



Advance Directives – The Why and the How

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Roadmap

- Importance of Advance Directives
- Execution Options
- Client Discussions
- Recent legislative updates

The Why: Importance of Advance Directives

- What documents are we talking about?
 - Those we can prepare—
 - Power of Attorney
 - Health Care Advance Directive & HIPAA Release
 - Funeral Planning Directive
 - Others to be aware of—
 - POST
 - Out of Hospital DNR
 - Organ/Tissue Donation
 - Psychiatric Advance Directive

The Why, Continued

- Allow you to identify the individual(s) you would want to be handling matters on your behalf
- With respect to health care:
 - Allow you to make decisions about your care when you are later unable to speak for yourself
 - Make family and health care providers aware of your wishes and comfortable with your choices

The Why, Continued

- Potentially avoid guardianship or other litigation
- Are no defaults for financial matters (statutory listing of defaults for health care, but not always good to rely on)
- Cognitive decline common
- Not just for older adults!

The How: Executing Directives

- Financial Power of Attorney: *Ind. Code 30-5-1-1, et seq.*
 - In writing
 - Name an attorney in fact
 - Give the attorney in fact the power to act on behalf of the principal
 - Be signed by the principal or at the principal's direction:
 - In the presence of a notary public
 - In the presence of witnesses*

The How: Executing Directives

- POA – Witnesses – Who?
 - Any person who is competent to be a witness
 - POA is void if a witness has an interest and cannot be proved without the witness
 - An interest?
 - Named attorney in fact or successor
 - Power or beneficial interest granted
 - Related to one of the above (spouse, descendant)

The How – Executing Directives

- POA – Witnesses
 - Principal must signify that the instrument is his/her power of attorney and
 - Sign it
 - Acknowledge a signature already made
 - Have someone else sign the principal's name at the principal's direction and in their presence
 - At least two witnesses must sign, in the presence of the principal and each other

The How – Executing Directives

- POA – Witnesses
 - If execution and completion is supervised by an attorney or directed paralegal—
 - Principal and witnesses may execute in counterparts
 - Affidavit of compliance required
 - May contain a self proving clause (similar to a Will)

The How – Executing Directives

- Electronic POAs (I.C. 30-5-11)
 - A principal (or someone acting at the principal's direction) may electronically sign a POA in the presence of a notary or witnesses
 - May use the electronic record to make a complete converted copy
 - Same rules apply for who may witness
 - If not in each other's physical presence and use A/V technology to satisfy the presence requirement, an attorney or directed paralegal must supervise and sign affidavit of compliance

The How – Executing Directives

- Health Care Advance Directive
 - Signed by the declarant (or someone signing the declarant's name at the direction of a declarant) in the presence of two adult witnesses or a notary
 - Two witnesses – at least one may not be the spouse or other relative
 - Notary - may be electronic
 - Counterparts ok if presence requirement satisfied and fact of signing counterparts included in the text. Must combine into composite document (affidavit of compliance optional)

The How – Executing Directives

- Health Care Advance Directive
 - If impossible or impractical for declarant to use A/V technology to satisfy presence requirement, may use telephonic interaction to interact with two witnesses (not notary)
 - Must indicate this was done in text of directive
 - Witnesses must be able to positively ID declarant and establish capacity

Health Care Representative

- Charged with making decisions based on the HCR's informed consent and on the decision the HCR reasonably believes the declarant would have made under the circumstances, taking into account the declarant's express or implied intentions or, if no reliable indication, consider the declarant's best interests

Content of Directive

- Health Care Decisions
 - State specific health care decisions by declarant
 - State declarant's preferences or desires regarding the provision, continuation, termination, or refusal of life prolonging procedures, palliative care, comfort care, or assistance with ADLs
 - Not limited like living will statute

Other Documents

- Funeral Planning Directive – Ind. Code 29-2-19
 - Statutory form. Signed and dated in presence of at least two adult witnesses
- Others to be aware of:
 - Psychiatric Advance Directive – Ind. Code 16-36-1.7
 - Out of Hospital DNR – Ind. Code 16-36-5
 - POST (Physician Orders for Scope of Treatment) – Ind. Code 16-36-6
 - Must have certain qualifying conditions
 - In connection with a physician or APP
 - Can be signed by a HCR

POA: Discussion Points

- Who – primary and at least one successor
 - Family vs. professional
- Effective date – now or later
- General or limited power

HCR: Most Important Discussion Points

(in my opinion)

- Who acts as health care representative
 - Order of priority or requirements to act
- Effective Date
 - My default
- Decisions and treatment wishes
 - Making clients aware of their options
 - Proposing language
- What the document does (and does not do)

POA Termination

- Updated legislation 2025:
 - Generally, a power of attorney terminates upon the death of the principal
 - It does NOT revoke or terminate the power as to authority granted under:
 - Authority to prepare, execute and file tax and tax information returns or other documents required by government; hiring attorneys, accountants, etc. to assist (NEW)
 - Limited to tax periods prior to and including principal's DOD; terminates upon appointment of a PR
 - Make anatomical gifts, request autopsy, make plans for disposition (NOT NEW)

Other Recent Legislation (2024)

- Definition of “health care representative” expanded to mean a competent adult *or other person*.
- Recording a POA without notary and preparation statements:
 - POA or electronic POA properly executed by two witnesses AND
 - A **proof** that is signed by at least one attesting witness and complies with IC 33-42 is attached to the POA

Other Recent Legislation (2024)

- New statute provides examples of signature formats for an attorney in fact to sign on behalf of a principal
 - Statement appears above, beside or below the attorney in fact's signature that identifies the principal and indicates the AIF is acting as the principal's agent under the POA
 - Helpful guidance to be able to provide



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