

## **Frequently Asked Questions about Mental Health Advance Directives for Providers.**

### **A. What is a Mental Health Advance Directive?**

A Mental Health Advanced Directive is a document that allows a person to make preferences regarding mental health treatment known in the event that the person is incapacitated by his/her mental illness. In effect, the person is giving or withholding consent to treatment in advance of when treatment is needed. This allows a person to make more informed decisions and to communicate his/her wishes more clearly. A new law was passed in Pennsylvania, effective January 28, 2005, that makes it possible for a person to make and enforce a mental health advance directive. Pennsylvania law allows for three types of mental health care advance directive: a declaration, a power of attorney, or a combination of both.

### **B. What is a Declaration?**

A declaration, like the directive that forms the basis for a “living will,” contains instructions to health care providers about the details of treatment in the event that an individual becomes incompetent or unable to communicate his/her wishes. They usually deal with specific situations and do not allow much flexibility for changes that come up after the document is written, such as a new type of medical crisis, new kinds of medication, or different treatment options.

### **C. What is a Mental Health Power of Attorney?**

A directive that is a mental health power of attorney allows a person to designate someone else, called an agent, to make treatment decisions on his/her behalf in the event of a mental health crisis. The advantage of this type of directive is that it provides flexibility to deal with the situation as it occurs rather than attempting to anticipate every possible scenario. When using this type of directive it is very important to choose someone the person trusts as an agent. Neither an attending doctor or his/her employee, or an owner, operator, or employee of a residential facility where the person is receiving care may serve as an agent.

### **D. What is a Combined Mental Health Declaration and Power of Attorney?**

Pennsylvania's statute also allows a person to make a combined mental health declaration and power of attorney. This advance directive option allows a person to make definite decisions about some things, but also allows the person to give certain powers to an agent. The person designates the decisions that he/she wants the agent to be able to make, and can limit the agent's power as little or as much as the person is comfortable with. This makes an advance directive more flexible in dealing with future situations, such as new treatment options, that the person would have no way of knowing about now.

#### **E. What makes a Mental Health Care Advance Directive valid?**

There is no specific form that must be used, but the document must meet the following requirements:

1. The person making the advance directive must be at least 18 years of age or an emancipated minor;
2. The person must not have been deemed incapacitated, such as by a guardianship proceeding or an involuntary commitment;
3. The document must be signed, witnessed and dated. Witnesses must be at least 18 years old. If the person cannot physically sign the document themselves, another person may sign on behalf of the person, but the person signing may not also be a witness. Neither a provider or an employee of the provider may serve as an agent unless they are also a blood relative.

4. The document must express preferences regarding the initiation, continuation, or refusal of mental health treatment. Other instructions may include, but are not limited to, designating an agent, nominating a guardian, temporary custody of children or pets, family notification, or dietary or religious preferences.

The advance directive is valid for two years from the date of execution unless one of the following happens first:

1. the person revokes the entire advance directive, or
2. the person makes a new advance directive.

If the person does not have capacity to make mental health care decisions at the time the advance directive will expire, the advance directive remains in force until the person regains capacity.

#### **F. What is Capacity?**

In this context, capacity is the basic ability to understand a diagnosis and to understand the significant risks, benefits, and alternative treatments of mental health care. It also includes the ability to understand the consequences of not receiving treatment.

#### **G. Does the person have to provide proof of capacity?**

No. Unless the person was adjudicated incapacitated, had a guardian or was under an involuntary commitment at the time of the writing, the person is presumed to have had capacity when the advance directive was created.

**I. Who will determine capacity to make mental health care decisions?**

Incapacity will be determined by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician, or mental health treatment professional. Whenever possible, one of the decision makers will be one of the person's actual treating professionals.

**J. What if a court appoints a guardian after an agent has been appointed to make mental health care decisions?**

The person may nominate a guardian of his/her person in the advance directive. The court will appoint a guardian in accordance with the person's most recent nomination except for good cause or disqualification. Ideally, the agent and the person nominated to be guardian would be the same person. However, the person may want one person to make mental health care decisions, and someone else to make other decisions. Or, the person may not wish to nominate a guardian in the advance directive. If the court-appointed guardian and the agent turn out to be different people, the court will give preference to allowing the mental health care agent to continue making mental health care decisions as provided in the advance directive, unless specified otherwise in the directive. If, after thorough examination, the court decides to grant the powers given to the agent to the guardian, the guardian would still be bound by the same obligations that the agent would have been.

**K. Can a person amend their Mental Health Care Advance Directive?**

Yes. A person may make changes to a mental health care advance directive in writing at any time, as long as he/she has capacity to make mental health care decisions. Changes must be executed and witnessed in the same way as the original document.

If a person is currently under an involuntary commitment and wishes to make changes, the person must have an evaluation for capacity to make mental health care decisions. The determination of capacity must be made by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician, or mental health treatment professional. Whenever possible, one of the decision makers will be one of the person's actual treating professionals. If the person is found to have capacity, the person may make changes that are executed and witnessed in the same way the original document was.

#### **L. Can a person revoke his/her Mental Health Advance Directive?**

Yes. A person may revoke one or more instructions or the whole directive at any time, as long as he/she has capacity to make mental health care decisions. The revocation may be made either orally or in writing. It is effective as soon as the provider is notified. An advance directive will automatically terminate after two years from the date of execution unless the person does not have capacity to make mental health care decisions at the time it would expire. If the person does not have capacity to make mental health care decisions at the time it would expire, it will stay in force until he/she regains capacity.

If a person is currently under an involuntary commitment and wishes to revoke the advance directive, the person must have an evaluation for capacity to make mental health care

decisions. The determination of capacity must be made by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician, or mental health treatment professional. Whenever possible, one of the decision makers will be one of the person's actual treating professionals. If the person is found to have capacity, the person may revoke all or some of the provisions of the advance directive.

#### **M. What are my responsibilities as a provider?**

You must do the following things:

1. Inquire whether or not a person has a mental health care advance directive.
2. Inform people who are being discharged from treatment about mental health care advance directives as part of discharge planning.
3. You may not choose whether to accept someone as a patient based solely on the existence or absence of a mental health care advance directive.
4. Upon notification of the existence of an advance directive, you must place a copy in the person's mental health care record.
5. You must make any revocation or amendments part of the person's mental health care record.
6. You must comply with the instructions unless the instructions are contrary to accepted clinical practice and medical standards or because medical treatment is unavailable, or if the policies of the provider preclude compliance.

7. If you are the mental health care provider that makes a determination regarding capacity to mental health care decisions, you must make that determination part of the person's mental health record.

**N. What if I can't comply with the instructions in the mental health care advance directive?**

As soon as the possibility of non-compliance becomes apparent, you must inform the person, agent, guardian, and/or any other legal representative. It may be possible to discuss and resolve the issue with the person or agent. If compliance is still not possible, you must make every reasonable effort to transfer the person to another mental health care provider who will comply with the instructions. While the transfer is pending, you must treat the patient in a way consistent with his/her advance directive. If all efforts to transfer fail, you may discharge the patient.

Remember that just because consent is provided in advance to a particular medication or treatment, that you will not prescribe that treatment or drug unless it is appropriate treatment at the time of the person's illness. Consent only means that consent is given to treatment if it is a suitable choice *at that time* within the standards of medical care. You will also have to consider if a particular treatment option is covered by the person's insurance. If, for example, the HMO does not cover a certain drug on its formulary, you may prescribe a drug that is similar, but is on the HMO formulary (unless the person has specifically withheld consent to that drug).

**O. What if compliance with the instructions could cause irreparable harm or death?**

You may file a petition with the court seeking a determination that following the instructions may cause irreparable harm or death. The court may invalidate some or all of the provisions of the mental health advance directive and issue an appropriate order within 72 hours from the filing of the petition. Even if the court invalidates some of the provisions of the directive, the remaining provisions will remain in effect.

**P. What if there is a conflict with instructions in another power of attorney or declaration?**

If there is a conflict, the provisions of the document latest in date of execution must be followed.

**Q. How does a Mental Health Advance Directive affect commitment under the Mental health Procedures Act?**

The voluntary and involuntary commitment provisions of the Mental Health Procedures Act are not affected by having a mental health care advance directive. What is affected is the provision of treatment after a person is committed.

**R. What information can I disclose to a mental health care agent?**

Unless specified otherwise in the advance directive, a mental health care agent has the same rights and limitations as the person to request, examine, copy, and consent or refuse to consent to the disclosure of mental health care information.

**Appendix A      sample form for declaration**

**Appendix B      sample form for power of attorney**

**Appendix C      sample form for combined declaration and  
power of attorney**

Prepared by: Disability Rights Network of Pennsylvania, 2007. All Rights Reserved.