

Advance Directives 101

Allen County Bar Association
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I. Introduction

A. The Importance of Advance Directives

B. Abbreviations

1. POA = power of attorney (the document)
2. AIF = attorney-in-fact (the appointee)
3. AHCR = appointment of health care representative
4. HCR = health care representative
5. POST = physician orders for scope of treatment
6. HIPAA = federal Health Insurance Portability and Accountability Act of 1996

II. Powers of Attorney

A. Governing Statute & Execution Requirements

1. § 30-5-1-1 *et seq.*¹
2. Execution requirements: principal's signature and notarization. § 30-5-4-1
 - a. Not always required to be recorded. § 30-5-3-3
 - Include required redaction language just in case?
 - Make margins recordable just in case?

B. General or Limited Powers – And Everything In Between

1. Limited in scope and/or timing.
 - a. Most commonly used for real estate transactions.
2. Use of statutorily enumerated powers in a “general” POA. See Exhibit A for list.
 - a. How much time do you have to spend with your client?
 - b. The “catch-all” clause. § 30-5-5-19
 - c. The “delegation” clause. § 30-5-5-18
 - d. The “health care” clauses. § 30-5-5-16 and § 30-5-5-17
 - Best to omit from a purely “financial” POA.

¹ All statutory references herein are to the Indiana Code unless otherwise indicated.

C. Springing Powers

1. Backstop for determining incapacity found in § 30-5-4-2(c).
2. Backstop HIPAA release authority found in § 30-5-4-2(d).

D. Duration of AIF's Authority

1. Almost all authority terminates at the principal's death. § 30-5-10-4
2. A few miscellaneous powers survive death, if included.
 - a. Anatomical gifts. § 30-5-5-16(b)(5)
 - b. Requesting an autopsy. § 30-5-5-16(b)(6)
 - c. Funeral planning and disposition of the body. § 30-5-5-16(b)(7)
3. The aforementioned powers could also be left out of a financially-oriented POA and included instead in a separate health care POA. This is a decision for the scrivener and the client.
4. Termination can be automatic per the terms of the POA document, otherwise, the POA is valid indefinitely. § 30-5-10-0.5 and § 30-5-10-2
5. Revocation must be in writing, and notice must be given to AIF of revocation. § 30-5-10-1
6. POA is "durable" and withstands principal's incapacity unless the document provides otherwise. § 30-5-10-3
7. A spouse's authority is revoked by divorce. §30-5-4-4-(a)(5)

E. Fees for Service as AIF

1. Compensation for "reasonable" expenses and "reasonable" fees may be taken by the AIF unless otherwise stated in the POA document. § 30-5-4-5

F. Brief Overview of AIF's Duties

1. AIF serves in a fiduciary capacity. § 30-5-6-3
2. Prohibition against self-dealing. *See, e.g., Estate of Rickert v. Taylor*, 934 N.E.2d 726 (Ind. 2010).
3. Common law presumption of impropriety if the AIF acts in his/her own favor. *Compton v. First Nat'l Bank of Monterey*, 919 N.E.2d 1181 (Ind. 2010).
4. AIF must keep records, but is not required to automatically provide an accounting (unless required by the POA document or otherwise requested). § 30-5-6-4
 - a. Accounting can be requested by principal (if alive and competent) or by the principal's guardian, personal representative, heirs & devisees.

G. Miscellaneous

1. Presumption of validity. § 30-5-8-2
2. Copies have equal force and effect as original. §30-5-8-5
3. Treble damages for failure to honor a valid POA. § 30-5-9-9
 - a. There can be difficulties using an old POA – some institutions may request completion of a "full force and effect" letter or similar document/affidavit. This is technically a violation of § 30-5-9-9, but sometimes it's wise to pick your battles.
4. AIF given preference for guardianship appointment. § 30-5-3-4

H. Example Forms

1. From the Allen County Bar Association and attached as Exhibits B and C.
2. Author's example form attached as Exhibit D.
3. Warning: Don't forget about § 30-5-5-4.5 (retirement plans) (2005) and § 30-5-5-7.5 (TOD transfers) (2009).

III. Health Care Directives & Living Wills

A. Appointment of Health Care Representative

1. Governing statute: § 16-36-1-7
2. Execution requirements: principal's signature and signature of at least one disinterested witness. § 16-36-1-7(c)
3. If no guardianship is in place, and no HCR is appointed, four groups have co-extensive authority to consent on behalf of an incapacitated person: spouse, parents, adult children, and adult siblings under § 16-36-1-5(2). Anyone want to see a fight?
4. Only effective during periods of the principal's incapacity. § 16-36-1-7(f)
5. The principal may also make a written disqualification of specific individuals from health care decisions. § 16-36-1-9
6. It is unnecessary, but not harmful, to include specific HIPAA release or authorization language. Pursuant to the HIPAA regulations (specifically 45 CFR § 164.502(g)), anyone who has authority under state law to act on behalf of an individual with respect to health care has access to medical records. You can read more about this on the Health and Human Services webpage at:

OCR HIPAA Privacy – Personal Representatives,
www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/personalrepresentatives.pdf
(last visited April 16, 2014).

7. Author's example form is attached as Exhibit E.

B. Health Care POA

1. Governing statutes: § 30-5-5-16 and § 30-5-5-17 (as discussed above)
2. Can (and should?) be separated from a financial POA.
3. Can (and should?) be combined in some way with the AHCR.
4. Author's example form attached as Exhibit E (combined with AHCR).

C. Living Will Declaration

1. Governing statute: § 16-36-4-1 *et seq.*
2. Execution requirements: principal's signature and signature of two disinterested witnesses. § 16-36-4-10 (also prescribes statutory form)
3. Statutory form attached as Exhibit F.

4. The opposite of a living will is a “life prolonging procedures declaration” pursuant to § 16-36-4-8 and § 16-36-4-11.
5. The least important of the health care directives? Reality of physician compliance?
6. The non-existence of a living will does not create any presumption regarding health care. § 16-36-4-18

D. Revocation of Health Care Directives

1. AHCR can be revoked by notifying either the HCR or the physician, either orally or in writing. § 16-36-1-7(j)
2. Health Care POA is revoked pursuant to POA statute (see above).
3. Living Will is revoked either by destroying all originals, in a signed writing, or orally, and must be communicated to the attending physician. § 16-36-4-12

IV. Funeral Planning Declarations

A. Governing Statute

1. § 29-1-2-19-1 *et seq.*

B. Execution Requirements

1. Must be signed and dated by the declarant and by at least two disinterested witnesses. § 29-1-19-8(b)

C. Revocation

1. Accomplished by destroying the original or in writing. §29-2-19-14

D. Miscellaneous

1. Largely duplicative of § 30-5-5-16(b)(7) but will trump a conflicting POA. § 29-2-19-17.
2. Allows for very specific funeral/disposition planning.
3. Statutory form prescribed by § 29-2-19-13 and attached as Exhibit G.
4. Provisions in favor of spouse revoked by divorce. § 29-2-19-15

V. Potential Pitfalls

A. Multiple AIFs and Alternate AIFs

1. Multiple AIFs have concurrent authority unless otherwise stated under § 30-5-4-3. So make sure they get along!
2. Once an alternate AIF is ‘activated,’ he/she remains the AIF unless otherwise stated. § 30-5-4-4
3. Should spouses be counseled against appointing different alternate financial AIFs?

B. Storage of Documents & Copies

1. Should you store the originals for clients? But would release of a document to an alternate appointee potentially breach attorney-client privilege? There are conflicting views on this question.

C. Revocation and Execution of Later Directives

1. Statutory revocation procedures are set forth for each type of directive. Therefore, later execution of new directives does not necessarily revoke previous ones, and can lead to confusion and conflicting authority. Hospitals frequently provide their own forms to patients (sometimes quite insistently), and clients need to be advised against signing these hospital forms and unwittingly creating a conflict with their already-established estate planning. Also, as mentioned below, completion of a POST form can result in revoking an existing AHCR.

D. Assessing Incapacity

1. Standard to be used is not the more permissive testamentary capacity standard. Principal-agent relationships are considered contractual relationships and are therefore judged by the same capacity standard as other contractual negotiations. *See, e.g., Scherer v. Scherer*, 405 N.E.2d 40, 47 (Ind. Ct. App. 1980). Contractual capacity in Indiana is the ability “to understand in a reasonable manner the nature and effect of [the] act.” *Gallagher v. Central Ind. Bank, N.A.*, 448 N.E.2d 304, 307 (Ind. Ct. App. 1983).

VI. Miscellaneous

A. Do-Not-Resuscitate Orders

1. Indiana POST Act § 16-36-6-1 *et seq.*
 - a. Indiana POST Form available at <https://forms.in.gov/Download.aspx?id=11217> and attached as Exhibit H.
 - b. Can be completed by HCR on behalf of an incapacitated person. §16-36-6-7(a)(2)
 - c. Must be signed by physician to be effective. § 16-36-6-8
 - d. Can be revoked orally, in writing, or by destruction. § 16-36-6-11
 - e. Will not trump a request for alternate treatment made by the patient or the patient’s HCR. § 16-36-6-12
 - f. Completion of section entitled “Designation of Health Care Representative” will result in the revocation of an existing AHCR (but not an existing health care POA).
2. Out-of-Hospital DNR Declaration § 16-35-5-1 *et seq.*
 - a. Form available at <https://forms.in.gov/Download.aspx?id=5596> and attached as Exhibit I.
 - b. Must be signed and dated by the declarant and two disinterested witnesses, as well as the declarant’s attending physician. §16-36-5-11
 - d. Can be revoked orally, in writing, or by destruction. § 16-36-5-18

- e. Can be signified by medical alert jewelry-type device purchased after execution of the DNR declaration. §16-36-6-17

B. Parental Delegations

1. Parents' ability to delegate health care powers on behalf of a minor child found in § 16-36-1-6 (subject to same execution and revocation requirements as AHCR).
2. Parents' ability to delegate other custodial powers on behalf of a minor child found in § 29-3-9-1 (subject to same execution and revocation requirements as POA).
3. Document concerning powers other than health care may not be effective for a period longer than twelve months. § 29-3-9-1(a)(2)
4. Example dual form attached as Exhibit J.