



*Adult Mental Health Services*

*An Office of the  
Department of Health and Human Services*

*John E. Baldacci, Governor*

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# MENTAL HEALTH ADVANCE DIRECTIVES

*A User Guide for Maine Consumers*

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# MENTAL HEALTH ADVANCE DIRECTIVES

## A User Guide For Maine Consumers

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# MENTAL HEALTH ADVANCE DIRECTIVES

## *A User Guide For Maine Consumers*

*Note: This guide is intended to be introductory, not exhaustive, and should not replace professional advice.*

### **PLANNING AHEAD**

While you are well and able to make decisions is a good time to plan for any potential future treatment needs. One of the realities of major mental illness is that many people go through periods of time when symptoms are better and times when symptoms are worse. During periods of wellness your ability to make treatment decisions and function in the community can be at a high level. During periods of crisis your ability to make treatment decisions and function in the community may be limited. Through the development of A MENTAL HEALTH ADVANCE DIRECTIVE you can create a document which allows you to say in writing what treatment decisions you believe would be in your best interest during those times when your ability to make decisions is compromised by your illness.

### **What is a MENTAL HEALTH ADVANCE DIRECTIVE and How Does It Work?**

#### **1. What is a MENTAL HEALTH ADVANCE DIRECTIVE?**

An Advance Directive for Mental Health Treatment (sometimes called a Psychiatric Advance Directive) is a document that allows you to make your choices known regarding mental health treatment in the event that your mental illness makes you unable to make decisions. In effect, you are making decisions about treatment before the time that you will need it. This allows you to make more informed decisions and to make your wishes clearly known.

The MENTAL HEALTH ADVANCE DIRECTIVE is a legal document that has two ways of making your wishes known. First, the form includes a set of instructions in which you can describe in written form your desires for treatment should you lose capacity to make decisions. The second way is to appoint a mental health agent to act on your behalf should you lose capacity to make decisions. You can fill out both of these forms, the instructions and appointment of a healthcare agent or you can fill out only advance instructions or only appoint a mental health agent.

#### **2. What are the advantages of having a MENTAL HEALTH ADVANCE DIRECTIVE?**

Many decisions may need to be made for you if you have a mental health crisis or are involuntarily committed and become unable to make treatment decisions. For example, choice of hospital, types of treatment, and who should be notified are decisions that may be made for you. Unfortunately, at the time of crisis, you may not be able to make your wishes known, and therefore you may end up with others making decisions that you would not make. One way to be sure that your doctors, relatives, and friends understand your feelings is to prepare a MENTAL HEALTH ADVANCE DIRECTIVE before you become unable to make decisions. When your choices are clearly stated, it reduces the chances for

conflict between you and your treating team and helps prevent forced treatments. Having a MENTAL HEALTH ADVANCE DIRECTIVE may also help shorten your hospital stay. When the treating team already knows your choices regarding treatment, they can follow your directives without delay. The MENTAL HEALTH ADVANCE DIRECTIVE puts you in the position to make treatment decisions while you are well, rather than when you are in a relapse. A MENTAL HEALTH ADVANCE DIRECTIVE may reduce circumstances requiring a court to make decisions about your care, since your wishes are already stated in a legal document which allows you basic control of your treatment with decisions you made when you were well.

Choosing an agent gives your MENTAL HEALTH ADVANCE DIRECTIVE flexibility to address changes in your health. Picking an agent who you know and trust will give you an advocate for your choices regarding treatment decisions.

### **3. What are the limitations of a MENTAL HEALTH ADVANCE DIRECTIVE?**

A poorly written MENTAL HEALTH ADVANCE DIRECTIVE may leave you open for treatment which you would not choose. It could also limit treatment options which may be helpful. If you appoint an agent who does not know you well or understand the nature of your illness, the agent may not know how to make good decisions on your behalf.

An agent may be difficult for some people to find. Once a MENTAL HEALTH ADVANCE DIRECTIVE is created and signed, it may be difficult to change or cancel. If you lose the ability to make decisions due to symptoms of your illness, your MENTAL HEALTH ADVANCE DIRECTIVE will be followed.

Should your behaviors present a danger to you or others in an emergency situation, your MENTAL HEALTH ADVANCE DIRECTIVE may be over-ridden by a mental health professional. All mental health professionals have a legal and ethical obligation to protect you and others in situations where somebody could be injured.

### **4. Under what circumstances will a MENTAL HEALTH ADVANCE DIRECTIVE be used?**

The MENTAL HEALTH ADVANCE DIRECTIVE will be used only when, and if, you become unable to make or express treatment decisions for yourself. This evaluation must be made by either two physicians or determined by a judge. Until you are determined to be unable to make decisions, the MENTAL HEALTH ADVANCE DIRECTIVE will not be used, and you can continue to make decisions about your treatment as you always have.

### **5. How will my ability to make decisions be assessed?**

Your decision-making capacity is based upon your ability to understand information well enough to know what your decisions about your mental health treatment means. This is defined as your ability to receive your medical information, your ability to understand the nature of your illness, the benefits, or risks of proposed treatments and your ability to communicate your treatment choices.

**6. Who determines whether or not I have decision-making capacity?**

You are assumed to have this ability unless two physicians, one of whom is your treating physician, based upon their clinical judgment, declare that you are unable to make informed choices and decisions. Upon the recommendation of a mental health professional, a judge may also declare you incompetent to make decisions on your own behalf.

**7. Do providers have to follow my instructions?**

As a general rule, after you have been determined to be unable to make treatment decisions, your providers must follow the MENTAL HEALTH ADVANCE DIRECTIVE instructions.

**8. Under what circumstances will my MENTAL HEALTH ADVANCE DIRECTIVE not be followed?**

There are several important exceptions to the general rule. First you can be given treatment, contrary to the instructions of your MENTAL HEALTH ADVANCE DIRECTIVE, in an emergency. Second, regardless of your wishes regarding hospitalization, you can still be involuntarily admitted to a mental health facility if you are alleged to be a danger to yourself or others. Third, you can be given treatment, contrary to the MENTAL HEALTH ADVANCE DIRECTIVE, if your wishes are contradicted by a court order. Finally, your instructions may not be followed if they are against hospital policy, unavailable or violate state or federal law. You can reduce the risk that your instructions will not be followed by discussing your preferences contained in your advance directive with your primary mental health provider. Remember, even if you consent in advance to a particular medication or treatment, your doctor will not prescribe that treatment or drug unless it is appropriate at the time.

**9. How does civil (involuntary) commitment affect the MENTAL HEALTH ADVANCE DIRECTIVE?**

You cannot use an advance directive to consent or refuse a civil (involuntary) commitment. The procedure that applies to your advance directive are different than those provided for involuntary commitment. However, even during an involuntary commitment your providers should attempt to follow your advance instructions as much as possible. You can designate your mental health agent to consent to a voluntary hospitalization under conditions you specify.

**Creating a MENTAL HEALTH ADVANCE DIRECTIVE:  
Operating Instructions**

**10. Do I have to have a MENTAL HEALTH ADVANCE DIRECTIVE?**

No. The decision to have a MENTAL HEALTH ADVANCE DIRECTIVE is entirely voluntary. No one can deny you treatment or care if you decide you do not want to have a

MENTAL HEALTH ADVANCE DIRECTIVE. The MENTAL HEALTH ADVANCE DIRECTIVE exists solely for you to state choices about mental health treatments while you are well, and to be followed during those times when you are not well.

**11. Do I have to use specific forms?**

No. The DHHS Office of Adult Mental Health Services and the Disability Rights Center of Maine have sample forms for filling out advance instructions and appointing a mental health agent which you may use. However, you may choose to create your own document or have a lawyer assist in making forms which meet the legal requirements.

**12. May I make changes to my MENTAL HEALTH ADVANCE DIRECTIVE?**

You may change your MENTAL HEALTH ADVANCE DIRECTIVE at any time, as long as you have capacity. If you make significant changes you should make a new document so that there are no conflicts or misunderstandings. Remember that your changes or a new directive must be witnessed by two individuals, at least 18 years of age, and you should give new copies to your provider, agent and other support people.

**13. May I revoke (or cancel) my MENTAL HEALTH ADVANCE DIRECTIVE?**

You may revoke or cancel a part or the whole MENTAL HEALTH ADVANCE DIRECTIVE at any time, as long as you have capacity. This may be done either orally or in writing. It is effective as soon as you tell your provider. If it is determined that you do not have capacity, the terms of your MENTAL HEALTH ADVANCE DIRECTIVE remain effective even if you object.

**14. What types of instructions should be included in a MENTAL HEALTH ADVANCE DIRECTIVE?**

A MENTAL HEALTH ADVANCE DIRECTIVE is a way to communicate anything that might be involved in your mental health treatment. For example, you can express your preferences about medications, inpatient treatment, emergency interventions, choice of facilities, preferences about providers, choice of a mental health agent, and anything else you want or don't want in your future care.

**15. How does a MENTAL HEALTH ADVANCE DIRECTIVE become a legally enforceable document?**

The MENTAL HEALTH ADVANCE DIRECTIVE must be signed by you and also by two witnesses.

**16. Who can be the witnesses?**

To be valid, your MENTAL HEALTH ADVANCE DIRECTIVE must be witnessed by two competent adults (over 18). Those witnesses must be able to say that they know you, that you appear to be of sound mind, and that you are not completing the MENTAL HEALTH

ADVANCE DIRECTIVE under duress, fraud, or undue influence. Certain persons cannot be witnesses. Your relatives, your doctor or his or her relatives, other persons involved in your treatment and the person designated as your agent cannot witness your MENTAL HEALTH ADVANCE DIRECTIVE.

**17. How long is a MENTAL HEALTH ADVANCE DIRECTIVE valid?**

A MENTAL HEALTH ADVANCE DIRECTIVE is valid as long as it is not revoked or changed. You can also determine an expiration date on the form if you wish.

**18. Do I need a lawyer to fill out the MENTAL HEALTH ADVANCE DIRECTIVE forms?**

No.

**19. If I move to another state will my MENTAL HEALTH ADVANCE DIRECTIVE for Maine still be valid?**

That will depend on the other state's laws. For example, Maine law generally accepts Mental Health Directives from another state that are valid under the laws of that state.

**20. Do I need a notary to make the MENTAL HEALTH ADVANCE DIRECTIVE effective?**

No. Under Maine law you only need to sign yourself and obtain the signature of two witnesses (see above for requirements for witnesses). However, some states require a notary's signature for the MENTAL HEALTH ADVANCE DIRECTIVE. If you travel frequently out of state, it may be a good idea to have your Maine MENTAL HEALTH ADVANCE DIRECTIVE signed by a notary to ensure its validity outside of Maine.

**21. Who should receive copies of my MENTAL HEALTH ADVANCE DIRECTIVE?**

The only way your providers will know about your choices is if you give them your MENTAL HEALTH ADVANCE DIRECTIVE. You should also give copies to your treating physician, agent and family members or other people that would be notified in the event of a crisis. Keep the original in a safe place and be sure that someone who would be told about a crisis can get the original so it can be given to the attending physician.

**What is a Power of Attorney for Mental Health Treatment and How Does it Work?**

**22. What is a power of attorney (also known as Mental Health Agent)?**

A mental health power of attorney allows you to designate someone else, called an agent, to make treatment decisions for you in the event of a mental health crisis. A power of attorney for mental health treatment provides flexibility to deal with a situation as it occurs rather than attempting to anticipate every possible situation in advance.

**23. Who can be an agent?**

Anyone over the age of 18 can be an agent. It is very important to choose someone you trust as your agent and to spend time with that person explaining your feelings about treatment choices. Your doctor or his/her employee or an owner, operator or employee of a residential facility where you are living cannot serve as an agent. You should talk to the persons you have named as agent and alternate agent to make sure that they understand your wishes and are willing to take the responsibility.

**24. When does an agent make decisions on your behalf?**

An agent is only able to act on your behalf when or if it is determined that you do not have capacity to make health decisions.

**25. What can an agent do on your behalf**

Your agent would make decisions about your treatment consistent with the instructions expressed in your MENTAL HEALTH ADVANCE DIRECTIVE. Also your agent may make decisions about treatment which you did not mention in the advance directive, based on what he or she believed you would want. In addition to making decisions about your treatment, unless you state otherwise your agent will be able to look at your mental health records.

**26. Is an agent different from a guardian?**

Yes, an agent is different from a guardian. A guardian is appointed by a judge when it is believed you will not be able to make treatment decisions for a long period of time. A guardian's authority extends to all your medical and psychiatric care. An agent can only act when two physicians determine you currently lack the ability to make treatment decisions. As soon as you regain the ability to make treatment decisions the authority of the agent ends. Also, the authority of the agent is only for decisions regarding treatment which may re-stabilize your psychiatric condition and restore your ability to make decisions on your own behalf.

**27. Can one individual be both an agent and a guardian?**

Yes.

**28. I already have a Durable Power of Attorney for Health Care Decisions. How is a Mental Health Power of Attorney different?**

The Durable Power of Attorney for Health Care Decisions is typically designed to handle general health care issues and is often connected to a medical advance directive. The Durable Power of Attorney for Health Care Decisions does not address mental health issues in any detailed way. Unlike some other health care issues, mental health issues can be more complex and typically their specific treatments (e.g. drug therapies) are not

addressed in durable health care powers of attorney. If you have a mental illness or have been diagnosed with a mental illness in the past, and you already have a durable health care power of attorney, you also may wish to have a MENTAL HEALTH ADVANCE DIRECTIVE to address issues that might arise and are not specifically covered by your health care DPOA. Your agent for physical and mental health care decisions can be the same person.

**29. Do I have to appoint a Mental Health Agent to have a Mental Health Advance Directive?**

You do not need to name an agent to have an effective Mental Health Advance Directive. The written instructions can stand on their own.