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### Practice Areas

Health Care

## Good Company

### CATCH 22: The Art of Assessing a Person's Capacity to Make Health Care Decisions Before Activating an Advance Directive

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Due to a significant educational effort by the Foundation for Healthy Communities, more New Hampshire citizens than ever have executed "Durable Powers of Attorney for Healthcare" documents. Through this legal document, also called an "Advance Directive," a person may designate an Agent (usually a family member) to make healthcare decisions on his behalf during periods of temporary or permanent incapacity. The Durable Power does not take effect until it is "activated" by the person's physician or Advanced Registered Nurse Practitioner ("ARNP") who must certify in writing that the person "lacks capacity to make healthcare decisions." New Hampshire's legal definition of "capacity" in this context is straightforward: "Capacity to make healthcare decisions means the ability to understand and appreciate generally the nature and consequences of a healthcare decision, including the significant benefits and harms of and reasonable alternatives to any proposed healthcare."

As a healthcare lawyer, I frequently advise hospitals, nursing homes, physicians, and ARNPs on the legal requirements for "activating" Durable Powers of Attorney for Healthcare. I remind my clients that unless the Durable Power is activated, competent adult patients have the absolute right under New Hampshire law to make their own choices about their health care, even if those choices appear to the caregiver to be unwise. The competent adult patient can, for example, decide to reject a life-saving blood transfusion or demand to be discharged from the hospital even if he is sure to die if he foregoes his doctor's recommended treatment. A competent adult's right to refuse medical treatment grows out of a constitutional guarantee to the right of privacy and liberty.

Determining whether a patient lacks capacity to make healthcare decisions - and thus whether to trigger the patient's Durable Power - can, at times, be surprisingly difficult for physicians and ARNPs. Among the myriad of variables that play into this equation are: 1) the patient's ability to communicate effectively; 2) the patient's level of comfort in a foreign setting such as a hospital; 3) the amount of time the physician has known or treated the patient; 4) the particular time of the day that the patient is evaluated (some elderly patients are far more alert in the morning than evening); 5) the amount of medication or sedation that the patient is under at the time of the evaluation; and 6) the complexity of the healthcare decision facing the patient (is it a simple or complicated medical procedure and are there multiple alternatives?).

Added to these factors is the natural bias that a physician or ARNP may bring to the table, including an expectation that a "rational" patient will

accept treatment that is recommended or life-saving. Does an elderly patient who chooses to be discharged despite the need for 24/7 care in a nursing home by definition lack capacity to make healthcare decisions? Does a patient who refuses life-saving treatment possess all of his faculties? Physicians and ARNPs are faced with such questions on a daily basis when determining whether to invoke a patient's Durable Power of Attorney for Healthcare document. Sometimes these quagmires seem to be nothing less than "Catch 22" situations straight out of Joseph Heller's novel.

On October 7, the Foundation for Healthy Communities sponsored a seminar (available on DVD through the Foundation) to address the complex issues involved in assessing "capacity to make healthcare decisions." In attendance were physicians, ARNPs, nurses, social workers, clergy, and others who are frequently called upon to make these difficult decisions. The faculty included Patrick Clary, M.D., a board certified Hospice and Palliative Care physician who is Medical Director at Exeter Hospital/Rockingham VNA; Alex de Nesnera, M.D., Psychiatrist and Associate Medical Director at New Hampshire Hospital; Randy Hayes, M.D., a family practice physician and Medical Director at Havenwood-Heritage Heights Continuing Care Community; Carol Stamatakis, Esq., the Director of Planning at the New Hampshire Council of Developmental Disabilities; and yours truly, Chair of the Health Care Practice Group at Sheehan Phinney Bass + Green PA. The seminar provides practical tips to practitioners who struggle with these issues. To obtain a DVD of this seminar, contact Lea Miner, lminer@healthynh.com, 603.225.0900.

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