

MISSION BRIEFING



NOT-SO SECRET AGENTS: YOUR GUIDE TO SUBSTITUTE DECISION-MAKING



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MISSION OBJECTIVES



Capacity vs. Competency

Substitute Decision Making
Arrangement Types

Do Not Resuscitate Orders (DNRs)

Emergency Situations



CAPACITY VS. COMPETENCY



Competency

- Legal decision that is normally a formal determination made by a court through legal proceedings.

Capacity

- The ability to understand the nature of effect of one's actions or decisions.

MISSION CRITICAL INFO:

CAPACITY

- Capacity can change frequently – it maintains fluidity.
- It doesn't "Turn Off/On" – No "Big Red Button"
- Area Dependent – it must be evaluated for the area of decision-making at hand.
- Temporary confusion shouldn't be the end-determination either.
 - Need to evaluate for UTI? Drug interactions? Delirium? Electrolyte Imbalance? Something else?



THE ABILITY TO CHOOSE



THE KEY:

- Do they understand the consequences of their actions?

NOT SIMPLY:

- They are making “bad” decisions.
- Don’t presume incapacity.

CAPACITY MUST BE AREA SPECIFIC

Financial

Money
Management

Property
Management

Ability to Contract

More!

Personal

Smoking/Drinking

Food Choices

Living
Arrangements

More!

Social

Social
Relationships

Intimate
Relationships

Social Activities

More!

Planning

Powers of
Attorney

Medical Decisions

Other Estate
Planning

More!



MISSION

TARGET:

Capacity for
What?

CAPACITY ASSESSMENT



- No Bright Line Test

- Many professionals working with older population, including those with individuals with disabilities, don't receive formal training to assess capacity.
- There are long-term consequences of alleging an individual is "incapacitated" are often not considered.
 - This can have serious impact on that person's decision-making.
 - Minimizes the individual's role in decision-making for himself/herself.



CAPACITY IS PRESUMED

- Challenges to Incapacity Require Evidence
- No Judicial Determination or Triggering event in legal document? **THEN → CAPACITY IS PRESUMED**
- Simply appointing or having a Power of Attorney ≠ Incapacity.

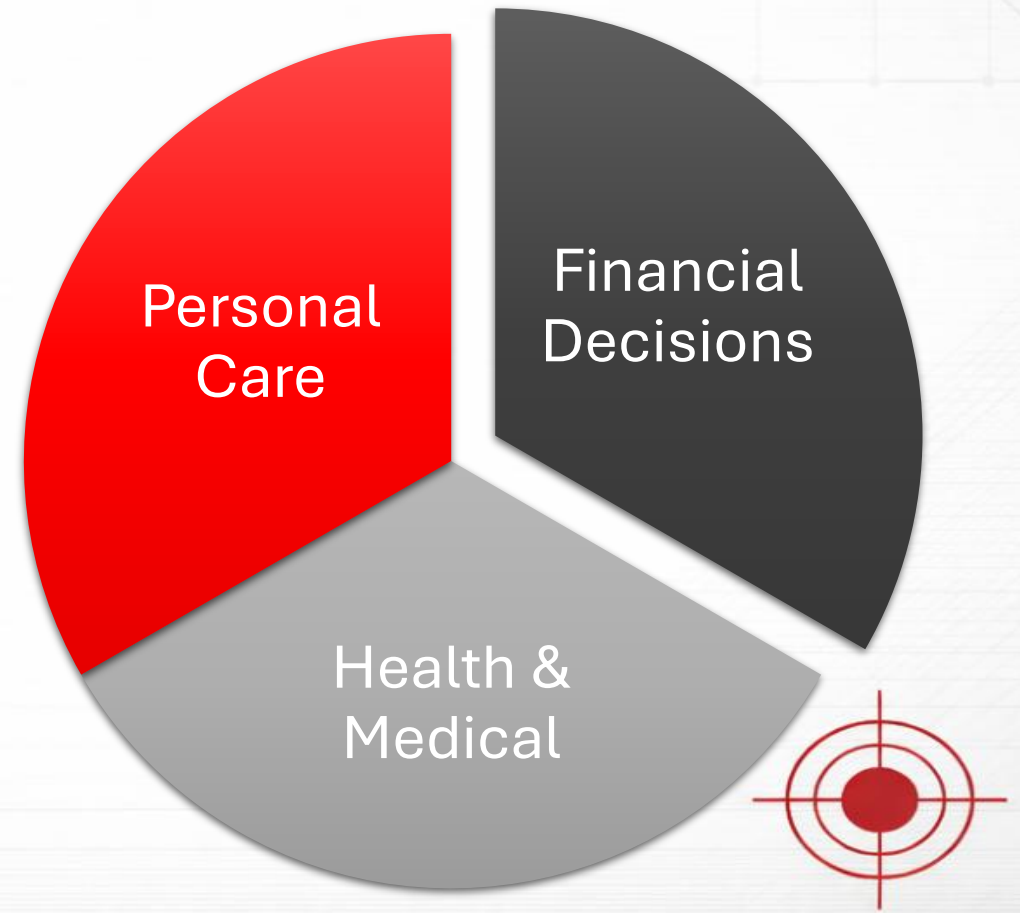
SUBSTITUTE DECISION-MAKING ARRANGEMENTS



MISSION BRIEFING

What Is Substitute Decision-Making?

- When another person is granted legal authority to make decisions on behalf of another.
- There are a variety of arrangements
 - Non-Court vs. Court Driven
 - Less Restrictive vs. Most Restrictive
 - Each has its own rules, processes and limitations.



SPANS A LIFETIME OF SCENARIOS



4-year-old boy
who needs
surgery



25-year-old
developmentally
disabled woman
with a Guardian



57-year-old man
unconscious
after heart
attack



78-year-old
woman with
end stage
Alzheimer's
Disease



MISSION OBJECTIVES



Protect Patient/Resident Autonomy
and promote Self-Determination

Navigate Legal and Ethical Issues

Advocate for Patient/Resident's
"Best Interests"

Support family and loved ones
navigate the decision-making



Most Flexible

Powers of Attorney

- Durable Power of Attorney for financial decisions
- Patient Advocate Designation for medical decisions

Social Security Representative Payee

Court-Appointed

- Guardianship of Incapacitated Individual
- Conservatorship of a Protected Person

Most Restrictive

TYPES OF ARRANGEMENTS

MOST FLEXIBLE OPTION: **Powers of Attorney**

FINANCIAL POWERS

- Durable Power of Attorney
- Extraordinary Powers
- Appoints "Attorney-in-Fact"
- New Michigan Law: 7/1/2024



MEDICAL/HEALTH CARE POWERS

- Patient Advocate Designation
 - Also called Health Care Power of Attorney or sometimes "Living Will"
 - Appoints "Patient Advocate"
- HIPAA Authorization & Release

FINANCIAL POWER OF ATTORNEY REQUIREMENTS

MCL 556.201 *et seq*

- Made by a person who is 18+ years old.
- Must be in Writing, Dated, and Signed by the Resident/Principal
- Must be either:
 - Notarized (Signed in the presence of a Notary) OR
 - Witnessed by 2 Independent Witnesses
 - **Best Practice: Do Both. Creates Presumption of "Genuineness"**
- Attorney-in-Fact must sign "Acknowledgment of Agent's Duties"
 - Not required for DPOAs prior to 10/1/2012, but **Best Practice** is to sign one.

MI UNIFORM DURABLE POWER OF ATTORNEY

- **Effective 7/1/2024**
- Properly signed DPOAs signed prior to this law are still valid.
- **Created Statutory Form**
 - **PROCEED WITH CAUTION:** Critical Document that should not be treated as basic form.
 - Seek Legal Advice.



MISSION BRIEFING

BEST PRACTICE TIPS: DPOAs

- ✓ Have Clear and Complete Copy of the most recent DPOA.
- ✓ Review the DPOA and confirm the requirements are met.
 - ✓ Review Annually and Ask about Updates!
- ✓ Is the Power of Attorney "Springing"?
 - ✓ If so, before Attorney-in-Fact has authority, 2 Doctor's Statements are required!



PATIENT ADVOCATE DESIGNATIONS

(AKA: Health Care Power of Attorney)

MCL 700.5506 et. seq.

- A person the individual trusts who has been “appointed” in a valid Patient Advocate Designation to make medical decisions.
- Only **“Springing”** by law
- Can **only** make Health Care decisions
- The Patient Advocate Designation provides guidance and restrictions for how the Patient Advocate is to act



PATIENT ADVOCATE DESIGNATION REQUIRES:



A Patient Advocate can be made by a person 18+ years old

Patient must be of "sound mind" (Testamentary Capacity) at the time of signing the Patient Advocate Designation

The designation must be in writing and signed/dated by the Patient

PATIENT ADVOCATE DESIGNATION REQUIRES CONT'D:



Signed in presence 2 independent witnesses who are unrelated/uninterested persons, who also must sign the document.

- Employees of a Facility where the Patient resides **CANNOT BE A WITNESS!**
- Notarization is not sufficient.

The Patient Advocate Designation must be part of the Resident's Medical Record & appointed Patient Advocate must accept.

- Attending Physician should have a copy on file.
- Facility where the Patient resides should have copy of file.
- Document must be reviewed annually
- Patient's capacity should also be re-evaluated annually

Patient Advocate's Acceptance must contain 10 statements that the Patient Advocate understands and acknowledges

PATIENT ADVOCATE LIMITATIONS

- Cannot delegate authority to another person not listed in the Designation.
- Cannot designate Co-Patient Advocates.
- If Patient regains competency (as determined by Medical Professionals) then the Patient Advocate's authority is suspended and the Patient can make decisions for him/herself .
- The determination that the Patient cannot make his/her own medical decisions does not legally terminate the Patient's independence the same way a Guardianship would.



PATIENT ADVOCATE CHALLENGES

Revocation

- A Resident can revoke a Patient Advocate at any time so long as they are able to communicate the intent to revoke**

** Subject to the 30-days for Mental Health Treatment (if allowed in the document)

- Revocation can happen even if the Resident/Patient is not "competent"

Removal

- A Patient Advocate can be removed by Probate Court for a variety of reasons, including an invalid Patient Advocate Designation or improperly acting Patient Advocate.
- A Patient Advocate can be replaced with a Guardian





MENTAL HEALTH TREATMENT & PATIENT ADVOCATES

- Includes those who may be impacted from Alzheimer's Disease, Dementia, Adverse Medication Reaction, UTIs, etc.
 - This makes it difficult for agents to help and could even result in the Patient "firing" the Patient Advocate.
- **GOOD NEWS: The Patient Advocate Designation can provide a solution!**

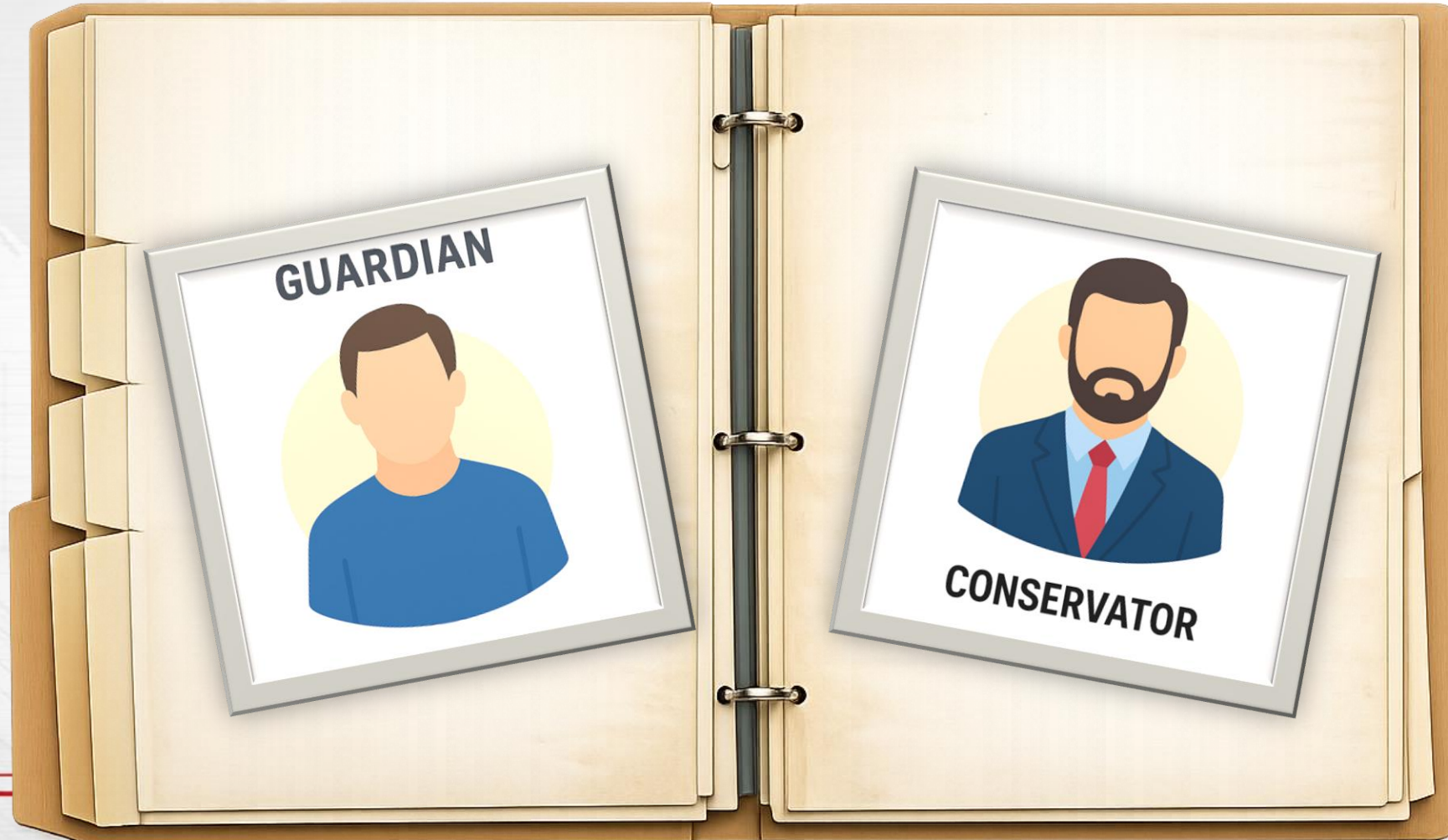
“30-DAY COOLING OFF-PERIOD”

- Even if the Patient “fires” the Patient Advocate, the Patient Advocate can still get the Patient treatment for up to 30 days before the revocation becomes effective!
- Provides more time for the Patient Advocate to get more help or stability.



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MOST RESTRICTIVE TYPES:



CONSERVATORSHIP

JUDGE



CONSERVATOR

PROTECTED
INDIVIDUAL



- Legal process in the Probate Court
 - Court appoints a person/entity (the “Conservator”) to make financial decisions on behalf of another whom the court has determined is unable to make such decisions for himself or herself (the “Protected Individual”).
- Some actions are restricted by statute and others are restricted by individual probate courts.
 - All probate courts require court approval to sell Protected Individual’s home .
 - Some courts may restrict spending money from accounts without approval.

GUARDIANSHIP

JUDGE



GUARDIAN



WARD



- Legal process in the Probate Court
 - Court appoints a person or entity (the “Guardian”) to make personal (and sometimes property) decisions on behalf of another whom the court has determined is unable to make such decisions for himself or herself (the “Ward”).
- Creates “legal ghosts.”
- Can result in abuse, neglect or exploitation.
- When used appropriately, this process can be a necessary and important part of protecting incapacitated individuals.
 - Should be pursued as a last resort option.

OVERVIEW OF THE PROCESS



Petition



Evidentiary Support



Priority of Appointment – Court has discretion for final appointment



Hearing (sometimes multiple or even a trial)



Findings & Order



Annual Reporting Requirements



Special Permissions

MISSION ALERT!

It's Not a Perfect System

- News media has covered many horrific stories of abuse, neglect, exploitation arising from Guardianship
 - Celebrity brings greater attention, but aren't the only targets
 - Michigan has its own horror stories
- Guardianship reform is a focus of Michigan Attorney General's office
 - But the road has challenges ahead.



MISSION ALERT!

**It's Not a Standard
Point in the
Process**

**You don't automatically need a
Guardian because:**

- **You're _____ years old**
- **You need help (lesser restrictive options exist)**
- **You have a _____ diagnosis (Alzheimer's, dementia, etc.)**
- **It's for your own good**
- **You are making "bad" decision**

MISSION BRIEFING

A LAST RESORT OPTION

“The typical ward has fewer rights than the typical convicted felon – they no longer receive money or pay their bills. They cannot marry – or divorce... it is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception of...the death penalty.”

-U.S. Representative Claude Pepper




PRE-GUARDIAN/CONSERVATOR BEST PRACTICES

- Always start by identifying the problem we are trying to solve.
 - Flow of Information/Communication?
 - Money or Asset Management?
 - Health Care?
 - Living Arrangements?
 - Safety?
- Ask if there is a less restrictive option that solves the problem.
- Work with knowledgeable professionals (i.e. *Mannor Law*) who can help identify and provide the appropriate tool for the problem.



MISSION OBJECTIVES

- **Don't assume the person has authority**
 - Request & obtain complete documentation (on admission & annually)
 - Letters of Authority – shows who is the Guardian or Conservator
 - Order of Guardianship and/or Order of Conservator
 - If necessary – can be obtained from Probate Court (public record)
- **Review these Documents Annually**
 - Some courts update “Letters of Authority” each year.
 - Some courts require approval before Guardian or Conservator can do certain things.



**DO-NOT-
RESUSCITATE
ORDERS (DNR)**

MISSION BRIEFING

A DO-NOT-RESUSCITATE ORDER



- A document that directs that in the event of a medical emergency outside of a hospital, no “heroic measures” (CPR) are to be taken.
- **Legal Authority:** Michigan Do-Not-Resuscitate Procedure Act, MCL 333.1051 *et. seq.*



WHO SIGNS A DNR?



The Person Him/Herself

- IF able to.



Patient Advocate

- IF the Patient Advocate Designation allows AND
- IF the Patient Advocate has been triggered.



PRACTICE TIPS:

- It is important to have a clear copy and review each year to make sure the one on file is the most current version.
- Confirm that the Patient Advocate Designation is valid! (see previous requirements).

WHO SIGNS A DNR?



Guardians of Legally Incapacitated Individuals

- Appointed February 4, 2014 or later.



BEFORE SIGNING:

1. Visit the Patient not more than 14 days prior to signing the DNR.
2. Consult with the Patient regarding the decision (if meaningful communication is possible); AND
3. Consult with the Patient's Attending Physician as to specific medical indications that support the DNR.

WHO SIGNS A DNR?



Guardians of Legally Incapacitated Individuals

- Appointed February 4, 2014 or later.



EACH YEAR MUST:

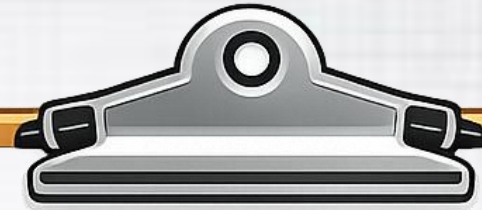
1. Visit the Patient and consult about reaffirming the DNR (if meaningful communication is possible); AND
2. Consult with the Patient's Attending Physician as to specific medical indications that support the DNR.

WHO SIGNS A DNR?



Guardians of Legally Incapacitated Individuals

- Appointed **BEFORE** February 4, 2014 or later.



BEST PRACTICE:

1. Consider getting Court approval before signing a DNR; AND
2. Would have to do all the same steps that Guardians appointed after February 4, 2014 would have to do as well.



DNR VALIDITY: Requirements



1. Patient must be 18 years old or older;
2. **Signed by Patient**, who is of sound mind to execute on his/her own behalf OR signed by a validly appointed **Patient Advocate/Guardian**;
3. Signed by **Patient's attending Physician** (unless refusal of treatment is solely for religious purposes); AND
4. Signed by **TWO** witnesses (18+ years old) – At least ONE of these witnesses is NOT the Patient's spouse, parent, child, grandchild, sibling, or presumptive heir.

**NO FORMAL
ARRANGEMENTS?
WHAT TO DO IN
AN EMERGENCY.**



MISSION OBJECTIVES



Social Welfare Act

- MCL 400.1, *et seq*

Dignified Death Act

- MCL 333.5652, *et seq*

SOCIAL WELFARE ACT:

Most Relevant for You

- **Applies to:**
 - Nursing Home Resident & Others enrolled in Medicaid
- **Relevant part:**
 - “If the person for whom surgical or medical treatment is recommended is not of sound mind, or is not in a condition to make decisions for himself, the written consent of such person’s nearest relative or legally appointed guardian, or person standing in loco parentis, shall be secured before such medical or surgical treatment is given.” MCL 400.66h



! HIGH ALERT !

BUT....

"Nearest Relative" is undefined
& no defined priority.
No guidance as to when patient
is not of "sound mind."

- Mini-Mental Exam is NOT sufficient.

Best Practice: Rely on the
opinion of the attending
physician and one other
physician or psychologist – who
documents their determination
in the patient's medical record.

SOCIAL WELFARE ACT

REMEMBER:

As long as the Patient
can make their own
decisions,
YOU SHOULD NOT look
to a family member for
decisions

DIGNIFIED DEATH ACT

Purpose



- Gives physicians certain responsibilities for a physician who diagnoses an individual as “terminally ill.”
- Basically, requires if the physician recommends the treatment, they must provide the patient with information on the recommended course of treatment and alternatives.
- Also requires physician to inform the patient of right to “an informed decision regarding receiving, continuing, discontinuing, and refusing medical treatment”, choose palliative care, and choose adequate and appropriate pain and symptom management.

BEST PRACTICE:

Spouse and children should all agree. If no mutual agreement, proceed with caution! Best course of action may be Guardianship.

DIGNIFIED DEATH ACT

HIGH ALERT

How does this apply to family members?

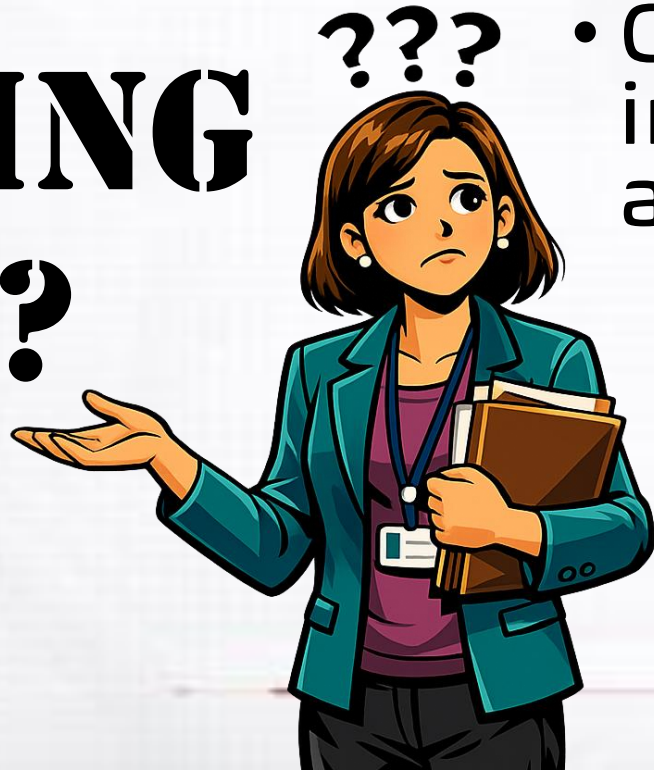
- If the patient is unable to give consent, the physician must provide the patient's Patient Advocate or Surrogate with the same information.
- **Surrogate** → member of immediate family, the next of kin, or legal guardian. MCL 333.5653(g).
- **Doesn't define address or set a priority of which family members can be surrogates.**
- **No guidance as to when patient is not of "sound mind."**

WAIT! ALERT!

- This is only Implied Authority – nothing *expressly* provides family members with the ability to make decisions.
- *Implication only exists when:*
 - Individual is terminally ill; **AND**
 - Cannot give informed consent; **AND**
 - Has no guardian or patient advocate
 - **THEN** → Substitute Decision-Maker



NOT ON MEDICAID? NOT IN A NURSING HOME?

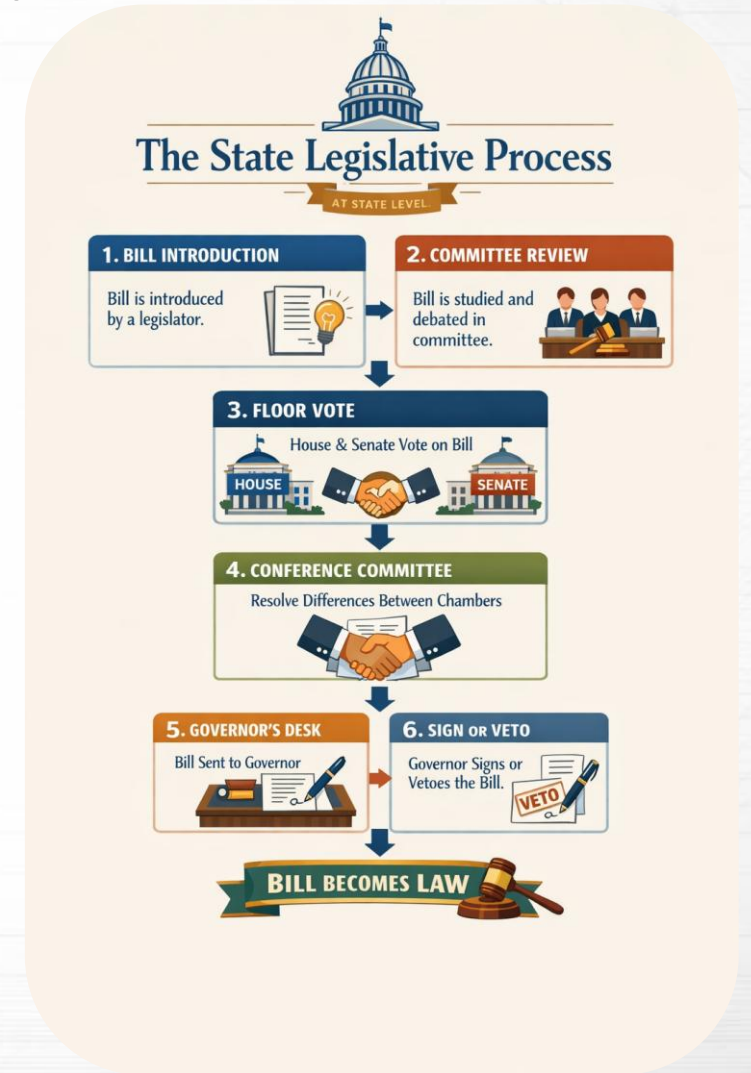


- No statutory authority employees or family members can rely on.
- Generally → status quo to preserve life to greatest extent possible.
- Custom can dictate otherwise in certain settings, but be aware of the potential risks!
 - **Lawsuits, citations from LARA or other regulatory agencies, etc.**
 - **If family agrees → lawsuits are less likely.**

MISSION BRIEFING

STAY TUNED!

- In 2025, **Michigan HB 4418** re-proposed a legal framework for surrogate health care decision-making where a patient is incapacitated and lacks a designated advocate or guardian.
- Similar bill failed to pass in 2024.
- **Key Proposed Provisions:**
 - Defined a "surrogate" as someone authorized to make health care decisions for a patient who is unable to do so and has no available patient advocate or guardian.
 - Established a priority list for surrogate decision-makers, including spouses, adult children, parents, and adult siblings.
 - Allow an adult or emancipated minor to designate a surrogate by informing their attending health professional, with the designation recorded in the patient's medical record.
 - Specify that the surrogate's authority is suspended when the patient regains decision-making capacity.



**"I can do things you cannot, you
can do things I cannot; together
we can do great things."**

– Mother Teresa

**MISSION
POSSIBLE**



