How POST Will Change Advance Directive Planning

By Robert C. Anderson

Before February 6, 2018, Michigan's only statutory advance directive on life support was an out-of-hospital "do-not-resuscitate" (DNR) form allowing a person to refuse life support if his or her breathing and heart stopped.[1] Michigan's enactment of Physician Orders for Scope of Treatment (POST) provides an additional standard form with more treatment options than simply do-not-resuscitate.[2]

The primary goal of POST is to improve the chances that the medical treatment preferences of a seriously ill patient will be honored by healthcare providers in the patient's last year of life. POST complements the advance directives available in Michigan, including healthcare powers of attorneys (officially known in Michigan as patient advocate designations), DNRs, and living wills. It may only be used by patients with a serious life-limiting illness and, like DNR, is only recognized outside a hospital. The reason why the statute does not apply in a hospital is because most hospitals have their own non-statutory physician-directed end-of-life medical orders.

The passage of POST had no opposition and enjoyed the support of the medical community, the Michigan Catholic Conference, Right to Life of Michigan, and the State Bar of Michigan Elder Law and Disability Rights Section.[3] In other states, this type of law is known as POLST (Physician Orders for Life-Sustaining Treatment) or MOST (Medical Orders for Scope of Treatment).[4] Almost all states have some form of a POST/POLST/MOST program either by statute, regulation, or local hospital practice.[5]

The national POLST effort began in 1991.[6] Michigan's POST program began as a two-year pilot program led by the nonprofit Honoring Healthcare Choices–Michigan.[7]

Description of POST

POST is a standard state-approved form in which a patient's end-of-life medical treatment preferences are translated by a patient's attending health professional into a set of jointly agreed upon medical orders.[8] Michigan's POST form is expected to be available in the near future through the Michigan

Department of Health and Human Services. The end-of-life decisions that POST addresses include resuscitation, ventilation, defibrillation, comfort measures, and other non-emergent measurers. A key component of POST is a thoughtful, facilitated advance-care planning conversation between a patient and his or her attending health professional before the form is signed.[9] This conversation addresses the patient's current diagnosis and prognosis, treatment options, medical implications of selecting POST preferences, and the patient's goals and preferences.[10] To be valid, the patient (or an authorized representative) and the patient's attending health professional must sign the form.[11] The only representatives allowed to sign POST on behalf of a patient are the patient's guardian or the patient advocate the patient appointed in his or her healthcare power of attorney (HCPOA).[12]

Advantages of POST

POST promotes simplicity since the form covers a limited number of the more important medical treatment decisions in a check-the-box format.[13] It promotes patient-informed consent by requiring the attending health professional to provide an information booklet and engage the patient (or representative) in the advance-care planning discussion mentioned above before POST is signed.[14]

The POST form must be periodically reviewed, and as a result, there is a greater chance it will reflect the patient's current medical situation and preferences.[15] Its acceptance by healthcare providers is enhanced because the patient's wishes are expressed as medical orders and written in medical terminology (rather than legal terminology commonly used in a living will).[16] POST promotes availability and portability because the form is printed in a highly visible color that must be placed in a prominent part of the patient's medical records and travels with the patient as his or her residential setting changes.[17]

Who can sign POST and in what settings is it recognized?

Unfortunately, POST's coverage is quite narrow.[18] A POST cannot be done for a minor or a developmentally disabled person.[19] Only adults with an advanced illness that would make death foreseeable within one year are permitted to use the form.[20] Patients admitted to hospice—which has a six-month terminal prognosis—could complete POST, but those in good or fair health with longer life expectancies could not. To sign a POST, the patient must be "capable of participating in medical treatment decisions."[21] As previously stated, a guardian or a patient advocate under a healthcare POA may consent to POST when a patient cannot. However, the statute requires that these representatives take certain steps before they can consent to POST.[22] A POST cannot be established in the event a patient lacks medical decision-making capacity and has neither a patient advocate under HCPOA nor a guardian.[23] In such an event, the appointment of a guardian could

At a Glance

A new statutory life-support form called Physician Orders for Scope of Treatment (POST) becomes available later this year and makes important improvements to existing law.

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be used to establish POST. The form must also be signed by the patient's attending health professional, which may include the patient's physician, physician's assistant, or nurse practitioner.[24] There is no witnessing or notarization requirement.

A POST form can only be officially recognized in an out-of-hospital setting, such as in an EMS treatment situation or in a residence, assisted-living facility, skilled nursing home, home for the aged, or an adult foster-care facility.[25] Despite this, the statute allows hospitals to use POST as a "communication tool."[26] A suggested time to establish POST is in a hospital as part of the discharge planning process for later use in a residential setting.

How POST compares with advance directives

HCPOAs are authorized by Michigan statute and appoint a patient advocate to act for a patient at a future time when two healthcare professionals certify that the patient has lost medical decision-making capacity.[27] A living will is used to document a person's end-of-life advance wishes in certain future medical situations. Although the Michigan legislature has not authorized the use of living wills, the Michigan Supreme Court has in *In re Martin* under the common-law doctrine of informed consent.[28] HCPOAs and living wills are typically drafted by attorneys, often contain lengthy legal explanations and legal terms, and vary from law firm to law firm. By contrast and as explained above, POST forms are uniform, contain medical terms, and are not drafted by attorneys. Other differences are that POST forms may only be created by terminally ill patients and must also be signed by an attending health professional.

Clinical studies and publications point to the failure of attorney-drafted living wills to be accepted and understood by healthcare providers.[29] Their length and legal terminology often prevent living wills from being useful in life-and-death emergency situations confronted by EMS or in hospitals. By contrast, published clinical studies report the success of POLST in honoring patient preferences.[30] POST captures a patient's here-and-now treatment preferences based on a current serious life-limiting illness with a prognosis that is fairly predictable and imminent.[31]

POST expands upon DNR by allowing patients the option of choosing resuscitation rather than simply do-not-resuscitate, and permitting a physician, physician assistant, or nurse practitioner to sign, whereas only a physician may sign a DNR.[32]

If a patient's choices on a POST form conflict with his or her preferences in an earlier-executed HCPOA, living will, or DNR, the medical orders in POST are presumed to express the patient's current wishes.[33]

Role of Michigan attorneys

The job of establishing POST lies with healthcare professionals. Although attorneys have no official responsibility in creating POST, they can still play an important role to educate clients and the public why it is important and when it should be used. Attorneys who practice elder law and estate planning typically assist clients in creating HCPOAs and living wills. Since POST is now available, attorneys should provide clients with the state's official form and booklet.

If a client has a serious health condition, the attorney should encourage the client or the client's patient advocate or guardian to schedule an appointment with the client's primary-care physician to discuss whether establishing POST is appropriate. Also, with client consent, the attorney could send a letter to the client's primary-care physician to explain the basis for making a POST referral and enclose a copy of the client's HCPOA. For example, assume a client has just received a diagnosis of serious heart failure or advanced cancer. Such a condition could conceivably result in death in one year. Therefore, it would be appropriate for the attorney to make a POST referral to the primary-care physician and mail a letter of explanation with a copy of the client's HCPOA.

Another important role for attorneys is to help clients document their end-of-life wishes in a living will or HCPOA. This is

because the POST law requires a patient advocate or a guardian who consents to POST to "comply with the patient's expressed wishes."[34] Also, to clarify the validity of a patient's wishes stated in a POST that conflict with his or her wishes stated in an earlier living will or HCPOA, the attorney should insert the following provision in living wills and HCPOAs: "In the event I create a POST at a future time, it is my direction that the treatment options I select in my POST shall take precedence over any conflicting treatment options stated in this document." Also, attorneys should suggest that clients insert into their HCPOAs the authority for their patient advocates to consent to POST. The following language is recommended: "I authorize my patient advocate to create a POST and to elect an option to withhold or withdraw treatment that could or would allow me to die."[35]

Conclusion

Attorneys practicing elder law and estate planning should inform clients how POST works and when they and their families should engage in planning. Keep in mind that POST does not replace the need for HCPOAs. In fact, appointing a patient advocate in a HCPOA is still the most important tool a client can use to be prepared for future loss of healthcare decision-making capacity. Attorneys should also recommend that clients include in HCPOAs the authority for their patient advocates to create POST. ■

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ENDNOTES

1. MCL 333.1051 through MCL 333.1067.
2. MCL 333.5671 through MCL 333.5685. Also enacted were MCL 700.5314(f), which amended EPIC to allow guardians to sign POST after meeting certain visitation and consultation requirements; MCL 400.726c, which required an adult foster-care facility to comply with a validly executed POST form; and MCL 333.1061a, which amended the do-not-resuscitate procedures act to resolve conflicts between DNR orders and POST forms.
3. Honoring Healthcare Choices–MI, *Summary of Public Act 154 of 2017: Physician Orders for Scope of Treatment (POST)* <http://nebula.wsimg.com/fdbb438cea76c66a1cb8076e4a84a0cb?AccessKeyId=A91F19FBA3CE26DA92E7&disposition=0&alloworigin=1>.
4. National POLST Paradigm, *State Programs* <https://polst.org/programs-in-your-state/>.
5. *Id.*
6. National POLST Paradigm, *History* <https://polst.org/about-the-national-polst-paradigm/history/>. In 1991, a group of ethicists in Oregon became frustrated that the end-of-life preferences stated in traditional living wills and healthcare proxies of seriously ill patients were not being honored by medical providers. The group developed a simple two-page form with treatment options and called it POLST. In 2004, the National POLST Paradigm was established at the Oregon Health & Science University Center for Ethics in Health Care. The national POLST office is now located in Washington, D.C.
7. Honoring Healthcare Choices–MI, *POST Press Release* <http://nebula.wsimg.com/8936a1d345fc91c0e017f1a592066e62?AccessKeyId=A91F19FBA3CE26DA92E7&disposition=0&alloworigin=1>.
8. MCL 333.5676(1)(b)(i).
9. *Id.* and MCL 333.5677(3).
10. *Id.* See also Honoring Healthcare Choices–MI, *Physician Orders for Scope of Treatment (POST) Executive Summary* <http://nebula.wsimg.com/88204786f05e14290f2ef08b3d7337ac?AccessKeyId=A91F19FBA3CE26DA92E7&disposition=0&alloworigin=1>.
11. MCL 333.5677(3).
12. MCL 333.5677(1)(b).
13. MCL 333.5676(1)(a)(iv).
14. MCL 333.5677(3).
15. MCL 333.5676(1)(a)(vi).
16. MCL 333.5676(1)(a)(iv).
17. MCL 333.5676(1)(a) and MCL 333.5677(3).
18. MCL 333.5674(2) and MCL 333.5677(1)(b).
19. MCL 333.5673(3) refers to a guardian of a legally incapacitated person in EPIC; a guardian of a developmentally disabled person is not covered in EPIC but rather in MCL 330.1604 of the Mental Health Code.
20. MCL 333.5677(1)(a)–(b) states that only a "patient" or an authorized representative may consent to POST. MCL 333.5674(2) defines "patient" as someone who has an advanced illness that "compromises his or her health so as to make death within 1 year foreseeable…"
21. MCL 333.5677(1)(a).
22. MCL 333.5677(1)(b) and MCL 333.5677(2).
23. MCL 333.5677(1)(b).
24. MCL 333.5676(1)(a) and MCL 333.5672(4).
25. MCL 333.5674(9) and MCL 333.5676(1)(c).
26. MCL 333.5679(1).
27. MCL 700.5506 through MCL 700.5520.
28. *In re Martin*, 450 Mich 204, 228; 538 NW2d 399 (1995) ("[A] written directive would provide the most concrete evidence of the patient's decisions, and we strongly urge all persons to create such a directive.").
29. Fegerlin & Scheider, *Enough: The Failure of the Living Will*, 34 Hastings Center Report 30 (2004) <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2896&context=articles> [https://perma.cc/F8WB-GPFX].
30. Tolle & Teno, *Lessons from Oregon in Embracing Complexity in Care*, 376 N Eng J Med 1078 (2017) <https://www.ohsu.edu/xd/education/schools/school-of-medicine/departments/clinical-departments/family-medicine/about/upload/17031616.pdf> [https://perma.cc/6U99-2WR9] and Bomba & Sabatino, *POLST: An Emerging Model for End-of-Life Planning*, The Elder Law Report, Vol XX, No 7 (2009) <https://molst.org/wp-content/uploads/2018/07/Bomb.Sabatino.POLST_.An-Emerging-Model-for-End-of-Life-Care-PlanningElderLawReport.2009-1.pdf> [https://perma.cc/9T2F-N8UD].
31. *POLST: Advance Care Planning for Seriously Ill.*
32. MCL 333.1053(2)(b), MCL 333.1053a(2)(b) (as to DNR), and MCL 333.5676(1)(a)(iii) (as to POST).
33. MCL 333.5681 and MCL 333.1061a.
34. MCL 333.5677(2).
35. MCL 333.5677(2)(b) provides that if a patient has not expressed his or her life-support wishes, a patient advocate may not elect life-limiting options on a POST form unless the healthcare POA contains the following statutory language from MCL 700.5509(1)(e): "A patient advocate may make a decision to withhold or withdraw treatment…only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death."