


CONTINUING LEGAL EDUCATION

Why and How Your Living Will & Health Care Directive May Fail You

Thursday, January 13, 2022 | 2:00 pm Eastern

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5 reasons to create a **video** advance directive

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Advance Care Planning and COVID-19

PRACTICE TIP • May 2020


David Godfrey, American Bar Association Commission on Law and Aging



NATIONAL CENTER ON LAW & ELDER RIGHTS

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cases on ADs
cases on **wills**

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Why wills?

7

Video ADs



8

Advertisement for MIDEO (My Informed Decision on Video) showing a smartphone displaying a video and a MIDEO card.

9

Advertisement for My Directives MOBILE featuring a smartphone with a man's face and the text "Make a statement. Make it yours. Make it available."

10

Advertisement for Vimty featuring a woman and an elderly woman, with the text "vimty Life, it's worth living".

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BUT


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More experience
with video **wills**
than video ADs

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decades

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Wills & ADs
analogous

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Used to call ADs
“living **wills**”

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Want wishes **followed**
when cannot speak

- property
- health care

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Roadmap

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5 benefits of video

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Demonstrate Validity

Capacity Voluntary

20

Assure accurate interpretation

21

Assure compliance

Risk management benefit for lawyer

22

Benefit #1

23

Validity

24

Claim that patient
lacked capacity
to complete AD

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Case 1

26



27

Sumner
Redstone



28

VIACOMCBS



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September 3

AD names agent
“companion”

30



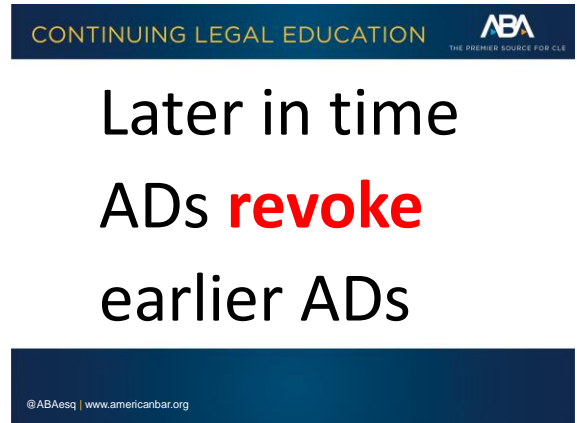
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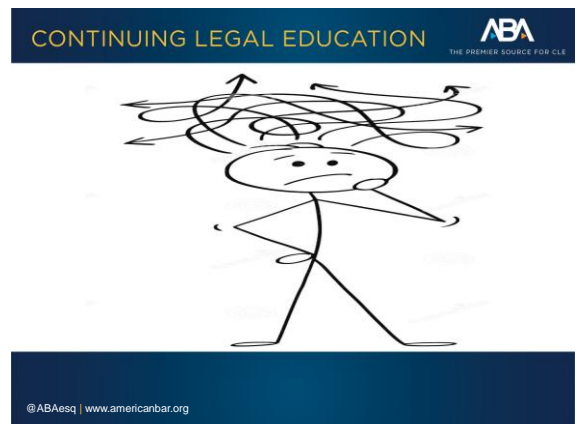
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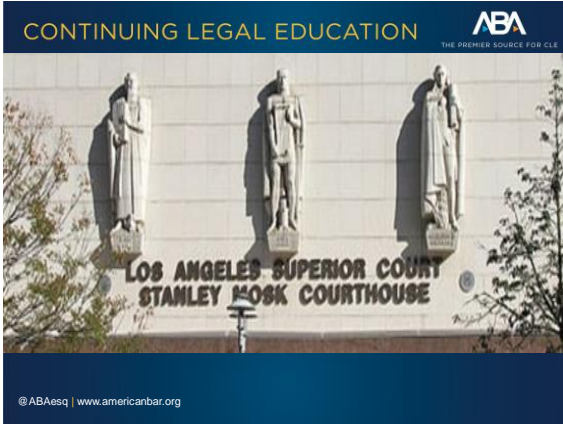
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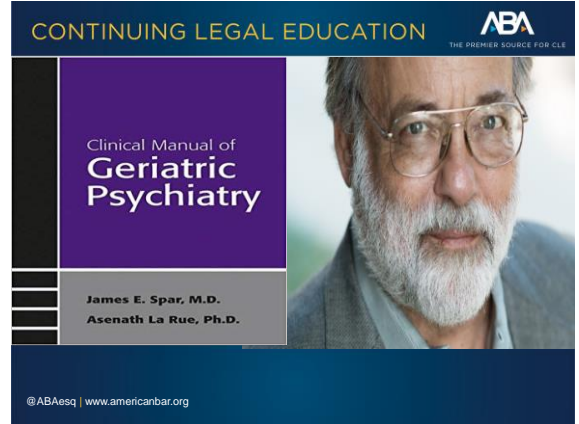
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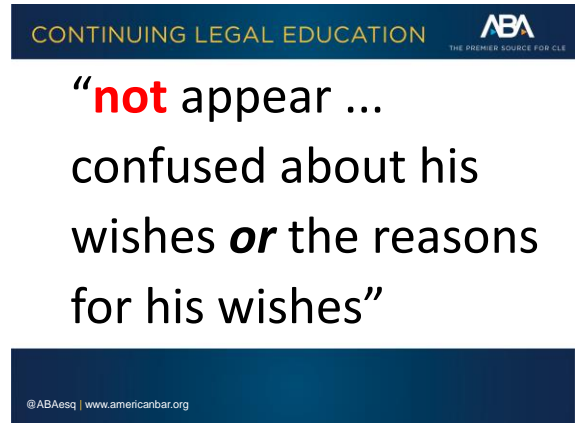
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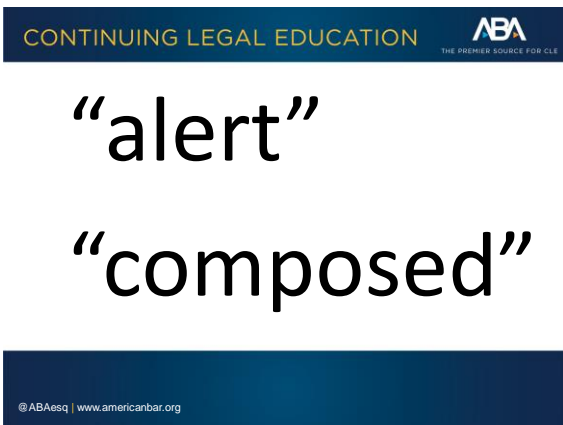
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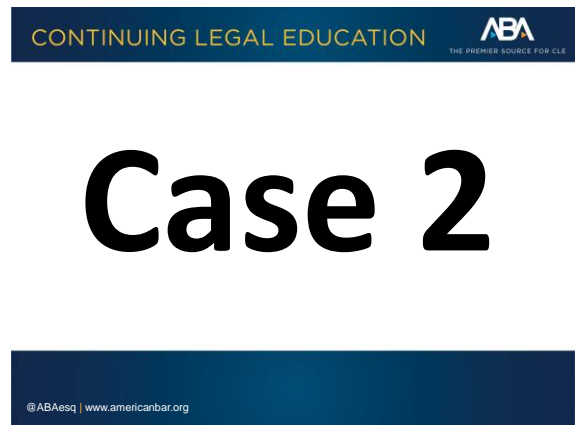
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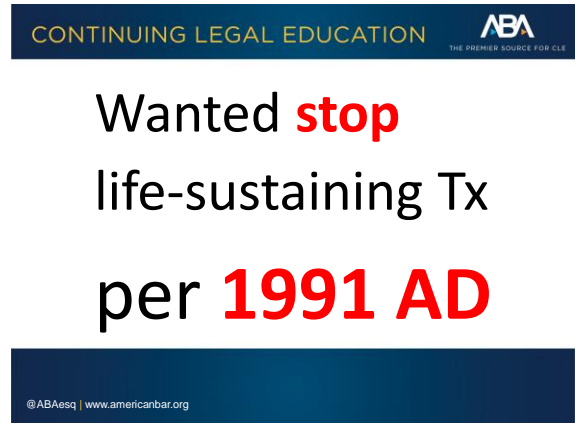
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New AD
“**continue** LST”

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Later in time
ADs **revoke**
earlier ADs

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BUT

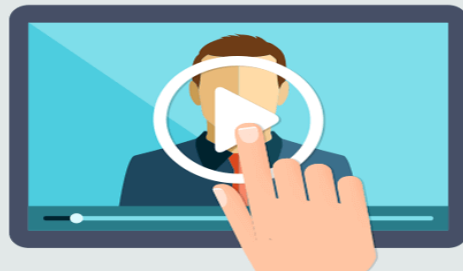
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Is the new
AD **valid**?

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Did Arline have
capacity to
complete?

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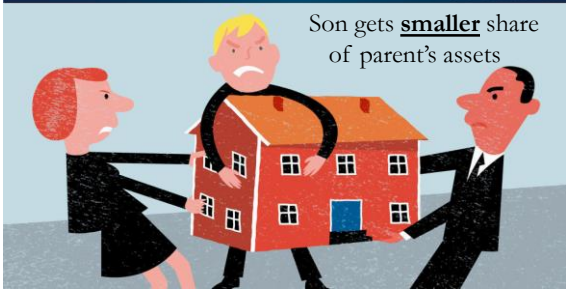
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Case 3

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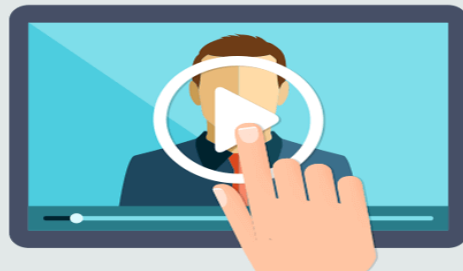
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Tried to
invalidate
will & trust

58

by challenging his
mother's **capacity**

59



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Case 4

61



62



63

“strong, robust
mental **capacity**
and faculties”

64

“clear beyond
peradventure ... knew &
understood perfectly well
what she was signing”

65

Upshot

66

Videos help
prove **capacity**

67

Benefit #2

68

Validity

69

Validity requires not
only capacity but also
voluntariness

70

Someone claims
patient **coerced**
to sign AD

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Case 1

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In re Bryon **2018**

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Testator left estate
to “caregiver”
instead of children

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“**serious** step ...
to disinherit
his children”

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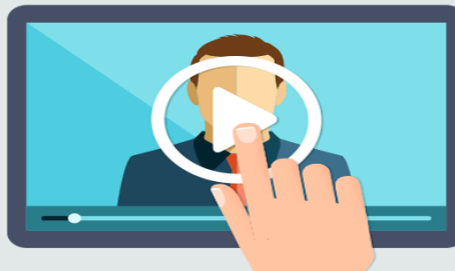
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“**particularly the Video,**
revealed that no one was
forcing Chris to do
anything he did not want”

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Case 2

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Upshot

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Videos
help prove
AD **validity**

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Capacity
Voluntariness

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Videos also help prove AD **meaning**

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Benefit #3

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Meaning

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What did the patient want?

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Did she want it under **these** circumstances?

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TRIAD VIII: Nationwide Multicenter Evaluation to Determine Whether Patient Video Testimonials Can Safely Help Ensure Appropriate Critical Versus End-of-Life Care

Ferdinando L. Mirarchi, DO, FACEP Timothy E. Cooney, MS,* Arvind Venkat, MD, FACEP;† David Wang, MD;‡ Thaddeus M. Pope, JD, PhD;§ Abra L. Fant, MD;|| Stanley A. Terman, PhD, MD,¶*

J Patient Saf 2017;13: 51–61

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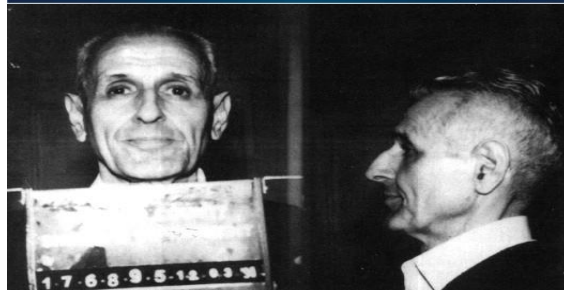


Janet Adkins

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The New York Times
*Doctor Cleared of Murdering
Woman With Suicide Machine*

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Cannot prosecute
murder if **consent**

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Suicide note

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“This is a decision
taken in a normal
state of mind and is
freely considered.”

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“I have Alzheimer’s disease and I **don’t** want it to progress any further. I **don’t** want to put myself or my family through any more of this terrible disease.”

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BUT

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More **unusual**

Want to “see & hear” the patient

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2022

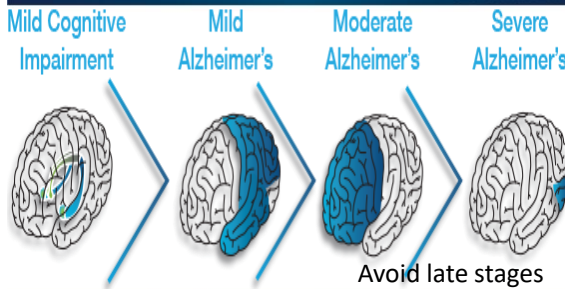
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Dementia directives

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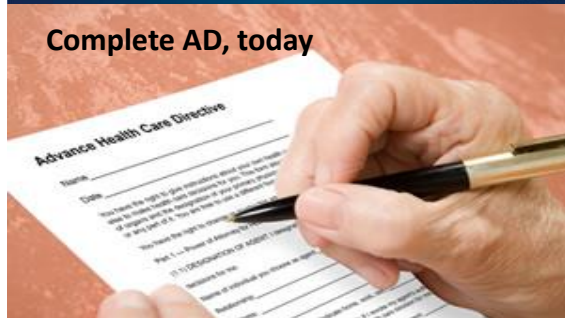
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So...

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At **point** Pt specifies

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Growingly popular

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A Piece of My Mind

588 JAMA, February 28, 1996—Vol 275, No. 8

My Living Will

I, William Arthur Hensel, being of sound mind, desire that my life not be prolonged by extraordinary means if my condition is determined to be terminal and incurable. I am aware and understand that this writing authorizes a physician to withhold or discontinue extraordinary means.

basic of comfort and nutritional care. Even a detailed living will that includes the refusal of all active treatments such as cardiopulmonary resuscitation, antibiotics, artificial nutrition, and hydration may be inadequate in such a situation. I do not want to become a vacant-looking body, reflexively swallowing food and water placed in my mouth, my soul frozen inside while my life

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Last 4 years

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ABOUT THE ADVANCE DIRECTIVE FOR RECEIVING ORAL FOOD AND FLUIDS IN DEMENTIA

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DARTMOUTH 



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Supplemental Advance Directive Dementia

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VEREINIGUNG FÜR
HUMANES STERBEN
DEUTSCHE SCHWEIZ

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NEVADA ADVANCE DIRECTIVE FOR ADULTS WITH DEMENTIA
PAGE 7 OF 10

PART 2. END-OF-LIFE DECISIONS ADDENDUM STATEMENT OF DESIRES.

4. I want to get food and water even if I do not want to take medicine or receive treatment. YES NO

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“did she **really**
mean that”

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Benefit #4

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Assure
compliance

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Not enough for
patient to convey
what she **wanted**

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Pt wants **more**
than caregivers
know her wishes

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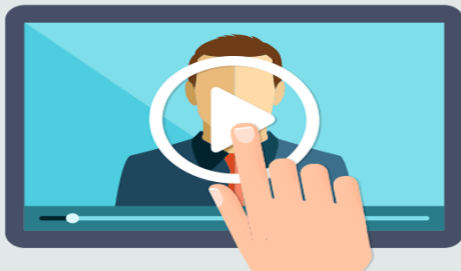


Patient wants
them to **follow**
her wishes

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Video may convey
no new **information**
(wishes, capacity)

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But makes family more willing to **accept**



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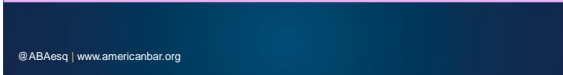
Emotion Facial cues
Inflection Intonation
Body language



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Benefit #5



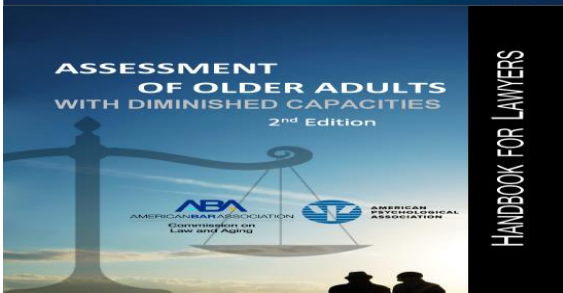
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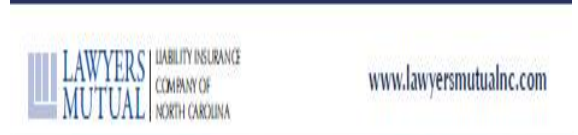
Risk management



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5 reasons to
create a **video**
advance directive

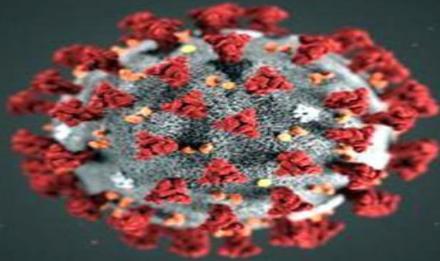
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2 last
points

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Legal status

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Relaxing
formalities

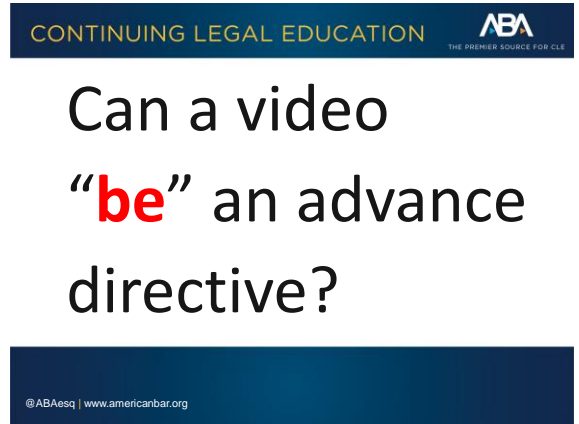
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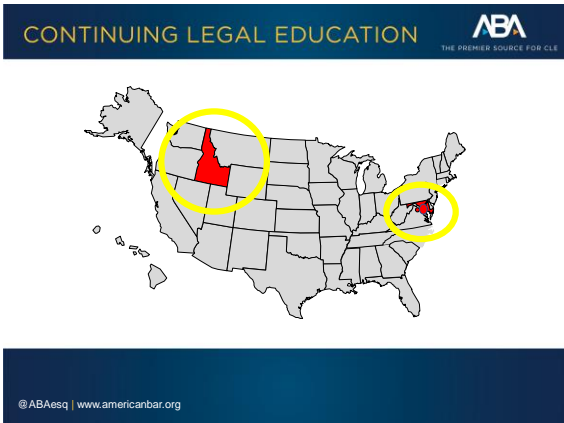
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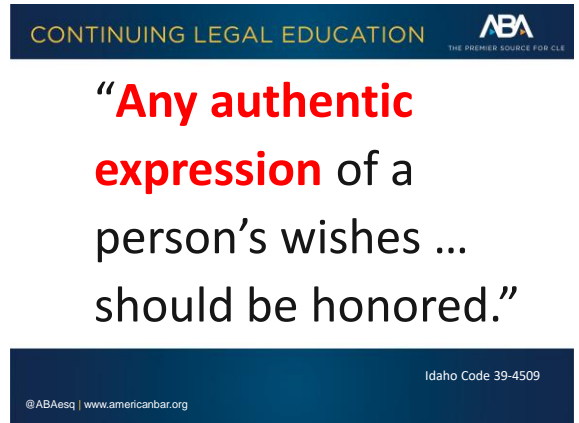
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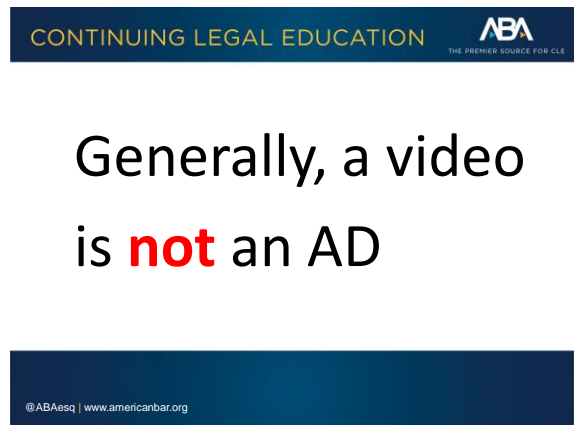
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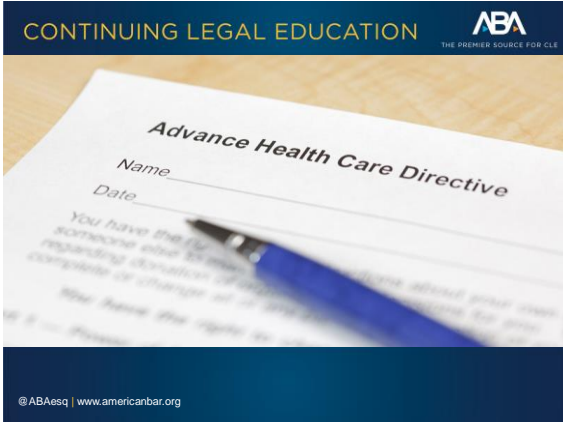
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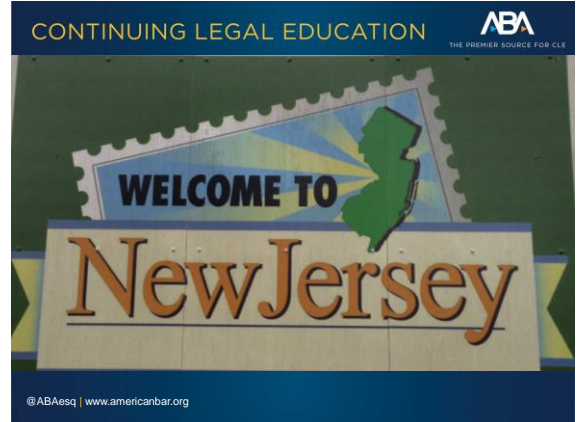
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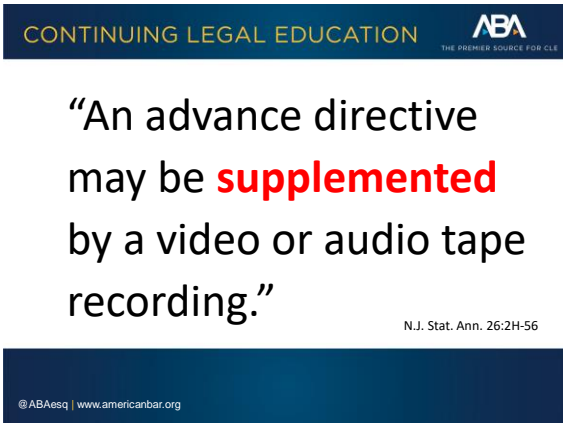
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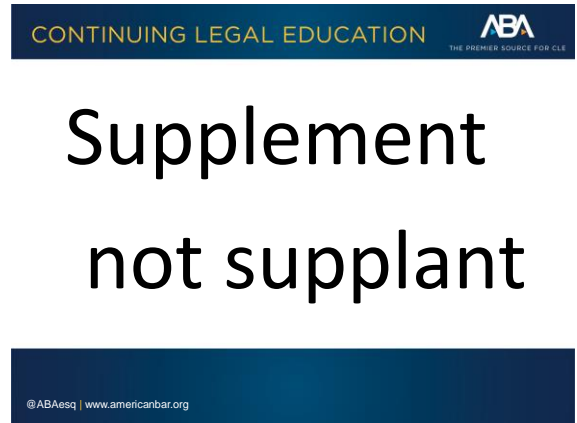
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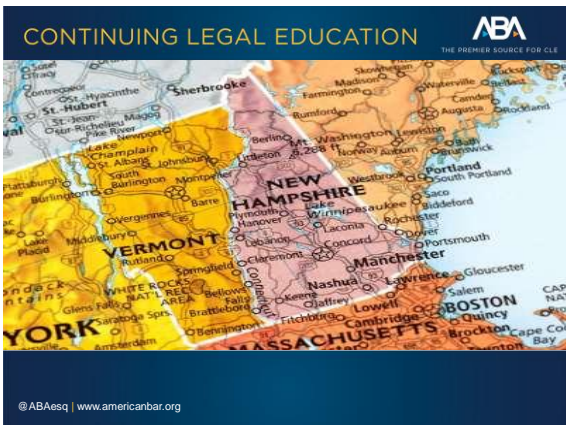
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Video might show
lack capacity

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Case 1

164



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2009 will

167



168

2012 will

169



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Beneficiaries in the
2009 will **challenge**
the 2012 will

171



172

Video used to
invalidate

173

Conclusion

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Value of video

175

Prove validity
Clarify meaning
Assure compliance

176

We **already** use videos in ACP

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Clinician → patient

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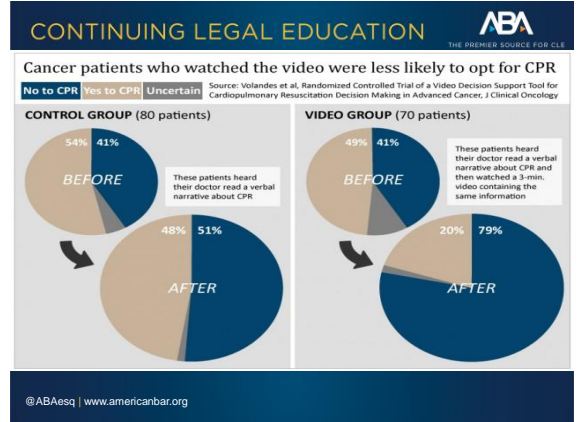
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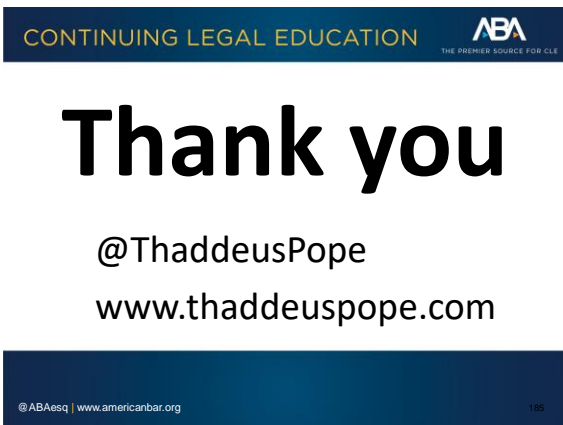
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References

Thaddeus M. Pope, *Video Advance Directives: Growth and Benefits of Audiovisual Recording*, 73 SMU LAW REVIEW 161-175 (2020).