

# **ADVANCE DIRECTIVE FOR MENTAL HEALTH CARE FREQUENTLY ASKED QUESTIONS**

## **What is a mental health advance directive?**

A mental health advance directive is a legal document that you can prepare now to express your choices about mental health treatment in the event that you are found incompetent to make such treatment decisions in the future. You may appoint someone to make health care decisions for you and/or you may provide specific directions regarding your mental health treatment.

## **What are the advantages of a mental health advance directive?**

- An advance directive empowers you to make your treatment preferences known.
- An advance directive will improve communication between you and your physician. It can prevent clashes with professionals over treatment and may prevent forced treatment.

## **Do I need to prove that I was legally competent at the time I created my advance directive?**

**No.** Under Maryland law, you are presumed competent to make an advance directive. Anyone challenging its validity in the future has the burden to prove in court that you were not competent at the time that you signed the advance directive. To protect yourself against any future claim that you were not competent when you signed your advance directive, you *may* want to ask a mental health professional to conduct a mental status exam and record in your medical file that you are competent to make treatment decisions at this time. Ask for a signed copy of this note, and attach it to your advance directive.

## **Are there restrictions on who can create an advance directive?**

To create an advance directive, you must be legally competent. This means that you must be at least 18 years old and have the capacity to make medical decisions, which means that two physicians have *not* certified that you are incapable of making an informed decision. For example, individuals who have a guardian over their person are not permitted to create advance directives.

## **Will my advance directive be legally binding under all circumstances?**

While advance directives for health care have been around a long time, their use for mental health care is a new area of law. It is not yet clear under what circumstances a court will rule that your mental health advance directive does not control. In general, a mental health professional does not have to provide treatment that he or she reasonably believes is contrary to sound medical practice. In addition, if you meet the legal criteria for involuntary hospitalizations, involuntary medication or restraint or seclusion, the hospital can override any specific objection to such measures in your advance directive. However, studies show that having an advance directive increases the likelihood that doctors, hospitals and judges will honor the choices that you make.

If you have a specific legal question regarding your mental health advance directive, you may contact the Maryland Disability Law Center toll-free at 1-800-233-7201, or TTY 410-727-6387.

## **Will my advance directive be honored in another state?**

State laws on mental health advance directives vary. Some provisions permitted under Maryland law may not be permitted in another state. In addition, a few states have no law regarding mental health advance directives so it is not clear whether they will be recognized by treating professionals in that state.

If you are planning a trip to another state, you may want to contact the Protection and Advocacy System (P&A) for that particular state to discuss which provisions in your advance directive, if any, are contrary to that state's law. You may contact the National Disability Rights Network at 202-408-9514; TTY 202-408-9521; or [info@ndrn.org](mailto:info@ndrn.org) for the number of the P&A in the state that you are planning to visit.

## **Am I required to appoint a health care agent?**

**No.** If you do not want a health care agent to act on your behalf should you become incompetent to make treatment decisions, do NOT fill out Section II, entitled "Appointment of Health Care Agent." You should be aware, however, that studies show that health care providers are much more likely to honor an advance directive when an agent has been appointed. It is therefore to your benefit to have someone that you trust advocate on your behalf during times when you are not competent to make treatment decisions.

If you do choose to appoint a health care agent, you can direct your agent to present only the choices that you have expressed in your advance directive. You can also authorize your agent to make other decisions about your care that are not in your directive. Or, you can appoint an agent without giving *any* written instructions regarding your mental health

treatment, but if you do this, you should clearly explain to your agent what your wishes are so that he or she can advocate effectively on your behalf.

### **When will my advance directive take effect?**

Your advance directive becomes effective when two physicians document that you are *incapable of making an informed decision*. This means that you are unable to understand the consequences or side effects of treatment and are not able to weigh the risks against the benefits of treatment when deciding whether or not to take medication or other treatment. Your inability to understand and weigh the risks and benefits of treatment prevents you from consenting to or refusing treatment.

### **How will my health care agent make decisions about my medical care?**

Your health care agent is required to make health care decisions for you based on *your* wishes, whether you express such wishes in your advance directive, in any other written document, or verbally. If you have not made your wishes known, your agent must make the decision that he or she believes that you would have made if you were competent to do so. If the agent cannot reasonably determine what your decision would have been, he or she must make the decision for you in accordance with your “best interest.” Best interest generally means that the benefits resulting from the treatment outweigh the risks, taking into account various factors, including the likely effectiveness of the treatment, any pain or discomfort it may cause, and whether the treatment is contrary to your religious beliefs and basic values.

### **Who should have copies of my advance directive?**

Your treating professionals and your agent---if you appoint one---and any alternative agents you name, should have a copy of your advance directive. You should also consider providing a copy to your family and/or close friends and to the hospital or crisis program where you may be taken in an emergency. The more you discuss your advance directive with the various people involved in your mental health care, including your psychiatrist, therapist, case manager, etc., the more likely that these individuals will honor your choices in the future. If you make changes to your advance directive, make sure to let everyone who has a copy know. If you travel, be sure to take a copy with you. Keep your original in an easily accessible place.

You should consider keeping a note in your wallet, along with your insurance or medical assistance card, advising physicians and others that you have an advance directive, where the document is located and the contact information for your health care agent, if you have appointed one.

## **May I revoke my advance directive?**

**Yes.** You may revoke your advance directive by physically destroying it (and any copies), by signing and dating a new advance directive, or by verbally stating that you revoke it. Revoking your advance directive can include removing or replacing your health care agent. Be sure to tell your health care agent, if you have appointed one, your treatment providers and your family and/or friends if you revoke your advance directive.

Some individuals may prefer to have their advance directive enforced during a future period of incapacity, despite their objection at that time. You may choose to specifically select this option in your advance directive. However, because Maryland law states that an advance directive may be revoked *at any time*, it is not clear whether such a provision would be legally enforceable.