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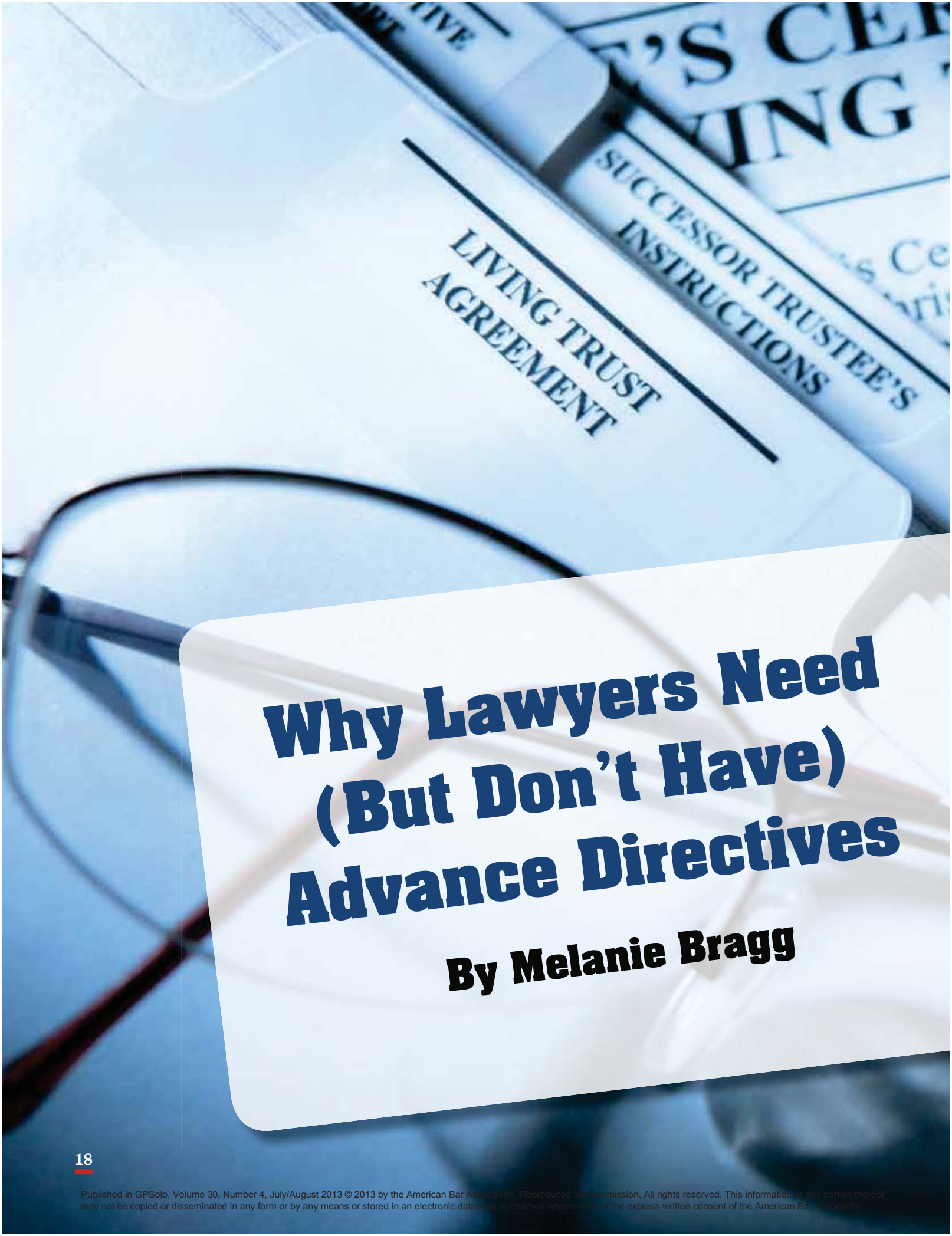

Why Lawyers Need (But Don't Have) Advance Directives

By Melanie Bragg

Lawyers are busy—busy solving problems, cleaning up other people's messes, trying to get paid a fair wage, keeping up with new laws and ever-changing technology. It is no wonder why many of us neglect to take care of our own estates and fail to draft the most important documents in our lives. Many lawyers are like the cobbler with no shoes when it comes to estate planning and drafting advance health care directives. Even if you are on top of this for yourself, keep reading; you will still learn something you can share. In this article I will spell out the "3L Secret Strategy" to discuss the subject of advance directives with your family members, your friends, and your clients. This is a general discussion and is not intended to cover all aspects of the subject or to apply to each state. My goal is to give you a strategy that will calm any fears you (or your clients) may have about executing these crucial documents.

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THE 3L SECRET STRATEGY

For me, drafting advance directives and simple wills for people is a public service. I have spent many years in probate court and know what happens when advance directives and wills are not done. Messy estates are no fun. They cause major grief and conflict for the families, more money lost to estate lawyers, and a smudge on the legacy of the deceased.

Lawyers are among the worst offenders. Probate courts across the nation report that many lawyers' families are in great disarray after the lawyer's death. And this observation is not limited to low-dollar estates.

The situation is equally dire regarding advance directives for health care decisions in the event of a lawyer's incapacitation.

When it comes to leaving messy estates, lawyers are among the worst offenders.

Why is this lack of preparation so prevalent? To make sense of a complex and far-reaching subject, I broke down the reasons into three areas and came up with the 3L Secret Strategy:

1. **Love.** Why on any given day do countless widows and widowers of prominent attorneys around the country find themselves going through piles of old files looking for the lawyer's will . . . which never turns up?
2. **Levity.** Why did it take ten years to get a husband-and-wife lawyer team to come in and execute their probate documents? (Once it was done they reported a vast sense of completion and relief.)
3. **Legacy.** Why do heirs of lawyers have to fight it out among themselves to the detriment of the lawyer's reputation in the community when a simple estate plan could have been done?

The 3L Secret Strategy—Love, Levity, Legacy—provides answers to these questions, and, if applied, the strategy will alleviate the problem. The 3L Secret Strategy is a call to action to lawyers in all fields to assess their situation and take action. And it gives lawyers three important reasons to pass along to their clients who likewise have not executed advance directives or probate documents.

LOVE (A MATTER AS SERIOUS AS DEATH)

The first of the three *L*s is love. People say they love their families. But when you practice probate law, it is easy to see where family members let each other down on a regular basis. My proposition is that if you love them, you will prepare for contingencies in advance so you do not pass along to them the stress and pressure of having to make decisions for you when you can no longer do so for yourself.

If you really love your family, you will act fast and get the advance directives and estate planning documents done. Even young lawyers die tragic deaths, like the one I know who died in a scuba accident last year. I often wonder if we put off such planning because we think we can conquer our own mortality by not facing it. Our logical brains know we cannot cheat death, but does our subconscious somehow think it is in our control? If we love our family or those who will be left behind in the event of our death, then we will disregard such questions and take care of it. *Now.*

LEVITY (A MATTER OF LIFE OR DEATH)

The second *L* of the Secret Strategy is levity—the sense of calmness and relief you (or your clients) will experience once the documents are executed. Having your estate plan worked out, regardless of where you are financially, will take a big load off your mind and increase your quality of life and self-image as you go through your busy days. You can enjoy life more when you know that if something were to happen, things would go as you desire, not as others might think you desire.

In the case of advance health care directives, it truly can mean the difference between life or death. What would you do if something unexpected happened to you, such as a car accident or sudden illness, and you could no longer dress or feed yourself or make simple day-to-day decisions? Have you ever thought about what would happen if you were hooked up to life support and could not communicate your desires to anyone?

Modern technology can keep us alive artificially, but do we want to be kept alive on machines? Do we want our family members to have to make and live with these very personal decisions?

If you do not have advance directives, then family members have to decide. If they cannot decide, the court can appoint someone to make the decision for them. Many years ago I was appointed to be the guardian of a man who was in a coma. He had two sons. One wanted him off life support. One wanted him on life support. The fact that they could not agree caused my appointment. If he had executed planning documents, it would have been easier on everyone—including me, a total stranger.

But it was not until my own mother lay in a California hospital on life support that I truly understood advance directives' true value from the perspective of a family member. It was 2012, and I had prepared my mother's California documents for her in 2006. I arrived at the hospital and there she was on a ventilator, clearly not comfortable and not happy about the situation. I showed the

doctor the directives and we discussed her prognosis. Even though we had discussed it, even though I knew what she wanted, I still found myself looking at the documents every so often and seeing her initials by the paragraphs indicating her desires. I can tell you that it would have been very difficult to make the decision for her that I made if I did not have her executed documents. It allowed my brother and me to deal with her death in a peaceful and loving manner. That experience changed everything about my feelings toward advance directives.

LEGACY (A MATTER OF LIFE AND DEATH)

The final of the three *L*s is our legacy. When you have your documents prepared and your loved ones do not have to decide for you or fight among themselves, your good legacy is intact and lives on beyond you. Our legacy is the very thing we spend so many years building as we serve our clients and our communities. After you are gone, you want people to know that you "walked the walk" and followed your own advice about the best way to take care of business.

So there you have the 3L Secret Strategy for advance directives. But what exactly do these documents entail, particularly regarding health care and end-of-life decisions? In order to familiarize you with the legal concepts and rules on advance directives, I present below an overview of the Patient Self-Determination Act of 1991 as well as the two most common types of advance directives: the directive to physicians (living will) and the durable medical power of attorney.

THE PATIENT SELF-DETERMINATION ACT OF 1991

The Patient Self-Determination Act (PSDA) went into effect December 1, 1991. The law provides that each time you are admitted into a health care facility, you must be given written information concerning your individual rights under state law to make health care decisions. The health care provider also must give you its own written policies with regard to these rights. The PSDA validated our American heritage of the freedom of self-choice. It applies to all health care facilities funded by Medicare or Medicaid and includes most hospitals and clinics.

The PSDA requires the health care facility to document whether or not you have an advance directive. Under the law, you are not required to execute an advance directive. You are only required to be informed. Health care providers cannot condition care or discriminate against you based on whether or not you have one. They must also follow state laws and educate staff and the community on these issues on a regular basis.

You want people to know that you "walked the walk" and followed your own advice about the best way to take care of business.

TWO TYPES OF ADVANCE DIRECTIVES

There are two types of advance directives: a directive to physicians ("living will") and a durable medical power of attorney. Keep in mind that each state has its own laws and names for these documents. The principles below are just the general principles for many of the advance directives in most states, using Texas law as my basic outline. This discussion will help you know what to look for in your own documents. If your state allows you to add your own provisions, you might want to include them as needed.

LIVING WILL

A directive to physicians, or living will, provides for the withholding or withdrawal of life-sustaining procedures in the event a patient's illness becomes terminal and there is no likelihood of recovery. In such a document, the patient expresses a desire *not* to artificially prolong his or her life. Any competent adult may execute a living will. This means a person over the age of 18 with the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision. He or she must understand the significant benefits and harms of the proposed treatment and its reasonable alternatives. A directive to physicians can be made on behalf of a minor patient by an adult spouse, parent, or legal guardian.

Witnesses. The procedure for a directive is informal. You need two witnesses to sign in your presence who are not related to you by blood or marriage and are not entitled to any part of your estate under a will or by operation of law. In most states the attending physician or anyone working for you cannot be a witness. Employees of a health care facility cannot usually be witnesses if they are involved in providing your direct patient care or are directly involved in the financial affairs of the facility. Another patient in the facility cannot usually witness your advance directive. Also, someone who has a claim against your estate would not be able to witness.

Agents. Most directive forms give you the option of naming an agent to make a treatment decision in the event that you become comatose, incompetent, or mentally or physically incapable of communication. It is an option, not a requirement. You often can make special provisions to your living will. Two of the most common additions are a request for pain medication for comfort measures only and a request to withhold artificial means of food and water.

Oral directives. Once you execute your directive, your health care provider should place it in your record immediately. Although it is best to have it in writing, in some states a competent adult may have an oral directive. If your state allows for an oral directive, it usually must be made in the presence of your attending physician and two witnesses, with the same qualifications stated above, and it must become a part of your medical record. The witnesses must sign the entry in the medical record.

Revocation. You can change your mind at any time. The primary consideration is what you want *now.* If you have signed a living will and then decide it wasn't the right decision for you, your change of mind has to be honored. A directive is effective until it is revoked. Most statutes provide a number of ways a directive can be revoked. You can destroy it, sign and date a new one (which replaces the old one), or simply state your intention to revoke. Make sure you make your oral statement to the physician. It's not enough to tell just anyone; the doctor is the one who has to know.

Effectiveness. Both written and oral revocations take effect when the doctor is notified. If the revocation is written, the physician must make a notation in the file that you revoked your living will. If the revocation is oral, the doctor must record when and where the notice was received in the patient's medical record.

Make a date with yourself to ensure your documents are done.

Revocation is easy, but documentation procedures must be followed.

Once you have a directive, before life-sustaining procedures can be withheld or withdrawn, the doctor must determine that the patient's death would be imminent without life-sustaining procedures. The doctor must note this determination on the medical record, and any proposed actions must follow the law and the patient's stated desires.

DURABLE MEDICAL POWER OF ATTORNEY

A durable medical power of attorney is a simple document that appoints an agent to make any health care decision on your behalf. I recommend that you appoint an alternate, too, in case the person you choose is unable or unwilling to serve if and when the need arises. Your agent can consent or refuse to consent to almost any health care treatment plan the health care provider proposes. Your agent will have authority to look at the medical and hospital records, to sign medical releases, and to consent to the disclosure of information on your behalf.

Who can't be agents? In many states, certain groups of people cannot serve as your agent: the health care provider, an employee of the health care provider, the residential health care provider, or their employee. Please note that employees of the physician or residential provider who are also your relatives may usually serve as your agent.

When effective? Your agent will take over only when the attending physician certifies in your medical record that you lack the capacity to make your own health care decisions.

Prohibited procedures. In some states, agents cannot consent to certain treatments, such as abortion or commitment to a mental institution. Check your state for particulars.

Execution. To execute the durable medical power of attorney, you simply must sign it in the presence of two witnesses. The requirements for who may be witnesses are the same as for the living will: The witnesses cannot be your agent; the health or residential care provider; your employee, spouse, or an heir; a person entitled to your estate by your will or by operation of the law; or a person with a claim against your estate. By signing it, the witnesses affirm that at the time of signing, you appeared to be of sound mind to make decisions and that you stated you were aware of what you were doing. The witness also affirms that you signed the document voluntarily, without any duress, and that you requested that he or she serve as a witness.

Effective date. The document is effective indefinitely after it is executed and delivered to the agent. Most of the forms have a place for an expiration date. If the expiration date is filled out, and on that day you are incapacitated, the document will continue to be effective. Some states have a disclosure statement attached and some states do not.

Revocation. You can change your mind about having a durable medical power of attorney even after you've signed the document. To do this, simply give oral or written notification to the agent, the doctor, or the residential health care provider. If possible, give *written* notification to both the agent and health care provider so there will be no question of your intentions. You may also revoke it by properly executing a new durable medical power of attorney, which replaces the old one. When your health care provider finds out you have revoked your durable medical power of attorney, he or she must immediately document it in your medical record and notify any interested parties, such as the agent and others involved in your patient care.

NO LONGER A SECRET

Now that you know the 3L Secret Strategy for advance directives—as well as a little about what these directives entail—I urge you to make a date with yourself to ensure your documents are done, ask your close friends and family about them, begin the conversation, and tell people how you feel. This is one secret best not kept to yourself. ■

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