

The MOST Important Issues To Consider When Dealing With Medical Directives

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COLORADO'S MEDICAL ORDERS FOR SCOPE OF TREATMENT ("MOST") FORM AND ITS IMPACT ON OTHER MEDICAL DIRECTIVES

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* Nothing in this presentation is intended to provide legal advice or to substitute for the medical judgment of a trained healthcare provider

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Litigation for Failure to Comply with Advance Directives

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- All claims based on failure to comply, regardless of the underlying theory, are based on the same principles:
 - the patient executed or stated an **enforceable advance directive**
 - the **provider had knowledge** or notice of the directive
 - the **provider gave or withheld care contrary** to the patient's instructions in the directive, and
 - some form of compensable **harm resulted**
- More litigation is filed alleging unwanted medical treatment was provided than litigation alleging desired treatment was withheld

Litigation for Failure to Comply with Advance Directives

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- Examples of causes of action brought against a provider or facility for failing to comply with an advance directive:
 - **Negligence**
 - Battery
 - Intentional or negligent **infliction of emotional distress**
 - **Lack of informed consent**
 - Wrongful prolongation of life
 - Breach of fiduciary duty
 - Violation of constitutional or civil rights
 - **Injunction or TRO**

Litigation for Failure to Comply with Advance Directives

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- Defenses that may be available:
 - The provider **did not have knowledge or notice** of the advance directive
 - The advance directive was technically **deficient** or inoperable
 - Health care providers are **statutorily immune** under state law
 - Care was provided in an **emergency** context
 - **Trigger event never occurred**
 - Health care provider can show maintaining patient's life through artificial means of life support **complies with acceptable standards of medical care** under the factual circumstances

Litigation for Failure to Comply with Advance Directives

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Courts acknowledged almost 20 years ago that “judicial action has been cumbersome and often untimely, in many instances resulting in the very manner of death sought to be avoided by patients prior to legal vindication of their right to forego treatment.” *Ficke v. Evangelical Health Systems*, 285 Ill. App. 3d 886 (1st Dist. 1996)

- States began to realize legislation was the only way to ensure patient’s wishes regarding medical care following incapacity could be enforced
- Knowing and understanding obligations and potential liability under state statutes is key

Medical Directives in Colorado

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- **Medical Orders for Scope of Treatment (MOST)**
Form: Medical Order signed by physician (C.R.S. § 15-18.7-101 *et seq.*)
- **Living Will Statute:** Declaration by Patient stating end-of-life treatment wishes (C.R.S. § 15-18-101 *et seq.*)
- **Advance Directives** – Durable Medical Power of Attorney appointing agent (C.R.S. § 15-14-503 – § 509)
- **CPR/DNR Directives** (C.R.S. § 15-18.6-101 *et seq.*)
- **Proxy-by-Statute** (C.R.S. § 15-18.5-101 *et seq.*)

Medical Directives - When They Apply

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- Is the patient **18**
- Current **medical condition** of the patient – terminal condition, persistent vegetative state, lacks decisional capacity
- Requisite **time periods** – have they passed
- Are there **inconsistent** forms? Most recently executed document prevails

Medical Directives – Issues

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- Will following the direction **cause pain**
- Is the patient **pregnant**
- Is there a **duty to act**
 - There is no **criminal liability** for failure to act unless there is a legal duty to act
 - Statutes regarding MOST form **create duty to act**
 - Duty and breach are also elements in **civil claim for negligence**

Medical Orders for Scope of Treatment (MOST) Form: implemented in 2010

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“Current instruments for making advance medical directives are often underutilized, hampered by certain institutional barriers, and inconsistently interpreted and implemented ... a consistent method for identifying and communicating critical treatment preferences that each sector of the health care community will recognize and follow [is needed].”

(C.R.S. § 15-18.7-101(1)(c)-(d))

Medical Orders for Scope of Treatment (MOST) Form

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- No substantive changes - places wishes on one document that becomes part of the medical chart and is clearly identified by being copied on bright green paper
- Signed by patient and physician so = **medical order**
- **Does not replace the living will** – forms work together to more fully capture patient's wishes regarding end-of-life treatment

Available on the Colorado Advance Directives Consortium Website – www.coloradoadvance directives.com

English and Spanish Forms

Instruction Booklet

Supplemental Review Form

SEND FORM WITH PERSON WHENEVER TRANSFERRED OR DISCHARGED					
<p align="center">Colorado Medical Orders for Scope of Treatment (MOST)</p> <ul style="list-style-type: none"> • FIRST follow these orders, THEN contact Physician, Advanced Practice Nurse (APN), or Physician Assistant (PA), for further orders if indicated. • These Medical Orders are based on the person's medical condition & wishes. • Any section not completed implies full treatment for that section. • May only be completed by, or on behalf of, a person 18 years of age or older. • Everyone shall be treated with dignity and respect. 			Last Name		
			First Name/Middle Name		
			Date of Birth		Sex
			Hair Color	Eye Color	Race/Ethnicity
<p>A Check One Box Only</p>	<p>CARDIOPULMONARY RESUSCITATION (CPR) <u>Person has no pulse and is not breathing.</u></p> <p><input type="checkbox"/> No CPR Do Not Resuscitate/DNR/Allow Natural Death</p> <p><input type="checkbox"/> Yes CPR Attempt Resuscitation/ CPR</p> <p><i>When <u>not</u> in Cardiopulmonary arrest, follow orders B, C, and D</i></p>				
<p>B Check One Box Only</p>	<p>MEDICAL INTERVENTIONS <u>Person has pulse and/or is breathing.</u></p> <p><input type="checkbox"/> Comfort Measures Only: Use medication by any route, positioning, and other measures to relieve pain and suffering. Use oxygen, suction and manual treatment of airway obstruction as needed for comfort. <i>Do not transfer</i> to hospital for life-sustaining treatment. <i>Transfer only</i> if comfort needs cannot be met in current location; EMS-Contact medical control.</p> <p><input type="checkbox"/> Limited Additional Interventions: Includes care described above. Use medical treatment, IV fluids and cardiac monitor as indicated. Do not use intubation, advanced airway interventions, or mechanical ventilation. <i>Transfer to hospital if indicated. Avoid intensive care; EMS-Contact medical control.</i></p> <p><input type="checkbox"/> Full Treatment: Includes care described above. Use intubation, advanced airway interventions, mechanical ventilation, and cardioversion as indicated. <i>Transfer to hospital if indicated. Includes intensive care. EMS-Contact medical control.</i></p> <p>Additional Orders: _____ (EMS=Emergency Medical Services)</p>				

FOR EASY IDENTIFICATION, FORM SHOULD BE PHOTOCOPIED ONTO WAUSAU ASTROBRIGHTS VULCAN

Recommended Form be Printed on Wausau Astrobrights® Vulcan Green 64lb paper but copies, faxes, and scans on white paper are valid

MOST Form: Guidance for Health Care Professionals

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Refer to Guidance for help interpreting each section of MOST form

http://192.232.251.216/~coadvdir/wp-content/uploads/2014/07/MOST_Instructions.pdf

**GETTING THE MOST OUT OF
THE *MEDICAL ORDERS FOR SCOPE OF
TREATMENT* PROCESS AND FORM**

**GUIDANCE FOR HEALTHCARE
PROFESSIONALS**

AUGUST 2010

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Medical Orders for Scope of Treatment (MOST Form): Definitions

(CRS § 15-18.7-102)

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- **Adult (over 18)**
- **Authorized Surrogate Decision Maker**
- **Decisional Capacity** – ability to provide informed consent
- **Emergency Medical Service Personnel, Health Care Facility, Health Care Provider, Medical Provider** (expansion from Attending Physician and Advanced Practice Nurse in Living Will statute)
- **Inconsistencies** – **most recently executed controls**; new MOST form replaces preexisting MOST

MOST Form: Contents

(C.R.S. § 15-18.7-103)

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- Name, DOB, Sex
- Eye and Hair Color
- Race/Ethnicity
- Contact Information of Physician, APN, or PA
- Patient's Signature and Date
- Physician, APN or PA Signature and Date
- Hospice Program if Applicable
- Instructions on CPR and Other Interventions

MOST Form: Contents

(C.R.S. § 15-18.7-103)

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Box on top right must be filled in completely



SEND FORM WITH PERSON WHENEVER TRANSFERRED OR DISCHARGED

Colorado Medical Orders for Scope of Treatment (*MOST*)

- **FIRST** follow these orders, **THEN** contact Physician, Advanced Practice Nurse (APN), or Physician Assistant (PA), for further orders if indicated.
- These Medical Orders are based on the person's medical condition & wishes.
- Any section not completed implies full treatment for that section.
- May only be completed by, or on behalf of, a person 18 years of age or older.
- **Everyone shall be treated with dignity and respect.**

Last Name		
First Name/Middle Name		
Date of Birth	Sex	
Hair Color	Eye Color	Race/Ethnicity

FOR EASY IDENTIFICATION

MOST Form: Contents

(C.R.S. § 15-18.7-103)


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CPR - **no pulse and not breathing** – stricter than Colorado CPR directive which can apply when patient is experiencing cardiopulmonary malfunction short of full arrest

NOTE: if patient previously completed CPR directive refusing CPR, an agent/guardian/proxy cannot check yes CPR on patient's behalf on MOST form – only patient can revoke prior CPR directive or select different choice. Refer to Guidance for help

A Check One Box Only	CARDIOPULMONARY RESUSCITATION (CPR) <u>Person has no pulse and is not breathing.</u>
	<input type="checkbox"/> No CPR Do Not Resuscitate/DNR/Allow Natural Death
	<input type="checkbox"/> Yes CPR Attempt Resuscitation/ CPR

When not in Cardiopulmonary arrest, follow orders B, C, and D




MOST Form: Artificially Administered Nutrition and Hydration (ANH)

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Only **one box** should be checked

NOTE: following the instructions can be complicated if a living will has been executed and the patient's choices are unknown or are inconsistent. Refer to Guidance for help

D Check One Box Only 	ARTIFICIALLY ADMINISTERED NUTRITION AND HYDRATION ****Always offer food & water by mouth if feasible****
	<input type="checkbox"/> No artificial nutrition/hydration by tube. (NOTE: Special rules for proxy by statute on page 2) <input type="checkbox"/> Patient has executed a "Living Will" <input type="checkbox"/> Patient has not executed a "Living Will" <input type="checkbox"/> Defined trial period of artificial nutrition/hydration by tube. (Length of trial: _____ Goal: _____) <input type="checkbox"/> Long-term artificial nutrition/hydration by tube. <i>Additional Orders:</i> _____

MOST Form: Signature and Review

Check signature section and refer to Guidance – only valid surrogate decision makers can sign for the patient – MPOA, Guardian, Proxy-by-Statute - not family members

SEND FORM WITH PERSON WHENEVER TRANSFERRED OR DISCHARGED

SIGNATURE OF PATIENT, AGENT, GUARDIAN, OR PROXY BY STATUTE (MANDATORY)

Significant thought has been given to the desired scope of end-of-life treatment and these instructions. Preferences have been discussed and expressed to a health care professional. This document reflects those treatment preferences, which may also be documented in a MDPOA, CPR Directive, Living Will, or other advance directive (attached if available). To the extent that my prior advance directives do not conflict with these *Medical Orders for Scope of Treatment*, my prior advance directives shall remain in full force and effect.

(If signed by surrogate, preferences expressed must reflect patient's wishes as best understood by surrogate.)

Signature	Name (Print)	Relationship/ Surrogate status (write "self" if patient)	Date Signed (Revolves all previous MOST forms)
Primary Contact Person for the Patient	Relationship and/or MDPOA, Proxy	Phone Number/Contact Information	
Health Care Professional Preparing Form	Preparer Title	Phone Number	Date Prepared
Hospice Programs (if applicable)	Address	Phone Number	Date Enrolled

REVIEW OF THIS MOST FORM			
Review Date	Reviewer	Location of Review	Review Outcome
			<input type="checkbox"/> No Change <input type="checkbox"/> Form Voided <input type="checkbox"/> New Form Completed
			<input type="checkbox"/> No Change <input type="checkbox"/> Form Voided <input type="checkbox"/> New Form Completed
			<input type="checkbox"/> No Change <input type="checkbox"/> Form Voided <input type="checkbox"/> New Form Completed
			<input type="checkbox"/> No Change <input type="checkbox"/> Form Voided <input type="checkbox"/> New Form Completed

HIPAA PERMITS DISCLOSURE OF THIS INFORMATION TO OTHER HEALTH CARE PROFESSIONALS AS NECESSARY

Check review section to confirm form has not been voided or a new form completed

Duties To Comply with MOST Form

(C.R.S. § 15-18.7-104)

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- Statutes now create a **DUTY to comply** with a MOST form that:
 - Is apparent and immediately available, even if executed in another state; and
 - Reasonably satisfies the statutory requirements (signing physician does not need to have privileges at the facility)
- **Verbal confirmation** from treating physician can be provided along with follow up signature w/in reasonable time but not more than 30 days (fax or email okay)
- Providers that comply are **immune** from civil/criminal liability and regulatory sanctions

Refusing to Comply with MOST Form Due to Moral Conviction/Religious Belief (C.R.S. § 15-18.7-105)

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- A provider can refuse to comply based on **moral conviction and/or religious beliefs**, if:
 - Notice is provided (prior to admission or treatment or ASAP after);
 - Patient is promptly transferred to another facility; and
 - Care and comfort pending transfer is provided
- Duty to communicate the existence of an executed MOST form when transferring to another facility

Revising the Terms of the MOST Form

(C.R.S. § 15-18.7-107)

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- Consent can be revoked at any time in any manner that “clearly communicates” the intent (by patient or decision maker)
- A provider can revise the form only if:
 - Change in medical condition since form was signed OR
 - Based on the provider’s independent medical judgment, the provisions of the form are not medically appropriate and the provider consults with the patient or their decision-maker who consents to the change
- A revised signed form must be recorded

Living Wills under Colorado Medical Treatment Decision Act

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- Statutes updated in 2010 to allow more flexibility in forms
- Applies when patient is in:
 - **Persistent Vegetative State** (determined by physicians not attorneys or courts) OR
 - **Terminal Condition** (incurable or irreversible condition – life sustaining procedures will serve only to postpone death)

Living Wills under Colorado Medical Treatment Decision Act: Provisions

C.R.S. § 15-18-104

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- **Adult** with decisional capacity at time signed
- Can elect to **withhold or withdraw life-sustaining procedures** (nutrition and hydration)
- Can designate MPOA to either override or follow preferences expressed in living will
- Can direct HCPs to provide comfort care
- Elections in living will apply when patient becomes either **Terminal or Persistent Vegetative State** AND **Lacks Decisional Capacity** to accept or reject medical or surgical treatment

Living Wills under Colorado Medical Treatment Decision Act: Compliance

C.R.S. § 15-18-107

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- If physician determines patient is either **Terminal** or in a **Persistent Vegetative State** AND **Lacks Decisional Capacity** to accept or reject medical or surgical treatment, the **attending physician shall order patient be examined by one other physician**
- If both physicians agree, they shall **certify such fact in writing in the medical chart** along with the living will declaration, and
- **Make reasonable efforts to locate MPOA** or family and notify that certification has been made

Issues To Consider with Living Wills

CRS § 15-18-101 *et seq.*

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- **Signed by patient** OR by another person in the patient's presence and at their direction and **not revoked** (NOT AP/APN, hospital employee, heir, or beneficiary)
- Did **2 witnesses** also sign (same limitations on who)
- If signed by the patient, did they have decisional capacity at the time signed
- Does declaration **incorporate other documents** – may trigger application of other statutes (e.g. organ donations, medical power of attorney)

Issues To Consider with Living Wills

CRS § 15-18-101 *et seq.*

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- Does the declaration **designate people to speak with** prior to final determination
- **Has 2nd physician examined the patient and agreed** and have **both** physicians certified condition in writing in the chart with a copy of the declaration
- Reasonable efforts to notify family of the certification and wait 48 hours for action to challenge to be filed
- Note: statute allows physician or advance practice nurse to continue artificial nutrition and hydration if discontinuing causes pain (§ 104(4))

Challenging a Living Will

CRS § 15-18-108

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- **Hospital should comply unless challenge is filed**
- Challenge can be filed by parent, adult child, spouse, beneficiary, or attorney-in-fact under a durable power of attorney
- Filed in county where patient is located; proof of notice to Attending Physician
- **Court will issue TRO until final determination is made and appoint GAL** who can take action in patient's best interests and report back to the court
- **Petitioner must provide 7 days notice of hearing** to GAL and spouse or beneficiary or adult child

Liability: Living Wills vs MOST Forms

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MOST Form

- Health care providers **SHALL** comply with valid executed forms
- Statute creates **DUTY to comply** unless provider has moral or religious objections and communicates this to the patient and coordinates immediate and timely transfer
- Health care providers who comply shall not be subject to civil/criminal liability or regulatory sanction for such compliance

Living Will

- AP/APN **MAY** comply unless actually knows issues on validity
- If AP/APN does not comply, they **MUST** transfer
- Refusal to comply **and** failure to transfer **SHALL** be unprofessional conduct or grounds for discipline
- Physician who signs certification (and those acting under them) shall not be subject to criminal/civil liability or licensing sanctions

Durable Medical Power of Attorney

(CRS § 15-14-506)

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- Appoints agent to decide when patient cannot (not limited to terminal or persistent vegetative state)
- “Durable” - continues after patient becomes legally/medically incompetent
- Should include an alternate or successor agent
- Should include language stating agent is personal representative under HIPAA
- Should be witnessed by 2 people unrelated to patient and should be notarized

CPR/DNR Directives under Colorado's Patient Autonomy Act (CRS § 15-18.6-101 *et seq.*)

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- State Board of Health regulations on format (<http://www.cdphe.state.co.us/em/Operations/CPRDirectives>)
- **Intervention allowed for specific issues** (e.g. pain medication, control bleeding, provide comfort care)
- **Minors**: only if doctor issued DNR order that is signed by both parents or legal guardian. Can be revoked by the same person who wrote it
- Compliance will not constitute assistance of suicide or subject the actor to criminal manslaughter charges CRS § 18-3-104(3)

HealthCare Proxy-By-Statute

(C.R.S. § 15-18.5-101 *et seq.*)

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- Used if patient lacks decisional capacity and there is no designated Healthcare Agent, MPOA or Guardian
- Physician must certify patient does not have decisional capacity
- Good faith effort to locate and assemble all “interested parties” - family members, life partners, close friends, and pastoral or other advisors – who decide by assembly who will serve as the “proxy”

HealthCare Proxy-By-Statute

(C.R.S. § 15-18.5-101 *et seq.*)

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- Identification of proxy must be documented in chart
- **Proxies** selected in this way **cannot withhold or withdraw artificial nutrition and hydration** for the individual **unless 2 physicians** – including 1 trained in neurology – determine that the treatment is only serving to prolong the patient's death
- **If no decision on who should serve as proxy can be reached, then Guardianship should be pursued through the Courts**

Resources regarding MOST forms

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Colorado Advance Directives Consortium

<http://coloroadvancedirectives.com/most-in-colorado/>



MOST in Colorado Link

Colorado Advance Directives Consortium

Dedicated to improving the tools and processes for healthcare decision making in Colorado.

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Life Quality Institute

<http://lifequalityinstitute.org/resources-for-healthcare-professionals/most/>

Medical Orders for Scope of Treatment (MOST) link under Resources for Healthcare Professionals Link

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