

CHAPTER X: ADVANCE DIRECTIVES

Disclaimer: The information contained in this chapter is not intended to be used as legal advice. Please refer to the most current specific state statutes and your own legal counsel when warranted. Some statutes may be referred to throughout this chapter.

LEGAL REQUIREMENTS

Federal and state laws require health care providers, including hospitals, long term care facilities, and home health agencies, to maintain written policies and procedures regarding patients' rights to make decisions concerning their care or to designate another person to make health care decisions for them. Pertinent laws include: (See Title 18-A, §5-801 to §5-817)

- Federal: Omnibus Budget Reconciliation Act of 1990
- Federal: Patient Self Determination Act of 1990
- State: Uniform Health-care Decisions Act of 1995
- State: Medical Treatment of Psychotic Disorders 1993

ADVANCE DIRECTIVE

The Uniform Health-care Decisions Act of 1995 defines an advance directive as "an individual instruction from, or a power of attorney for health care by, an individual with capacity"--i.e., an individual who is mentally competent. An individual is assumed to have capacity unless determined otherwise by the individual's primary physician or by the court.

An advance directive may include:

- Directions concerning the types of care the individual may want or not want;
- Designation of another person to make health care decisions for the individual (also called a durable healthcare power of attorney);
- Instructions concerning organ donation; and
- Designation of a specific physician as the individual's primary physician.

MHA PACKET OF INFORMATION

The Maine Hospital Association's Advance Directives Task Force has developed a patient information packet, "Taking Charge of Your Health Care," which includes advance directive forms which reflect the 1995 changes in state and federal law. The packet is used by hospitals, long term care facilities, physicians, home health agencies, state agencies, and attorneys. For a full-size copy of the packet, contact:

Maine Hospital Association
33 Fuller Road
Augusta, ME 04330
207-622-4794

SURROGATES

When a patient who does not have an advance directive is in a terminal condition or persistent vegetative state and is unable to make or communicate health care decisions, a surrogate--generally a member of the patient's family--may make the decision as to withholding or withdrawing life-sustaining treatment. The following persons may act as surrogate, in descending order of priority:

- Spouse (unless legally separated)
- Adult child
- Parent
- Adult brother or sister
- Adult grandchild
- Adult niece or nephew
- Adult aunt or uncle
- Nearest other adult relative by blood or adoption

If none of the above are available, a non-relative may serve as surrogate, provided that he or she has "exhibited special concern for the patient" and is "familiar with the patient's personal values."

When making the decision to withhold or withdraw life support, a surrogate is required to act in accordance with the patient's wishes, if known, or in the patient's best interest and in good faith. A competent patient has the right at any time to disqualify any person, including a family member, from acting as the patient's surrogate.

REVOCATION

A competent individual may revoke an advance directive at any time and in any manner, except that designation of an agent may be revoked only in writing or by personally informing the supervising health-care provider. Any health care provider, agent, guardian, or surrogate who is informed by the patient that the advance directive has been revoked must communicate that fact to the supervising health care provider and to any health care facility in which the patient is receiving care.

GUARDIAN

A court order is required for a patient's guardian to revoke an advance directive made by the patient. The guardian is required to comply with any wishes regarding health care decisions which were expressed by the patient while the patient was competent, unless a court orders otherwise. Also, health care decisions made for the patient by the patient's designated agent take priority over those made by the guardian unless a court orders otherwise.

PROVIDER'S DUTIES

When a health care decision is made by someone other than the patient, the health care provider is required, if possible, to inform the patient of the decision and the identity of the person who made it.

The health care provider is required to document in the patient's record any known advance directive, revocation of an advance directive, or designation or disqualification of a surrogate. If the advance directive, revocation, designation, or disqualification is in writing, the provider must request a copy, and if a copy is furnished, the provider must include it in the patient's record.

If the patient is transferred to another health care facility, the transferring facility must notify the receiving facility of any advance directive and supply a copy of the document if reasonably possible.

When the patient's primary physician makes or is informed of a determination that the patient lacks or has recovered capacity, or that another condition exists that affects the validity of the patient's advance directive or the authority of the agent or surrogate, the physician must document the information in the record. The physician must also inform the patient, if possible, as well as the patient's agent or surrogate.

The health care provider must comply with the patient's advance directive and/or the decisions made by the patient's agent or surrogate, unless:

- The instructions or decisions are contrary to the Uniform Health-care Decisions Act.
- The facility's policies, based upon reasons of conscience, forbid compliance. (The policy must have been promptly communicated to the patient, agent, or surrogate.)
- Compliance would require medically ineffective care or care contrary to generally accepted standards.

If the provider declines to comply, the provider must inform the patient, if possible, and the patient's agent or surrogate. The provider must assist in the transfer of the patient to another provider and provide continuing care until transfer can be effected or until the court issues a ruling.

HEALTH INFORMATION

Unless the advance directive instructs otherwise, a person then authorized to make health care decisions for a patient may have the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or any other health care information.

ANATOMICAL GIFTS

As noted above, an advance directive can contain instructions concerning an anatomical gift, including organ and tissue donation. Other statutory requirements concerning anatomical gifts are contained in Maine's Uniform Anatomical Gift Act. The Act requires that whenever a patient who is medically suitable to be an organ donor dies in the hospital, a representative from the NEOB must ask the next of kin if they will consent to donate. The request for donation and the outcome must be documented in the patient's record. Hospitals must submit a report to the state each year showing the number of requests made and the number of organs harvested.

MENTAL HEALTH ADVANCE DIRECTIVES

Maine law recognizes that patients with mental illness may not always act in their own best interests when suffering an exacerbation. In order to limit "psychiatric emergencies" and to promote patient rights and autonomy, Maine law allows patients 18 years or older, while in a state of remission, to make a plan for what they feel is an appropriate plan of care, including medications, should they themselves become too ill to consent freely. This document must be in writing, be signed, dated and witnessed, by non relatives and non health care providers, and be notarized. The law provides a sample form which may be used. As with Medical Advance Directives, Mental Health Providers must have procedures in place to insure that the document is available to the treating physician(s) when needed.