



*In Collaboration with the Department of Children and Families
Substance Abuse and Mental Health Program Office of Circuit 17*



Mental Health Advance Directives

Common Misconceptions about Mental Health Advance Directives

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Common Misconceptions about Mental Health Advance Directives

Advance Directives Are the Same as a Living Will

Although the **Living Will** is *one type* of an advance directive, they are not the same. The **Living Will** only addresses what is referred to as ‘end of life’ decisions. It indicates a person’s wishes regarding interventions that prolong life if a terminal illness/condition or coma is present. A **Living Will** does not address treatment choices when a person cannot say what he wants and a terminal condition is *not* present. Also, **Living Wills** are rarely clear-cut and often need interpretation.

The **Advance (Medical) Directive** is more thorough. It outlines healthcare choices and gives *directives in advance* with regard to potential health crises in the future. For example, if someone has a mental illness and feels there might be the need for emergency psychiatric hospitalization at some point, the person can write out his preferences for that situation. This is called an **Advance Directive for Mental Health**. However, short of having a crystal ball, it is impossible to predict all possible health care problems, treatment decisions and other variables a person may face in the future.

Advance Directives Are Not Legal in Every State

Every state recognizes both the Durable Power of Attorney for Health Care and the Living Will-type advance directives. Increasingly, states are moving towards accepting the more inclusive combined advance directives, but they do differ significantly in this regard. From state to state there is variability in the terminology used, the scope of decision-making that can be addressed (both in the advance directive itself and by the appointed health care agent, or proxy), and the requirements for making an advance directive. This variability leads to some confusion about the “portability” of advance directives across state lines.

Generally, states recognize advance directives if they meet the legal requirements of the state in which they were made or the state in which the treatment is being provided. Some states are silent on the issue and, in not explicitly precluding their recognition, can be seen to *imply* the acceptance of advance directives made in another state. If there is doubt, the rules governing the making of advance directives in the state where treatment is being given would then apply and, therefore, the advance directive may not be recognized. For example, Maryland does not require that an advance directive be notarized. In a state requiring notarization, the advance directive may not be recognized. In any event, health care providers should recognize the advance directive as clear and important evidence of the patient’s wishes, even if it is not *legally* controlling.

Telling My Doctor What I Want Is No Longer Enough; I Have to Write Everything Down

This is not the case!! You do not have to make out an advance directive for your provider to be accountable in your treatment. Although it is a good idea to have a written advance directive, *it is not meant to replace* oral communication with your health care provider! As a matter of fact, several states, including Maryland, recognize oral instructions as formal advance directives if they are properly witnessed. Finally, one of the most important benefits of creating an advance directive is that the process *promotes* communication between you and your health care provider, thereby clarifying your thoughts on treatment choices and personal goals for your provider!

I Give Up Decision-Making Control When I Name a Health Care Agent

As long as a person remains capable of making health care decisions, he must be the one to give consent to treatment. A provider who ignores a *competent* individual's objections, and provides treatment based on the health care agent's authorization, is inviting legal charges of battery. In most states, advance directives become effective *only* when the person lacks the capacity to make health care decisions. Also, you may revoke your advance directive, which protects you from potential abuses of this decision-making privilege by a health care agent. Finally, the best way for you to maintain decision making control, and provide further protection from potential abuses, is to carefully consider whom you entrust with this responsibility. Then discuss, at length and in detail, your values, morals and thoughts about various treatment options with that person. It is important to know that naming a health care agent provides *more control* in health care decision-making when you are incapacitated. Consider who makes your health care decisions if you are found to lack the capacity to make your own decisions and have no identified health care agent and your advance directive needs interpreting, doesn't address a situation or you simply don't have one. Most states have a way of identifying a default 'surrogate decision-maker', usually based on relationship. States without this process depend on the family to jointly agree on, and consent to, treatment. Disagreement amongst family members can result in a hospital physician or ethics board becoming your default decision-maker. So, without naming a health care agent, the person who ends up being your decision-maker may actually be the last person you would have entrusted with this responsibility!

I Need to Get a Lawyer and Use Specific State Forms to Make an Advance Directive

First, many states have forms for appointing a health care agent and creating an advance directive, but in most of these states the forms are optional. In a small number of states the forms must be 'substantially followed' or some specific language must be used. In all cases, changes or additions to forms are permissible, and actually advisable, to personalize the form to reflect individual values and wishes.

Next, while a lawyer can be a valuable resource, one is *not* necessary to create an advance directive. A lawyer can help you with the *format* of your advance directive. As far as the *content* of your Advance directive, there may be more appropriate resources available to you.

Information from family, friends, and mental health professionals that know you can help you to fill out your treatment options. However, remember, you have the final say so as to what goes on your advance directive form and the influences of others, as beneficial as they may seem, may not be necessarily what you truly want for your treatment options. You taking ownership of the directive is extremely important, that it is your decision, and that it meets up to your standards.

Health Care Providers Are Not Legally Obligated to Recognize My Advance Directive

Legally, providers are required to recognize your Advance Directive. However, as with any law, reality can cloud the issue... this is why we have lawyers, judges, and courts. *Realistically*, there are a few situations in which providers may not recognize a legally executed advance directive. These include:

- If the doctor or facility is unaware of the existence of an advance directive. Although the Patient Self-Determination Act of 1991, *42 U.S.C. §§1395cc(a)(1)(Q), 1395mm(c)(8), 1395cc(f), 1396a(a)(57), (58), 1396a(w)*, requires hospitals, nursing homes and home health agencies to inquire about your advance directive, and to document it if you have one, the document frequently doesn't make it into the medical record. This is why it is very important for you to give copies of your Advance Directive to your doctor(s), other health care providers involved in your treatment, your appointed health care agent(s), family members, and friends... the more people who have your Advance Directive, the more likely it is to "show up" in your record and be followed. Remember to keep a record of who has a copy of your Advance Directive, so you can provide them with copies of future amendments!
- If your Advance Directive is vague and open to interpretation. Appointing a Health Care Agent addresses this situation by giving someone the authority to provide this interpretation.
- If a provider or facility objects to your advance directive on a matter of conscience. Most states permit this, and, in this case, the provider must inform the individual and assist with transferring him to a provider who will honor the advance directive. This is the argument that will be used if a provider is hesitant to recognize an Advance Directive for Mental Health, a situation which is inevitable until this form of advance directive is more widely utilized and accepted. A Health Care Agent can prove invaluable in providing advocacy in this situation.
- In situations where you are being provided treatment by emergency personnel and they are unaware of the existence of and/or provisions in your Advance Directive. This can be partially addressed by carrying a wallet card with pertinent information or wearing a medic-alert bracelet.
- If, in your Advance Directive, you refuse treatment which, based on circumstances at the time, can be legally given without your consent. For instance, refusing inpatient admission to a psychiatric facility if you meet the requirements for an involuntary admission.

It is not the purpose of this paper to misrepresent Advance Directives as the solution to all problems with treatment planning, adherence issues and crisis planning. Advance Directives, although legal in most states, will not always be followed (there are always 'legal loopholes' if one looks closely enough). Additionally, the use of Advance Directives for Mental Health is a relatively new application of this tool and, therefore, its' recognition as valid may take time... and a court case, or two. Also, laws are very clear that you can *refuse* treatments in an advance directive, but the recognition of stated *preferences* lies in a 'gray zone', making the enforceability of preferences more difficult. Taking these things into consideration, you might reasonably ask, "Why go through the time and effort of making an advance directive?" The answer is that the process of executing an advance directive actively involves you in your treatment planning... it gives you a voice. Making your voice heard, and your wishes known, is a powerful and important step to take towards recovery. Advance Directives for Mental Health provide you with a vehicle by which to do this.

1. Discuss with the consumer his/her various medical and mental health issues which will need to be addressed in the ADMH, including but not limited to:
 - History and potential course of current medical/psychiatric conditions;
 - Potential complications of those conditions;
 - Possible treatment options for those situations (medications, somatic therapies, psychotherapy, etc.);
 - Potential venues within which treatment options can be rendered;
 - Any services which may be helpful in those situations (i.e., psychosocial programs, residential placement, etc.)
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2. Discuss with the consumer his/her preferences regarding:
 - Treatment choices, therapeutic programs/facilities and location, and services;
 - Preferences on inclusion in studies;
 - Any "end of life" directions, which can include not only life-sustaining measures, but also issues such as organ donation;
 - Other peripherally related preferences, such as temporary dependant care, visitation, release of information, etc.
3. Find out if certain interventions have worked well or, alternatively, have been unsuccessful or detrimental in the past and include this information.
4. Discuss any discomfort you may have in acting upon any treatment choices the consumer makes and to whom (provider) you might transfer his/her care in that situation.
5. Discuss with the consumer how s/he feels about appointing a Health Care Agent and the pros and cons of doing so.
6. This is a perfect opportunity to provide for consistent coordination of care for the consumer with multiple providers. Involve the other providers in the

consumer's efforts to execute his/her ADMH. Identify one of the providers to take responsibility for ongoing case-management and coordination.

7. Assist with periodic review of the consumer's ADMH to assure it continues to reflect his/her wishes as treatment options evolve.
8. Remember, these are things which would be discussed and actions which would be taken with the consumer whether or not s/he is executing an ADMH. The process of executing an ADMH merely provides a tool to facilitate these discussions and serves to focus the effort.