

California Probate Code § 4783 provides the following requirements for execution of a POLST:

(a) Forms for requests regarding resuscitative measures printed after January 1, 1995, shall contain the following:

"By signing this form, the legally recognized health care decisionmaker acknowledges that this request regarding resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form."

(b) A printed form substantially similar to that described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 4780 is valid and enforceable if all of the following conditions are met:

(1) The form is signed by the individual, or the individual's legally recognized health care decisionmaker, and a physician.

(2) The form directs health care providers regarding resuscitative measures.

(3) The form contains all other information required by this section.

------->Barrier: Providers engaging in POLST conversations during phone or video may not be able to timely and easily obtain a signature on the printed form from a patient (or their legally-recognized decisionmaker) who is social distancing and too frail/sick or isolated to provide a physical or digital signature.

------->Proposed Solution: Clarify that a patient or legally recognized decisionmaker signature on a POLST may be obtained in the same manner as an advance directive as at § 4673(a)(2) ("signed either by the patient or in the patient's name by another adult in the patient's presence and at the patient's direction). This would enable health care providers conducting POLST visits via phone or video to sign at their direction. In CSC or system-level guidance, providers should be provided with instruction as to how to sign the POLST on behalf of a patient. E.g. to write

"Patient/Decisionmaker Name, as directed by Patient/Decisionmaker on date/time to Provider Name by mode of telephone/video."

Proposal 6: Instruct health care providers to honor ACP documents that are consistent with the above guidance and otherwise appear valid and consistent with the individual's known wishes.

------->Barrier: Providers may be hesitant to honor ACP documents that contain alternate documentation of signatures as provided in the above, which could result in patients receiving care or treatment contrary to their wishes.

------->Proposed Solution: Direct CDPH to issue an All Facilities Letter (AFL) to all licensure categories – including but not limited to hospitals, nursing homes, hospices, and home health agencies – to instruct health care providers to honor ACP documents that are consistent with the above guidance and otherwise appear valid and consistent with the individual's known wishes.

Proposal 7: Instruct local emergency services agencies (LEMSAs) medical directors to update LEMSA policies directing EMS personnel to honor ACP documents that are consistent with the above guidance and otherwise appear valid and consistent with the individual's known wishes.

------->Barrier: EMS personnel may be hesitant to honor ACP documents that contain alternate documentation of signatures as provided in the above, which may result in delivery of care or treatment which is inconsistent with the patient's wishes.

------->Proposed Solution: Instruct LEMSA medical directors to update LEMSA policies and direct EMS personnel to honor ACP documents that are consistent with the above guidance and otherwise appear valid and consistent with the individual's known wishes.

Proposal 8: Instruct CDPH to issue an All Facilities Letter (AFL) to all licensure categories – including but not limited to hospitals, nursing homes, hospices, and home health agencies – informing the licensed facilities of the Executive Order.

Proposal 9: Clarify that a principal may designate an agent under a power of attorney as provided by Probate Code §4123 or the Uniform Statutory Form Power of Attorney as provided for in Probate Code §4401 to provide care and decision-making for a child of the principal including but not limited to care and decision-making regarding residence, education, health care, and financial matters.

-----> Barrier: The law is currently vague as to whether a parent acting as a principal in a power of attorney, including the Uniform Power of Attorney, can designate an agent to act on behalf of the parent for the benefit of the child to provide housing; make dental and medical decisions; and provide for general welfare including food, clothing, education, and other living expenses and provisions. As a result, third parties may reject the power of attorney and a court may hesitate to enforce the power. A

clarification that the designation of powers is valid under existing law would provide confidence for third parties to accept the agent's authority under the power of attorney.

------> Proposed Solution: Clarify that under existing law a parent may designate an agent under a power of attorney to act on behalf of the parent/principal to provide for the personal and financial care of a minor child of that principal. Clarify that the principal's designation of powers to the agent in this regard can include any issue or matter related to the child as designated by the principal in the power of attorney.