

Advance Directives for Mental Health Care

WHAT YOU MUST KNOW TO COMPLY WITH
THE LAW

The New Jersey Law

- P.L. 2005, c. 233, became effective on March 21, 2006. The legislature found that although advance directives for health care (living wills) are an appropriate vehicle to get proper care in the case where a person is unable to make health care decisions and communicate them because of any serious illness, the issues that affect a person with mental illness warranted enactment of a separate law to communicate to health care providers the decisions that such a person would make in a crisis but is prevented from doing so by their particular serious illness.
- May be called a PAD (Psychiatric Advance Directive) or Mental Health Care Advance Directive (MHCAD)

Special responsibilities of state hospitals

- N.J.A.C. 10:32-1.5 Every state psychiatric facility shall develop policies and procedures that require appropriate clinical staff to:
 - 1. Inform current patients of:
 - i. The availability of advance directives for mental health; and
 - ii. The availability of the State's voluntary registry;

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- 2. Assist patients in executing advance directives for mental health;
 - 3. Make a routine inquiry of each patient admitted and the referring or committing physician or screening service, at the time of admission, or at such other times as are appropriate under the circumstances, concerning the existence and location of an advance directive for mental health care;

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- 4. Provide appropriate informational materials concerning advance directives for mental health care, including standard forms approved by the Division of Mental Health Services, and information about the DMHS Registry, established pursuant to *N.J.A.C. 10:32-2.1*, to all interested patients and their families and mental health care representatives;
 - 5. Assist patients who express an interest in discussing and executing an advance directive for mental health care in doing so, as well as to encourage and enable patients to periodically review their advance directives for mental health care as needed and to consult with an advocate if they wish to do so;

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- 6. Inform mental health care professionals of their responsibility to defer to a patient's mental health care representative or advance directive unless doing so would:
 - i. Violate an accepted standard of mental health care or treatment under the circumstances of the patient's mental health condition, including past responses to requested or proposed treatments;
 - ii. Require the use of a form of care or treatment that is not available to the mental health care professional responsible for the provision of mental health services to the patient;
 - iii. Violate a court order or provision of statutory law; or
 - iv. Endanger the life or health of the patient or another person;

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- 7. Inform staff that a mental health care professional who intentionally fails to act in accordance with the requirements of the Act is subject to discipline for professional misconduct
 - 8. Provide training for staff that includes a forum for discussion and consultation regarding the requirements of the law and regulations for staff and clients, as well as a discussion of the criminal penalties that can be assessed for noncompliance with the Act;

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- 9. Establish procedures that provide for staff consultation with an institutional ethics committee; designate a person to resolve disputes; and provide for referrals to the Attorney General in order to seek resolution by a court of competent jurisdiction in the event of disagreement among the patient, mental health care representative and responsible mental health care professional concerning the patient's decision-making capacity or the appropriate interpretation and application of the provisions of an advance directive for mental health care to the patient's course of treatment;

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- 10. Prohibit any employee from acting as a mental health care representative for a current or former client of the hospital unless that designation is approved by the facility chief executive officer; and
 - 11. Establish procedures for gathering data required by *N.J.A.C. 10:32-1.4*.

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- N.J.A.C. 10:32-1.6
 - A psychiatric facility shall report to the Department, by a written report to the Assistant Commissioner for Mental Health Services, every incident in which an employee has materially failed to comply with the policies required by *N.J.A.C. 10:32-1.5*.
 - Notification of the Assistant Commissioner shall occur no later than five business days after the facility substantiates the event and shall be made in a form and manner prescribed by the Division.

What kind of document constitutes an advance directive?

An advance directive :

- must be appropriately signed (or directed to be signed in the presence of one witness)
- may be supplemented by a video or audio tape recording (but recording is not alone an advance directive)
- must be dated (and may contain an expiration date; if none, it is indefinitely valid)
- must be witnessed by at least one person, two if the first is a cohabitant or relative or heir.

Disallowed witnesses

No witness may be:

- the declarant's designated mental health care representative or
- the current treating professional

If there is only one witness, that person may not be

- a. related or cohabitant or domestic partner of the declarant
- b. currently entitled to any part of the declarant's estate or
- c. operator of the declarant's congregate residence

What can an advance directive provide?

- May contain either a proxy or instructions for treatment or both. If both, the proxy predominates.

Proxies

- An advance directive may name a proxy, called in the law a mental health care representative, who must be a competent adult and may also name alternates and persons with whom the proxy must consult.
- An operator, administrator, or employee of a psychiatric facility or agency in which the declarant is a patient or resident may not serve as a proxy unless related to the declarant.

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- A mental health care professional may be the declarant's proxy so long as the person does not act as the proxy while treating the declarant. The MHCP proxy may not make the decision that the declarant lacks capacity to make a medical decision.

Instructions may include:

- A statement of the declarant's general mental health care philosophy and objectives;
- the declarant's specific wishes regarding the provision, withholding or withdrawal of any form of mental health care;
- or both

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- The declarant's specific wishes regarding the provision, withholding or withdrawal of any form of mental health care may include:
 - a. the identification of mental health care professionals and programs and psychiatric facilities that the declarant would prefer to provide mental health services;
 - b. consent to admission to a psychiatric facility for up to a specified number of days;

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- c. a refusal to accept specific types of mental health treatment, including medications;
 - d. a statement of medications preferred by the declarant for mental health treatment;
 - e. a statement of the preferred means of crisis intervention or other preferences for mental health treatment; and
 - f. additional instructions or information concerning mental health care

Who can make an advance directive?

- Currently competent adults and emancipated minors.
- NOT persons with guardians, although before a guardian is appointed, while the person is still competent, s/he may have executed an advance directive.

When does a *health care* advance directive (living will) take effect?

- When the declarant is rendered unable to make decisions and communicate with a health care provider about their treatment options because of serious illness, injury or permanent loss of mental capacity.

When does a *mental health care* advance directive take effect?

- When the responsible mental health care professional determines that the patient lacks decision-making capacity.

MHCP and RMHCP definitions

- "Mental health care professional" means an individual licensed or certified by the State to provide or administer mental health care in the ordinary course of business or practice of a profession.
- "Responsible mental health care professional" means a person licensed or certified by the State to provide or administer mental health care who is selected by, or assigned to, the patient and has primary responsibility for the care and treatment of the patient.

Duties of Responsible Mental Health Care Professionals

- Each RMHCP must make an affirmative inquiry of the patient and others as appropriate concerning the existence of an advance directive, including consulting the Division's registry or other registries in other states if there is an indication from the client that an advance directive exists there.
- The Division registry is located at Centralized Admissions. Call to see if there is an advance directive.

RMHCPs

- If there is an advance directive, the RMHCP shall document its existence and location in the declarant's record, and/or attach a copy.
- If an RMHCP knows of a revocation, reaffirmation, modification, or suspension of an advance directive, s/he shall document that, too.

- When a declarant has lost capacity and has named a proxy, the RMHCP must discuss with the consumer to the extent possible, the proxy, and any other MHCP involved in the patient's care, the nature, risks, and benefits of any proposed treatment, and must obtain informed consent from the proxy.

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- When a declarant has lost capacity and has not named a proxy, the RMHCP must determine what treatment the declarant has consented to, whether it is within a reasonable standard of care, legal, and does not create a danger to the declarant or another person before treating the declarant.

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- The RMHCP shall determine whether a declarant lacks the capacity to make a particular mental health care decision, and
 - shall inform the declarant and any proxy of this determination and
 - of the way to dispute that determination.

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- If the declarant has chosen a mode of treatment that is not available at or through the treating agency but is available at or through another facility, the RMHCP shall be responsible for transferring the declarant if possible and assuring that the records are transferred in a timely manner; if transfer is not possible, the RMHCP shall determine whether to override the advance directive.

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- Each RMHCP must give consumers, at an appropriate time, the opportunity to execute, modify, or revoke an advance directive.
 - Each RMHCP must promote the patient's capacity for effective participation.

Responsibilities of all MHCPs

- Get a password for the registry if necessary
- Cover as an RMHCP when necessary.
- Cooperate in effecting appropriate transfers and assure that consumers are not abandoned or treated disrespectfully because of their choice of treatment.
- Continually assess the capacity of a declarant whose advance directive has become operative, and if s/he regains capacity offer him or her the opportunity to consent to or reject treatment, with the involvement, unless the consumer objects, of the proxy.

PENALTIES

- There are civil and criminal penalties for deliberate interference with the law.
- Attorney General may deny representation if the deliberate interference negates good faith.
- Professional discipline for licenses.
- Private hospitals can be fined.

FAQS

- Things patients may *want* to know.
- Things you may *need* to know.

Can a proxy admit a declarant as a voluntary?

- A proxy can sign a declarant into treatment only if the responsible mental health care professional determines that the declarant is incapable of making the decision to voluntarily accept inpatient treatment, and if the declarant has explicitly authorized the proxy to consent to the declarant's admission, and if each paragraph of the advance directive that makes that provision is initialed by the declarant at the time the advance directive is executed.

What if a guardian is assigned to the declarant by a court?

- If a different individual has been appointed as the patient's legal guardian, the mental health care representative shall retain legal authority to make mental health care decisions on the patient's behalf, unless the terms of the legal guardian's court appointment or other court decree provide otherwise.

What happens if the directive does not permit treatment, or does not authorize treatment that is recommended by a physician?

- If there is a proxy, that person can decide. If the patient has executed an instruction directive but has not designated a mental health care representative, or if neither the designated mental health care representative or any alternate designee is able or available to serve, the instruction directive shall be legally operative. BUT RMHCP must decide if the instruction is clear and valid.

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- If the instruction directive is, in the exercise of the RMHCP's reasonable judgment, not specific to the patient's mental health condition and the treatment alternatives, the responsible mental health care professional, in consultation with a legally appointed guardian, if any, family member, or other person acting on the patient's behalf, shall exercise reasonable judgment to effectuate the wishes of the patient, giving full weight to the terms, intent and spirit of the instruction directive.

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- If the instruction directive provides clear and unambiguous guidance under the circumstances, it shall be honored in accordance with its specific terms by a legally appointed guardian, if any, family member, mental health care professional and psychiatric facility involved with the patient's mental health care, and any other person acting on the patient's behalf, unless.....

Court Order

- There is a court order that contradicts the directive (especially a commitment order if the declarant has specifically said not to hospitalize him or her).
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Clinical Override

- If the responsible mental health care professional determines that compliance with the directive or the decision of the proxy would:
 - (1) violate the accepted standard of mental health care or treatment under the circumstances of the patient's mental health condition; or
 - (2) require the use of a form of care or treatment that is not available to the mental health care professional responsible for the provision of mental health services to the patient; or
 - (3) violate a court order or provision of statutory law; or
 - (4) endanger the life or health of the patient or another person.

But if there is a commitment order...

- And the declarant is hospitalized involuntarily, the advance directive still applies, so the commitment is valid as an overriding court order, but the provisions of the Advance Directive (other than a refusal of hospitalization) survive.

How can a declarant change or revoke a MHAD/PAD

- The declarant may state that s/he wishes to be able to modify, revoke, or suspend the advance directive.
- Divorce or legal separation or termination of a domestic partnership will revoke the designation of a spouse or domestic partner unless otherwise stated in the advance directive.

Ulysses Clause

- A declarant can make it impossible for him or her to change the advance directive under certain circumstances, for example, if s/he has been found committable or is taken to a screening service.

Revocation/modification

- The declarant may modify, revoke or suspend the advance directive, unless s/he has made those actions unavailable in the original document, by the following means:
 - (a) notification, orally or in writing, to the mental health care representative or mental health care professional, or other reliable witness, or by any other act evidencing an intent to revoke the document; or
 - (b) execution of a valid (witnessed, dated, etc) subsequent directive.

But if an inpatient wants to change a PAD, rules are different

- An **inpatient** in a psychiatric facility (regardless of commitment standard) may modify, revoke or suspend an advance directive for mental health care, including a proxy directive or an instruction directive, or both, by any of the above means **unless** a responsible mental health professional who is not the patient's mental health care representative determines that the patient lacks decision-making capacity to make the decision to modify, revoke or suspend the advance directive.

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- This determination must be made in writing, include the professional's opinion concerning the nature, cause, extent and probable duration of the patient's incapacity, and be made part of the patient's medical records; it must be confirmed by one or more other mental health care professionals; and the responsible mental health care professional must inform the patient and his or her proxy of the determination and the right to contest the determination.

WRAPs

- A WRAP can be converted to a PAD/MHAD.
- Needs signature, date, and witness(es)