

MEDICATING PATIENTS INVOLUNTARILY AT PSYCHIATRIC HOSPITALS

I. Introduction

All hospital patients with unimpaired capacity have the right to consent to or refuse treatment unless there is an emergency. In light of this right to informed consent, a patient can only be medicated involuntarily if

- a guardian for the incapacitated patient consents,
- the incapacitated patient has an advance directive that allows treatment over objection,
- treatment is authorized following an administrative hearing, or
- a psychiatric emergency exists.

This summary is just an overview of the applicable laws. You should refer directly to the Rights of Recipients of Adult Mental Health Services regulation <http://www.maine.gov/dhhs/dlrs/Licensing/RightsRecipients/Index.html> and to the statutes about guardianship and advance directives <http://janus.state.me.us/legis/statutes/18-A/title18-Ach5sec0.html> . If you have any questions about the rights and procedures related to involuntary commitment and involuntary medication at psychiatric hospitals go to <http://janus.state.me.us/legis/statutes/34-B/title34-Bch3sec0.html> and read Article 3 for Involuntary Commitment information.

For more complete information related to the content and effect of advance directives, go to the Maine Disability Rights Center's Advanced Health Care Directives Manual <http://www.drcme.org/publications.asp?pubid=16>

II. Consent of a Guardian

A person with a guardian has been determined by a Probate Court to lack capacity to make certain decisions. A guardian with unlimited powers may consent to medication of a patient over the patient's objection. A limited guardian may consent to medication on the patient's behalf only if the guardianship papers confer the right to consent to medical treatment. In either case, though, the guardian's authority to consent to treatment may not include authority to restrain the ward in order to provide the medication. The scope of the guardian's authority in this area has not been addressed by the courts in Maine.

A guardian's powers are limited by an advance directive or durable health care power of attorney. A guardian may neither revoke an advance directive nor pre-empt the health care decisions of an agent with power of attorney without permission of the Probate Court. A guardian must comply with wishes and instructions expressed when the ward had capacity and known to the guardian.

In a civil commitment proceeding related to progressive treatment (so-called outpatient commitment), the District Court may consider the requests of a guardian, but may choose not to honor them.

III. Treatment Based on the Patient's Previously Expressed Wishes

For more complete information related to the content and effect of advance directives, go to [DRC booklet](#).

A person with unimpaired capacity may give specific written or oral instructions about treatment and may appoint an agent to make health care decisions in the event of the person's incapacity. An advance directive often includes written instructions and also names an agent with power of attorney to make health care decisions.

An agent with a durable health care power of attorney can consent to medication over objection of the patient when the patient has been determined unable to make decisions. The agent must, however, follow instructions that were given by the patient while the patient had capacity.

A patient may make oral or written instructions to a health care provider or to a person who would be able to make decisions for the patient (a "surrogate") when the patient is incapacitated and no agent or guardian is reasonably available. Among the people who may act as surrogates for purposes of carrying out the patient's instructions are spouses, life partners, adult children, parents, and adult children. The validity of Maine's surrogate law in the context of psychiatric treatment has not been tested in the courts, however.

In a civil commitment proceeding related to progressive treatment (so-called outpatient commitment), the District Court may consider an advance directive or the requests of an agent with power of attorney, but may choose not to honor them.

IV. Administrative Hearing

The Rights of Recipients of Mental Health Services describes that steps that a hospital must undertake to use the administrative hearing process for involuntary medication.

This begins with a qualified mental health professional (most likely a psychiatrist) recommending a treatment for an involuntarily committed patient. If the patient objects, the mental health professional must determine whether the patient lacks capacity to consent or object to treatment. If the clinician believes that the recommended treatment is in the patient's best interest, but that the patient lacks capacity, the clinician must seek a second opinion about the patient's capacity.

To determine capacity to consent to medication, clinicians must use the following standard: A person lacks capacity if the person has insufficient understanding to make a responsible decision concerning a particular treatment and to comprehend information about (i) symptoms that any proposed medication is intended to relieve, (ii) the nature of the proposed treatment and why the doctor believes that the treatment is indicated, (iii) the expected benefits and risks of the treatment, including contraindications and potential adverse effects, (iv) anticipated duration, (v) where the patient can obtain further information, and (vi) the patient's authority to give or withhold consent.

If both the clinician seeking to treat and the clinician giving the second opinion find that the patient lacks capacity, then the clinician seeking to treat must notify the Office of Advocacy and the Disability Rights Center, the patient's next of kin (if the patient doesn't object), a patient representative if the patient designates one, and the head of the hospital.

Before proceeding to a hearing for involuntary medication, the clinician recommending treatment must hold an alternative treatment meeting. In the alternative treatment meeting, the treatment team and the patient explore why the patient refuses treatment and discuss appropriate alternatives that may be available. If the patient and the clinician recommending treatment cannot reach agreement about alternatives, then the clinician or the patient can choose to proceed to an administrative hearing.

Before the hearing, the hospital must notify the patient of the request for an administrative hearing, offer the patient assistance with the hearing, give the patient a notice of his rights, and assist the patient in getting a lawyer. The hearing must be held within ten days of the hospital's request, and the hospital must notify the patient, a person designated by the patient, and the patient's lawyer of the hearing date at least 5 days before that date.

The hearing is confidential. At the hearing, the hearing officer will first determine whether a mediated solution is appropriate. If not, the hospital must proceed to make a clear and convincing showing that

- 1) The patient lacks capacity to make a decision about a particular treatment;
- 2) The proposed treatment is based on adequately substantiated exercise of professional judgment;
- 3) The benefits of the treatment outweigh the risks and the possible side-effects; and
- 4) The proposed treatment is the least intrusive appropriate treatment available under the circumstances.

The hearing officer will not authorize treatment if the patient shows that, if he possessed capacity, he would have refused the proposed treatment on religious grounds or on the basis of other previously expressed personal convictions or beliefs. Also, the hearing officer cannot order electroconvulsive therapy. The hearing officer will make his decision within three working days of the hearing. If the hearing officer approves the treatment, the hospital may not begin treatment until at least one full working day after the decision is announced. The hospital may then treat the patient for a period not to exceed sixty days. The patient may appeal the decision to Superior Court.

If the hospital seeks to continue involuntary treatment beyond sixty days, it must first notify family or the public guardian of the potential need for guardianship, and it must undertake the same process that it undertook for the original hearing.

V. Psychiatric Emergency

A patient, whether voluntary or involuntary, may be treated without informed consent under very limited circumstances for a very limited period of time in an emergency.

Emergency treatment may occur only when

- 1) as a result of a patient's behavior due to mental illness, there exists a risk of imminent bodily injury to the patient or to others;
- 2) treatment is required immediately to ensure the physical safety of the recipient or others;
- 3) nobody legally entitled to consent on the patient's behalf is available; and
- 4) a reasonable person concerned for the physical safety of the patient or others would consent to treatment under the circumstances.

A clinician may not order emergency treatment simply because a patient refuses treatment.

Only a physician or a physician extender may order emergency treatment. The person ordering the emergency treatment must see and document the behaviors that created the emergency. The person ordering the emergency treatment must also document four other things:

- the period (up to 72 hours) for which medication may be administered,
- the expected benefits of the emergency treatment order,
- what behaviors and responses the staff should monitor, and
- how the staff should monitor the patient's behaviors and response to treatment.

Emergency treatment can continue only as long as the emergency continues. If, during the period for which emergency treatment was ordered, the risk of imminent bodily injury ends, then the emergency treatment must be discontinued immediately.

VI. Conclusion

Every patient has the right to govern his own treatment unless he lacks capacity or there is an emergency. The circumstances of incapacity and emergency are very precisely defined, and must be strictly observed to protect this right.

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