

Making changes to the advance directive form

By Phil Hingson

Recent discussions on the elder law Internet discussion list raised the question of whether or not the form of the advance directive can be changed. The statutory language in ORS 127.531 is at the heart of this issue. Paragraph (1) of that section states in part that “[t]he form of an advance directive executed by an Oregon resident must be the same as the form set forth in this section to be valid.” Paragraph (2) states that “[a]n advance directive shall be in the following form,” and then proceeds to give the actual advance directive form. However, in the statutory form itself, in the last paragraph of instructions located just before the blanks for filling in name, birth date, and address, the language states that “[y]ou may cross out words that don’t express your wishes or add words that better express your wishes.” At first blush, these statutory provisions seem contradictory.

When interpreting statutory language, ORS 174.010 requires that “where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” The simplest interpretation that will give effect to all of the above advance directive provisions is that the advance directive must be given to an individual in its statutory form, but the individual filling it out can modify the form.

Assuming the above interpretation, it should be very clear that the person who fills out the advance directive can cross out words in the statutory form, or add words to the statutory form, to better express his or her wishes. For example, the last choice of paragraph (7) in *Part C* states that “I DO NOT have a health care power of attorney.” However, given the definition of a “health care power of attorney” at the beginning of paragraph (7), *Part B* constitutes a health care power of attorney. Thus, if a client fills out *Part B* and then fills out *Part C* and indicates in paragraph (7) that she does not have a health care power of attorney, she may arguably have just revoked *Part B*. While such an argument defies common sense, this is exactly the position the Veterans Administration recently took in refusing to honor the appointment of health care representatives

under *Part B* of an advance directive. To avoid this result, some attorneys have clients write in the language “other than *Part B*” after initialing “I DO NOT have a health care power of attorney,” and then have the client initial the change. Other attorneys avoid this particular issue by instructing their clients not to initial any of the choices under paragraph (7) of *Part C*.

If you are having your clients repeatedly make the same changes, the issue arises as to whether you, as their attorney, can modify the advance directive form on your computer. Since your clients can personally modify the statutory form, they individually should be able to direct you to do so on their behalf. The fact that the change is made on the computer instead of manually should not invalidate the advance directive. However, if you present all of your clients with the same pre-modified version of the form, the risk of invalidating the advance directive increases, because the form you are initially presenting to them is not the statutory form. In either case, showing the changes to the form on your computerized version may reduce the risk of invalidation. This could be done by using strike-through fonts and/or by typing language above or below the existing statutory language. Such obvious changes would then be visible to the person signing the advance directive as well as to his or her physicians. If the form presented shows the original statutory language as well as the change, and if the client acquiesces by initialing such change, it should be difficult for anyone to invalidate that advance directive. Also, keep in mind that minor changes made for clarification purposes, as illustrated in the above paragraph, are much less likely to be attacked than substantive changes to the scope or intent of the statutory form.

Changing the statutory form differs from adding an addendum to the form. The advance directive form clearly allows individuals to write in additional conditions or instructions, and if such instructions surpass the three blank lines provided in *Part B* or *Part C*, there is nothing in the statutes to



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a POLST clearly expresses his or her wishes on resuscitation, life sustaining measures, artificial nutrition, and antibiotics. This document is signed by a physician or nurse practitioner and will be honored by care facilities, paramedics, and other health care providers. Advance directives do not serve this function.

Some people dutifully complete advance directives and lock them away for safekeeping, never to be seen again. They find discussing their wishes for care at the end of life more difficult than completing the forms. However, without this dialogue the forms are much less useful. I try to normalize this conversation and bring it up with all my patients. I often tell them it is one of the nicest gifts they can give their families. It isn't a matter of if but when. After all, the death rate in this country really hasn't changed. It's still one per person.

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prohibit referencing an attached addendum. However, care should be exercised to ensure that the addendum adds clarity instead of further confusion. To avoid any argument that you have modified the statutory form, the safest practice is to incorporate the addendum by reference in the statutory blank lines in *Part B* and/or *Part C*, then attach the addendum to the advance directive, rather than placing the addendum language directly in *Part B* or *Part C*. The addendum must be filled out prior to having the advance directive witnessed.

To summarize, individuals can change their own advance directives and can add an addendum. They should also be able to direct their attorneys to make such changes or to add the requested addendum to the computerized form. However, attorneys who present their clients with advance directive forms that the attorneys have modified without individual direction from their clients run the risk of violating the provisions in ORS 127.531 that require the advance directive to be the same as the form set forth in that section. Such attorneys should try to minimize that risk by showing the statutory language along with the changes thereto, and by making the changes reasonably obvious.

Important elder law numbers as of July 1, 2005

SSI Benefit Standards	Eligible individual \$579/month Eligible couple \$869/month
Medicaid (Oregon)	Long term care income cap. \$1,737/month Community spouse minimum resource standard. \$19,020 Community spouse maximum resource standard \$95,100 Community Spouse Minimum and Maximum Monthly Allowance Standards. \$1,604/month; \$2,377/month Excess shelter allowance Amount above \$481/month Food stamp utility allowance used to figure excess shelter allowance. \$287/month Personal needs allowance in nursing home. \$30/month Personal needs allowance in community-based care \$122/month Room & board rate for community-based care facilities. \$458.70/month OSIP maintenance standard for person receiving in-home services \$580.70 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2004 \$4,700/month
Medicare	Part B premium \$78.20/month Part B deductible \$110/year Part A hospital deductible per illness spell \$912 Skilled nursing facility co-insurance for days 21-100. \$114/day