Objectives

1. Identify the various types of advance directives.

2. Identify the requirements to effectuate advance directives.

3. Review recent legislative changes regarding advance directives.
What is an advance directive?

An **advance directive** is a legal document in which a person specifies what actions should be taken for their health if they are no longer able to make decisions for themselves because of illness or incapacity.
Types of Advance Directives

Advance directives include the following:

(A) a directive to physician
(B) a medical power of attorney
(C) an out-of-hospital DNR order
(D) an in-hospital DNR order
Directive to Physician

- A **Directive to Physician**, also known as a living will, is an instruction to administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition that has been diagnosed and certified in writing by the attending physician.

- A patient may also include other directions for medical care, such as instructions regarding artificially administered nutrition and hydration, intravenous antibiotics, etc.

- If the patient does not have a MPOA, he or she may also designate in a directive a person to make a health care or treatment decisions for the patient in the event the patient becomes incompetent or otherwise mentally or physically incapable of communication.
Directive to Physician
Requirements

- A **directive to physician** may be executed at any time by a competent adult patient either written (signed in the presence of and by 2 witnesses or a notary) or non-written (issued in the presence of 2 witnesses and the attending physician).

- A **directive to physician** for a minor may be executed by the minor’s adult spouse, parent(s), or legal guardian.

- A **directive to physician** may be revoked at any time without regard to the declarant's mental state or competency, by physically destroying the document; signing and dating a written revocation; or orally stating the intention to revoke.
A Medical Power of Attorney (MPOA) is a document delegating to an agent the authority to make any health care decision on the patient’s behalf should the patient become incapacitated.

The medical power of attorney must be signed by the patient in the presence of and by 2 witnesses or a notary.

Treatment may not be given to, or withheld from, the patient if the patient objects, regardless of whether, at the time of the objection, a medical power of attorney is in effect; or the patient is incompetent.
MPOA

- A MPOA agent may not consent to:
  1. voluntary inpatient mental health services;
  2. convulsive treatment;
  3. psychosurgery; or
  4. abortion.

- A MPOA may be revoked orally or in writing at any time, without regard to the declarant's mental state or competency.

- A MPOA’s authority is automatically revoked upon dissolution of marriage to the patient.
An **Out of Hospital DNR** is a directive to health care professionals acting in an out-of-hospital setting, such as long-term care facilities, private homes, hospice, EMS vehicles, and doctors’ offices, hospital clinics, and emergency departments, to withhold cardiac life saving measures in the event a patient stops breathing or their heart stops breathing such as CPR, advanced airway management, artificial ventilation, defibrillation, and transcutaneous cardiac pacing.

An **Out of Hospital DNR** may be executed at any time by a competent adult patient either written (signed in the presence of and by 2 witnesses or a notary, and the patient’s attending physician) or non-written (issued in the presence of 2 witnesses and attending physician).

An **Out of Hospital DNR** for a minor may be executed by the minor’s parent(s), legal guardian, or managing conservator.
Out of Hospital DNR Requirements

- **Out of Hospital DNR** for an incapacitated adult may be executed by the attending physician and the person's legal guardian or MPOA.

- If the person does not have a guardian or MPOA, the attending physician and a qualified relative (patient's spouse; reasonably available adult children; parents; or nearest living relative), may execute an out-of-hospital DNR order in the presence of at least 2 witnesses.

- If no qualified relative is available, an out-of-hospital DNR order must be concurred with by another physician who is not involved in the treatment of the patient.
An **Out of Hospital DNR** may be revoked by the person who executed the document, at any time, without regard to the declarant's mental state or competency, by physically destroying the document, or orally stating the intention to revoke.

However, an oral revocation takes effect only when the intent to revoke is communicated to the responding health care professionals.
In-Hospital DNR Orders (SB 11)

- An **in-hospital DNR** is a directive to health care professionals acting in a health care facility or hospital, to refrain from performing CPR on a patient whose circulatory or respiratory function ceases.

- The 2017 Texas Legislature passed Senate Bill 11 in special session, which provides a framework that regulates DNR orders for patients admitted in a hospital setting. The bill took effect on April 1, 2018.

- Previously, only Out of Hospital DNR orders were explicitly regulated, so the law marks a significant change. SB 11 is a completely new law and does not change the law regarding the regulation of Out of Hospital DNR orders.

- The purpose of SB 11 is to ensure that doctors do not unilaterally write DNR orders for patients without discussion or consent from either the patient or a surrogate decision-maker.
In-Hospital DNR Requirements

Effective April 1, 2018

An in hospital DNR:
- Must be issued and dated by the patient’s attending physician; and
- Must be in compliance with:
  1) The written and dated or oral (witnessed by 2) directions of a capacitated patient;
  2) The patient’s advance directive;
  3) The directions of an incapacitated patient’s legal guardian or MPOA; or
  4) A mutual decision made by the attending physician and the surrogate decision maker.

A physician may also issue an in hospital DNR order if:
- The patient’s death is imminent regardless of CPR,
- The DNR is medically appropriate, AND
- The patient never conveyed directions against a DNR order when the patient was capacitated.
In-Hospital DNR Notice Requirements

- Before a DNR order issued due to a patient’s imminent death can be placed in a patient’s medical record, a health care facility must inform the patient of the order’s issuance, or if the patient is incapacitated, make a reasonably diligent effort to contact the patient’s legal guardian or MPOA, or if no guardian or agent is known, the patient’s spouse, adult children, or parents.

- If one of the individuals listed above arrives at the patient’s health care facility after the DNR order has been issued and notifies a health care professional providing direct care to the patient of their arrival, the applicable provider is required to disclose the DNR order to that individual. If one person has already received this notice, it is not required that additional persons receive the same notice.
Risk Management Concerns

- It is important that any institutional policies dealing with end-of-life issues and the implementation of DNR orders are reviewed for compliance with the new law requirements.

- Physicians who deal with this situation with any regularity will likely have concerns and questions regarding how to correctly implement a valid DNR in conjunction with the new law. Institutional training sessions should be considered.
RM Concerns Regarding Notice

- A person who makes a good faith effort to comply with the notice requirements and contemporaneously records those efforts is afforded protection from civil and criminal liability, as well as, from disciplinary action from the person’s licensing authority.

- Thus, for liability protection purposes, recording of the notice or notice efforts in the patient’s medical record is crucial.

- This documentation requirement will likely need to be updated in your current policies regarding DNR issuance.

- Providers will likely need education on this new obligation, as well, and this should be incorporated into your institutional training.
In-Hospital DNR Revocation

- A patient, or an incapacitated patient’s MPOA or legal guardian may revoke the patient’s advance directive under which the DNR Order was issued, or revoke prior consent to a DNR Order.

- A patient's attending physician may revoke a DNR order that he/she has issued at any time.
RM Concerns Regarding Revocation

- SB 11 allows a MPOA or guardian to revoke an incapacitated patient's DNR order under any circumstances, which can cause potential problems when a patient's next of kin disagrees about a DNR order.

- Issues may also arise when a surrogate wants to take advantage of an incapacitated patient—for example, keeping him alive to collect benefits on his behalf.

- These concerns likely do not require any changes to your institution’s current policy, however, it is important to keep these issues in mind, particularly when it comes to determining who is the proper surrogate for the patient.
Disagreements

- If a provider does not wish to execute or comply with a DNR order or the patient's instructions concerning CPR, the patient, MPOA/guardian or qualified relatives will be told of the benefits and burdens of CPR.

- If the disagreement persists, the provider must make a reasonable effort to transfer the patient to another physician, facility, or hospital willing to execute or comply.
RM Concerns Regarding Disagreements

- When there is still disagreement about a course of treatment for a patient after reasonable unsuccessful efforts to transfer the patient, the physician may need to consult with a private attorney and/or consult hospital or health care facility policies and in-house legal counsel to determine how to proceed.

- Current institutional policies should be reviewed to determine what actions are available should this situation arise.
Protections

- SB11 provides limited liability protection (and protection from disciplinary review and action) for physicians and other health care professionals who act in good faith to issue a DNR order or who cause CPR to be withheld or withdrawn from a patient in accordance with a DNR order.

- Similarly, SB11 provides that physicians and other health care professionals are not liable or subject to disciplinary action if they fail to act in accordance with a DNR order of which they have no actual knowledge.
Possible Penalties

- SB11 added a criminal Class A misdemeanor offense that applies when a physician or other person intentionally conceals, cancels, effectuates, or falsifies another person’s DNR order or if the person intentionally conceals or withholds personal knowledge of another person’s revocation of a DNR order in violation of the law.

- Additionally, a physician or other health care professional is also subject to review and disciplinary action by the Texas Medical Board or other appropriate licensing board if the person intentionally fails to effectuate a DNR order in violation of the law, or intentionally issues a DNR order in violation of the law.

- These two enforcement provisions are drafted very broadly and it thus may be difficult to properly and adequately assess associated legal risks. Thus, it is recommended that physicians consult with private counsel and/or consult hospital/health care facility policies and legal counsel in order to understand where individual physicians may face the greatest legal risks.
Possible Future Changes?

On April 20, 2018, the Texas Health and Human Services Commission (HHSC) proposed amendments to the Texas Administration Code Title 25, sections §133.2 and §133.41 to implement the changes required by SB 11 for use of an in-hospital DNR.

However, the proposed rules impose requirements in addition to the general obligations described in SB 11 including:

- the governing body of a hospital must adopt a DNR policy that complies with SB 11 and the proposed rule;
- establishment or revocation of a DNR must be entered into the patient medical record as soon as practicable;
- medical staff bylaws must include DNR procedures that comport with SB 11 and the proposed rule; and
- the patient’s nursing plan of care must indicate whether a physician has issued a DNR order for the patient and to inform the patient or the person authorized to make treatment decisions.

Note: These rules only apply to hospitals licensed by DSHS.
RM Implications

- If the proposed rules are adopted, a hospital will need to make changes to its hospital and medical staff policies to comply with the Texas Administration Code unless compliant policies are already in use.

- Until proposed rules are finalized a hospital has flexibility in implementing compliant activities. For example, a hospital may be in compliance with SB 11 without including the specified requirements in its medical staff bylaws. Once the proposed rules are finalized, however, a hospital must implement the changes required by the regulations because, even if the hospital is otherwise compliant with SB 11, HHSC may take an adverse action against the license of the hospital for failure to comply with licensing regulations.

- Further, institutional training sessions should be considered, especially for nurses who will find themselves with a new obligation under the rules to make the notification to the appropriate person.
Questions??