

The capacity to execute a health care proxy (HCP) is a specific type of decision-making capacity. Because decision-making capacity is always task- and decision- specific, the capacity to appoint a healthcare agent is different from the capacity to consent to treatment. A person may retain the ability to execute a HCP even if they do not have the capacity to consent to treatment.

Capacity to Appoint a Health Care Agent

EDUCATIONAL HANDOUT SERIES

VA



U.S. Department of Veterans Affairs
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Real Life Examples

- Can this Veteran with moderate dementia, whose decisional abilities are so impaired he cannot make a medical decision, change his HCP to appoint a different agent?
- Can this Veteran with confusion following a TBI who now needs a medical decision – and has no family or close friends to serve as default surrogate – now execute a HCP to avoid guardianship?

DEFINITIONS

Health Care Proxy (HCP)	A type of advance directive in which an individual (1) appoints another person to make health care decisions on the individual's behalf, and may also (2) instruct that person about preferences for future treatments. A HCP is the same as Durable Power of Attorney for Health Care.
Health Care Agent	The person named in the HCP to make medical decisions on one's behalf if needed. In practice clinicians may call the agent the proxy – although here when we say Health Care Proxy we mean the legal document.
Living Will	The instructional component of the HCP in which the patient says what he or she would want in certain circumstances. In this fact sheet we will address the capacity to appoint a health care agent via a HCP; we will not address the capacity to instruct others in future hypothetical medical decisions which has more in common with the capacity to make a medical decision.

What VA Policies may apply?

VA clinicians must follow VA laws, regulations and policies, in addition to clinical practices, when treating Veterans and sharing Veteran health information.

The following may be relevant.

- VHA Handbook 1004.02: Advance Care Planning and Management of Advance Directives
www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2967
- VHA Handbook 1003.01: Informed Consent for Clinical Treatments and Procedures
www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2055
- VA Form 10-0137 is used by patients to document treatment preferences for both medical and mental health care. <https://www.va.gov/vaforms/medical/pdf/vha-10-0137-fill.pdf>



How might dementia affect the capacity to appoint a Health Care Agent?

Most older adults do not have dementia, and the presence of dementia does not necessarily mean that an older adult lacks capacity for domains such as consent to treatment or choosing a health care agent. Similar to other types of capacity assessments, assessment of capacity to appoint a health care agent should focus on the individual’s abilities and not his or her diagnosis. Most veterans with mild to moderate dementia can express their preferences for a health care agent. Further, even if an individual lacks capacity, their assent or approval should be sought in an effort to promote their involvement and consideration of their preferences.



What supports can help?

When disclosing the purpose of the HCP, use clear language that the Veteran, family and caregivers can understand easily. Provide supports as necessary to accommodate for any sensory deficits (e.g., drawings, pocket talkers, magnifying glass). Also consider the Veteran’s language, preferred mode of communication (written, verbal, and/or visual). Finally, as the HCP can have a good deal of complex language, consider the Veteran’s health literacy level, explaining carefully the information written in the document.



What values might be important to patients who are completing a HCP?

An individual’s values and cultural background may influence their comfort with completing a HCP. Some individuals may be reluctant to complete a HCP because of previous negative experiences with health care. Some individuals may be isolated and may not have family or friends to appoint. In such situations it is critical to help the person think through whether there might be someone to appoint, and to document their health care values.



How do I ask about capacity to execute a HCP?

Because the HCP is a signed legal document, some courts have focused on the concept of “contractual capacity”: e.g., possessing sufficient ability to understand the nature, extent, character, and effect of the particular transaction. In contrast, some statutes use vague standards: e.g., being of sound mind and under no constraint or undue influence. Keeping in mind the concepts of understanding a document and avoiding constraint and undue influence, it may be useful to focus upon the following abilities.

Understanding and Appreciation	What it means to: <ul style="list-style-type: none"> • Give authority to another to make health care decisions, • Through the HCP legal instrument, • In the event of diminished capacity to consent to treatment
Reasoning and Communication	Ability to communicate and explain: <ul style="list-style-type: none"> • A consistent choice of a health care agent, • Who is “appropriate” by virtue of relationship and knowledge



Tools and Tips

As with any decision-making ability, the clinician should start with a presumption of capacity. Furthermore, because HCP are not completed as often as is desired – we wish to encourage completion of HCP, and not create barriers. Therefore, consideration of whether a person has the capacity to execute a Health Care Proxy is likely only to occur when there is evidence of diminished decision-making abilities in other areas. Generally, an evaluation of capacity to execute a HCP can be embedded in the usual clinical conversation, by asking questions as the clinician explains the document. Below is a set of more formal questions that may be useful when needed.

Possible questions to check the Veteran's understanding and preferences:

1. What is a Health Care Proxy / Advance Directive?
2. What is a good thing about having an Advance Directive?
3. What does a Health Care Agent or Proxy do for you?
4. What persons would you consider to be your agent?
5. Who would you choose as your agent?
6. Why would you trust this person?
7. What happens if your illness gets worse and you are unable to speak for yourself?



Acknowledgement and Disclaimer

This handout was developed as part of an educational effort sponsored by the VHA Employee Education System and the VHA Office of Geriatrics and Extended Care. This handout is one from the Assessment of Decision Making Capacity Handout Series which links to a VA TMS educational activity. Information presented in this handout was based on the consensus of the educational planning committee considering research, practice, and general principles at the time of its drafting. The purpose of this document is for education. The contents should not be construed as policy, but rather as an educational resource that may be useful and effective in clinical practice. VA clinicians must follow VA laws, regulations and policies, in addition to clinical practices, when treating Veterans and sharing Veteran health information. Links to free clinical resources may be included in the handout but should not be construed as official endorsement of these tools.

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Additional Resources at: Additional Resources are available at the VA TMS system. Please search the course catalog by keyword 'capacity'.

References:

1. Moye J, Sabatino CP, Brendel RW. Evaluation of the Capacity to Appoint a Health Care Proxy.