AB 128 Power of Attorney: Liability Concerns for Nevada Medical Providers and Others

Notaries and Witnesses May Have Liability Issues Too

by Thomas F. Coleman, J.D.

Something was missing from the testimony about Assembly Bill 128 at a hearing in the Nevada Assembly Judiciary Committee on February 23, 2015.

There was no discussion of the potential legal liability of medical providers who rely on the instructions from an agent designated in an AB 128 form. Likewise, the potential liability of witnesses and notaries who sign the form was not addressed.

AB 128 would create a new medical power of attorney form that could be signed by adults with intellectual disabilities. Only people with an IQ lower than 70 would be able to use the new form.

I submitted a legal analysis of the bill to the committee, raising concerns about its ramifications. Dr. Nora Baladerian submitted a clinical analysis of the bill, from the perspective of a psychologist who has worked with this population for several decades. She raised a "red flag" on several aspects of the bill.

Medical providers are often not present when a medical power of attorney form is executed. Witnesses or a notary are. Therefore, the discussion of their liability precedes that of an examination of liability for medical providers.

A witness who signs the form authorized by current law must declare, under penalty of perjury, that the principal "appears to be of sound mind." The same assertion must be made by witnesses who sign the AB 128 form.

If witnesses are not used, both the current form and the AB 128 form allow for this "sound mind" certification to be made by a notary public.

AB 128, by its own terms, can only be used by people with intellectual disabilities. Intellectual disability means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

By this definition, the people who AB 128 is intended to benefit may very well be people who lack the capacity to contract or to give informed medical consent. Without the capacity to contract or to give informed medical consent, they lack the capacity to make an informed decision to delegate life-and-death medical decision making to another person.

Although written in another context, the Nevada Legislature has linked the issue of subaverage intelligence with the issue of capacity to contract. (NRS 159.0593)

As will be discussed more below, a medical provider may be sued by the estate of a patient with an intellectual disability for negligence or wrongful death of the patient. The plaintiff may argue that the medical provider did not act in good faith in relying on the AB 128 form because the provider knew that the patient lacked the capacity to delegate such authority at the time the form was signed.

Witness and Notary Liability

As part of a defense, the medical provider may sue the witness or notary. The provider may argue that he or she relied on the certification by the witness or notary that the patient was of sound mind at the time the power of attorney form was signed.

The question would then arise as to the factual basis for that certification. If the witness or notary was not familiar with the details of the patient's mental capacity, then perhaps such an assertion should not have been made by the witness or notary under penalty of perjury.

If the witness or notary was familiar with the level of the patient's mental incapacity and signed the certification anyway, they could be guilty of misrepresentation. Either way, a witness or notary who signs a "sound mind" certification in a contract signed by someone with subaverage intellectual functioning runs a risk of liability to a medical provider who relies upon the certification or to a surviving family member who sues for wrongful death.

Blacks Law Dictionary (online) defines "sound mind" to mean "having the ability to think, understand and reason for oneself." The lawyers at Legalzoom, an online legal service, say that under Nevada law the term "sound mind" means "capable of reasoning and making decisions."

If someone is not of "sound mind," they are considered to be incapacitated and cannot enter into contracts or execute a valid will. According to NRS 132.175, "incapacitated" means "a person who is impaired by reason of mental illness, mental deficiency, advanced age, disease, weakness of mind or any other cause except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."

The "sound mind" certification is not unique to Nevada. Ohio, for example, has the same requirement for medical powers of attorney.

As mentioned in the clinical analysis of Dr. Baladerian, Disability Rights Ohio has an explanation of the term "sound mind" and its applicability to medical powers of attorney.

Their website tells people with disabilities that in order to have a durable power of attorney for health care, "you must be at least 18 years old; you must be of sound mind; and you must not be under or subject to duress, fraud, or undue influence in executing the agreement."

The website further explains that under Ohio law, "A person of sound mind must have the ability to understand and to communicate the decision to execute a durable power of attorney and the effect of the document."

The Disability Rights Ohio website states that a working definition "of sound mind" would be: "at the time you execute the durable power of attorney for health care, you have the capacity to make informed health care decisions for yourself; and you understand the basic purpose of the document you are signing, and the consequences of signing the document."

Will Nevada notaries be willing to sign such a certification for someone with an IQ below 70, or 60, or 50, or lower? Will they risk later liability when a disgruntled family member is suing a medical provider for wrongful death and is looking for others to name as a defendant?

For most notaries, a "sound mind" certification is generally a routine matter because it is obvious to the notary that the person signing the document knows what they are doing. But certifying that a person with an intellectual disability is of "sound mind' is quite a different matter. What would the National Notary Association have to say about AB 128?

Parents who may have problems finding a Nevada notary to make a "sound mind" certification for an AB 128 power of attorney will likely turn to friends or relatives to witness the form. These witnesses may not even read the language of the certification clause they are signing under penalty of perjury.

They may think they are just affirming that this is the signature of the principal. In fact, they are doing much more than that. They also must certify that the principal appears to be of sound mind.

A witness may not realize that, by acting on the power of attorney, a medical provider can later argue that he or she relied on the "sound mind" certification by the witness. The witness may be drawn into litigation and accused of misrepresenting the facts about the mental condition of the principal at the time the form was signed. These issues were not addressed at the committee hearing on AB 128.

Medical Provider Liability

According to current Nevada law, a physician, health care facility or other provider that in "good faith" and accepts an "acknowledged" power of attorney for health care without "actual knowledge" that the power of attorney is void or invalid, or that the purported

agent's authority is void or invalid, is not subject to civil, criminal liability, or discipline for unprofessional conduct. (NRS 162A.815) The law says "acknowledged." It does not say "witnessed."

"Good faith" means "honesty in fact." (NRS 162A.060) "Acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgments. (NRS 162A.020)

The Clerk of the Supreme Court is an individual authorized to take and certify an acknowledgment. (NRS 2.280) So is a Justice of the Peace (NRS 4.180) and a judge of a District Court. (NRS 3.150)

Several factors must exist for a medical provider to be released from liability for accepting a power of attorney and accepting an agent's consent for a medical procedure. The key terms are "acknowledged" and "good faith" and "actual knowledge."

The prerequisite that the form is "acknowledged" requires that the power of attorney form is verified by a notary, justice of the peace, or judge. Such a verification would include the "sound mind" certification discussed above.

If the power of attorney does not contain a verification by a notary or other individuals authorized to take acknowledgments, there is no release of liability. Acting on a form that is merely witnessed exposes medical providers to liability even if they acted in good faith and did not have actual knowledge that the form was invalid since all three requisites must exist for a release of liability.

Assuming the form was certified by a notary or other person authorized to verify an acknowledgment, providers may still face liability if they do not act in "good faith" or if they had "actual knowledge" the form was void or invalid.

Medical doctors have a higher standard when it comes to the requirement of "good faith." Because they have a fiduciary relationship to a patient, the Nevada Supreme Court has ruled that doctors must exercise the "utmost good faith" because physicians have an "elevated position of trust." *(Hoopes v. Hammergren*, 725 P.2d 238 (1986))

A medical doctor, especially one who has been treating a patient with an intellectual disability for a long time, would be hard put to argue, in utmost good faith, that he or she did not know the patient lacked the capacity to sign a health care power of attorney.

What the doctor knew, and when the doctor acquired such knowledge, would be issues addressed in a wrongful death action by a surviving relative who challenges the validity of the power of attorney and the reliance on it by the doctor.

A doctor is trained to recognize lack of capacity to make medical decisions. A doctor also knows enough about capacity to know when a person has insufficient mental capacity to understand the terms of a contract. A power of attorney is a contract.

Doctors and other medical providers have no liability for providing medical services with the consent of a duly appointed guardian. That is one reason why they may ask parents of an adult son or daughter with an intellectual disability to obtain a guardianship.

A guardianship petition does not have to ask for plenary powers. It does not have to strip the adult of authority to make other decisions. The petition and order can be limited to medical decisions only.

As currently written, AB 128 exposes notaries, witnesses, and medical providers to liability. This issue should be addressed by legislators.

The Medical Association, Nurses Association, and Hospital Association in Nevada should be asked to weigh in on this bill. Notaries should too. These professionals may be unwilling to assume the risks posed by AB 128. If so, that should be known. ◊◊◊

Attorney Thomas F. Coleman is the Executive Director of the Disability and Guardianship Project of Spectrum Institute. (tomcoleman@spectruminstitute.org)

Spectrum Institute

9420 Reseda Blvd. #240, Northridge, CA 91324
www.spectruminstitute.org • (818) 230-5156