

CHAPTER 32

ADVANCE DIRECTIVES FOR
MENTAL HEALTH CARE

Authority

N.J.S.A. 30:4-177.59 and 30:9A-10.

Source and Effective Date

R.2007 d.187, effective June 18, 2007.
See: 38 N.J.R. 3407(a), 39 N.J.R. 2346(a).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 32, Advance Directives for Mental Health Care, expires on December 15, 2014. See: 46 N.J.R. 1524(a).

Chapter Historical Note

Chapter 32, Advance Directives for Mental Health Care, was adopted as R.2007 d.187, effective June 18, 2007. See: Source and Effective Date.

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 32, Advance Directives for Mental Health Care, was scheduled to expire on June 18, 2014. See: 43 N.J.R. 1203(a).

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SUBCHAPTER 1. SCOPE AND PURPOSE

10:32-1.1 Scope

This chapter shall apply to psychiatric hospitals listed in N.J.S.A. 30:1-7 and to the Division of Mental Health Services in the Department of Human Services.

10:32-1.2 Purpose

The purpose of these rules is to standardize the use of advance directives for mental health care and to foster the self-directed recovery of persons who have mental illnesses.

10:32-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Adult” means an individual 18 years of age or older.

“Advance directive for mental health care” or “advance directive” means a writing executed in accordance with the requirements of N.J.S.A. 26:2H-107. An “advance directive” may include a proxy directive, an instruction directive, or both.

“Decision-making capacity” means a patient’s ability to understand and appreciate the nature and consequences of mental health care decisions, including the benefits and risks of each, and alternatives to any proposed mental health care, and to reach an informed decision. A patient’s decision-making capacity is evaluated relative to the demands of a particular mental health care decision.

“Declarant” means a competent adult who executes an advance directive for mental health care.

“Department” means the Department of Human Services.

“Division” or “DMHS” means the Division of Mental Health Services in the Department of Human Services.

“DMHS registry” means the registry for advance directives established by the Division of Mental Health Services pursuant to section 17 of P.L. 2005, c. 233 (N.J.S.A. 30:4-177.59).

“Domestic partner” means a domestic partner as defined in section 3 of P.L. 2003, c. 246 (N.J.S.A. 26:8A-3).

“Inpatient” means a person who has been admitted for treatment to a State psychiatric facility listed in N.J.S.A. 30:1-7.

“Instruction directive” means a writing which provides instructions and direction regarding the declarant’s wishes for mental health care in the event that the declarant subsequently lacks decision-making capacity.

“Licensed independent practitioner” means an individual permitted by law to provide mental health care services without direct supervision, within the scope of the individual’s license to practice in the State of New Jersey pursuant to N.J.S.A. 45:1-1 et seq., and may include physicians, advanced practice nurses, licensed clinical social workers, and psychologists.

“Mental health care decision” means a decision to accept or refuse any treatment, service or procedure used to diagnose, treat or care for a patient’s mental condition. Mental health care decision also means a decision to accept or refuse the services of a particular mental health care professional or

psychiatric facility, including a decision to accept or to refuse a transfer of care.

“Mental health care professional” means an individual licensed or certified by this State to provide or administer mental health care in the ordinary course of business or practice of a profession.

“Mental health care representative” means the individual designated by a declarant pursuant to the proxy directive part of an advance directive for mental health care for the purpose of making mental health care decisions on the declarant’s behalf, and includes an individual designated as an alternate mental health care representative who is acting as the declarant’s mental health care representative in accordance with the terms and order of priority stated in an advance directive for mental health care.

“Patient” means an individual who is under the care of a mental health care professional.

“Proxy directive” means a writing which designates a mental health care representative in the event that the declarant subsequently lacks decision-making capacity.

“Responsible mental health care professional” means a licensed independent practitioner who is selected by, or assigned to, the patient and has primary responsibility for the care and treatment of the patient. For purposes of determining whether a patient, who has executed an advance directive for mental health care, has or does not have the capacity to make a particular mental health treatment decision, a physician, advanced practice nurse, or psychologist on the declarant’s treatment team may function as a responsible mental health care professional, but for all other purposes, each member of the State hospital treatment team assigned to the declarant may be considered a “responsible mental health care professional.”

10:32-1.4 Annual reporting

(a) The chief executive officer of each psychiatric facility listed in N.J.S.A. 30:7-1 shall submit a report to the Commissioner of Human Services, through the Division of Mental Health Services on September 1, 2007, and on September 1 in every year thereafter, about that facility’s implementation of the New Jersey Mental Health Advance Directives Act. The report shall not include patient identifiers, but shall include:

1. The percentage of patients admitted during the preceding year who had executed an advance directive before admission;
2. The number of patients who executed or modified an advance directive for mental health care while a patient at the facility;
3. The number of advance directives that were challenged by the treating professionals at the facility, and in each case why the advance directive was challenged,

whether and by whom the overriding of the advance directive was approved, and whether the patient appealed the override;

4. The number of staff trained to assist patients with advance directives (initial and follow-up training);
5. The number of sessions held by the administration for professional staff to explain their legal obligations under the Act and these rules;
6. The number of persons who are discharged with an advance directive; and
7. A narrative that describes any systemic problems encountered during the year in the implementation of the act, problems in accessing the registry, complaints from patients or families, or other issues.

10:32-1.5 Policies at psychiatric facilities

(a) Every psychiatric facility listed at N.J.S.A. 30:1-7 shall develop policies and procedures that require appropriate clinical staff to:

1. Inform current patients of:
 - i. The availability of advance directives for mental health; and
 - ii. The availability of the State’s voluntary registry;
2. Assist patients in executing advance directives for mental health;
3. Make a routine inquiry of each patient admitted and the referring or committing physician or screening service, at the time of admission, or at such other times as are appropriate under the circumstances, concerning the existence and location of an advance directive for mental health care;
4. Provide appropriate informational materials concerning advance directives for mental health care, including standard forms approved by the Division of Mental Health Services, located at Chapter Appendix A, incorporated herein by reference, and information about the DMHS Registry, established pursuant to N.J.A.C. 10:32-2.1, to all interested patients and their families and mental health care representatives;
5. Assist patients who express an interest in discussing and executing an advance directive for mental health care in doing so, as well as to encourage and enable patients to periodically review their advance directives for mental health care as needed and to consult with an advocate if they wish to do so;
6. Inform mental health care professionals of their rights and responsibilities under P.L. 2005, c. 233 (N.J.S.A. 26:2H-102 et seq.) and these rules, including the responsibility to defer to a patient’s mental health care representative or advance directive unless doing so would:

i. Violate an accepted standard of mental health care or treatment under the circumstances of the patient's mental health condition, including past responses to requested or proposed treatments;

ii. Require the use of a form of care or treatment that is not available to the mental health care professional responsible for the provision of mental health services to the patient;

iii. Violate a court order or provision of statutory law; or

iv. Endanger the life or health of the patient or another person;

7. Inform staff that a mental health care professional who intentionally fails to act in accordance with the requirements of the Act is subject to discipline for professional misconduct pursuant to section 8 of P.L. 1978, c. 73 (N.J.S.A. 45:1-21);

8. Provide training for staff that includes a forum for discussion and consultation regarding the requirements of P.L. 2005, c. 233 (N.J.S.A. 26:2H-102 et seq.) and these rules for staff and clients, as well as a discussion of the criminal penalties that can be assessed for noncompliance with the Act;

9. Establish procedures that provide for staff consultation with an institutional ethics committee; designate a person to resolve disputes; and provide for referrals to the Attorney General in order to seek resolution by a court of competent jurisdiction in the event of disagreement among the patient, mental health care representative and responsible mental health care professional concerning the patient's decision-making capacity or the appropriate interpretation and application of the provisions of an advance directive for mental health care to the patient's course of treatment;

10. Prohibit any employee from acting as a mental health care representative for a current or former client of the hospital unless that designation is approved by the facility chief executive officer; and

11. Establish procedures for gathering data required by N.J.A.C. 10:32-1.4.

10:32-1.6 Reporting of interference with patient rights to have or invoke an advance directive

(a) A psychiatric facility shall report to the Department, by a written report to the Assistant Commissioner for Mental Health Services, every incident in which an employee has materially failed to comply with the policies required by N.J.A.C. 10:32-1.5.

1. Notification of the Assistant Commissioner shall occur no later than five business days after the facility substantiates the event and shall be made in a form and manner prescribed by the Division.

SUBCHAPTER 2. REGISTRY OF MENTAL HEALTH CARE DIRECTIVES

10:32-2.1 Creation and maintenance of a registry of mental health care directives

(a) The Division shall create an internet-based registry that contains information about the advance directives for mental health care of individuals who choose to submit such information.

(b) The information shall be submitted either electronically or on paper on a registry form developed by the Division, Chapter Appendix B, incorporated herein by reference, that shall be available to all licensed mental health programs and to the public through the Department or Division website.

(c) The registry form (Chapter Appendix B) shall be an addendum to the standard advance directives for mental health treatment form (Chapter Appendix A) published by the Division of Mental Health Services, but shall clearly be an optional portion of the form, and shall be separately witnessed or executed electronically through a secure website with appropriate safeguards to prevent fraudulent access or registration.

(d) Only DMHS staff, declarants, licensed independent practitioners, and mental health screeners certified by the Division of Mental Health Services pursuant to N.J.A.C. 10:31-3.3, and employed by a designated screening service shall be authorized to access information on the registry. Information on the registry shall only be accessed by persons other than the declarant for purposes of maintenance of the registry or of ascertaining the wishes of a declarant who has registered his or her advance directive, and shall be treated as confidential protected health information.

10:32-2.2 Access to the registry

(a) An authorized person may access the registry through the Internet, http://www.state.nj.us/humanservices/dmhs/wellness_recovery.htm, 24-hours a day, seven days a week, or on the telephone at (609) 777-0700 during weekday business hours by providing a password issued by the Division of Mental Health Services pursuant to (b) or (c) below.

(b) The Division of Mental Health Services shall provide a user name and password to any licensed independent practitioner or a person who is certified as a mental health screener pursuant to N.J.A.C. 10:31-3.3 upon the request of that person and receipt of proof of the license or certification.

1. A person who obtains a user name and password shall keep that user name and password confidential and shall use it to access information only about a person to whom they are a responsible mental health professional as defined in these rules and who has provided a name, social security number, or other unique identifier to the licensed or certified provider for purposes of accessing the advance directive or for purposes of treatment or payment. The

purposeful misuse or disclosure of a password, or failure to report the accidental disclosure of a password, shall be cause to revoke that person's privilege to access the database.

(c) The Division of Mental Health Services shall provide each registered declarant with a user name and password that shall limit their access to their own registered directive. The

consumer may share that user name and password with a mental health care representative. If the representative does not have the password, the Division of Mental Health Services will provide that user name and password to a person who presents either satisfactory proof that they are the person named in an advance directive, or a court order naming the person as the guardian of the person who executed an advance directive.

APPENDIX A

This form may be used as a Mental Health Care Advance Directive, as may a portion of this form or any other form, so long as the document is dated, signed, and properly witnessed.

Declaration of Mental Health Care Representative

I, _____, being a legal adult of sound mind, voluntarily make this declaration for mental health treatment. I want this declaration to be followed if I am incapable, as defined in New Jersey Statutes 26:2H-108. I designate _____ as my agent for all matters relating to my mental health care including, without limitation, full power to give or refuse consent to all medical care related to my mental health condition. If my agent is unable or unwilling to serve or continue to serve, I appoint _____, as my agent. If both are unable or unwilling to serve or continue to serve, I appoint _____, as my agent. I want my agent to make decisions for my mental health care treatment that are consistent with my wishes as expressed in this document or, if not specifically expressed, as are otherwise known to my agent.

If my wishes are unknown to my agent, I want my agent to make decisions regarding my mental health care that are consistent with what my agent in good faith believes to be in my best interests. My agent is also authorized to receive information regarding proposed mental health treatment and to receive, review and consent to disclosure of any medical records relating to that treatment.

I specifically authorize my representative to receive information about my treatment for HIV/AIDS if applicable and relevant._____(initial)

I specifically authorize my representative to receive information about alcohol and substance abuse diagnosis and treatment if applicable and relevant._____(initial)

This declaration allows me to state my wishes regarding mental health care treatment including medications, admission to and retention in a health care facility for mental health treatment and outpatient services.

(initial one of the following)

_____ This designation of a mental health care representative is irrevocable if I have been found under the standards in New Jersey Statutes Annotated 26:2H-108 to lack capacity to directly consent to my care.

_____ I can revoke this designation of a mental health care representative at all times.

If you wish to complete an instruction directive, continue on page 2. Otherwise, go to the signature section on page 5.

Mental Health Instruction Directive

The following are my wishes regarding my mental health care treatment if I become incapable.

Preferences and Instructions About Physician(s) or other professionals to be Involved in My Treatment

I would like the professional(s) named below to be involved in my treatment decisions:

_____ Contact information: _____

_____ Contact information: _____

I do not wish to be treated by _____ (facility or professional)

Preferences and Instructions About Other Providers

I am receiving other treatment or care from providers who I feel have an impact on my mental health care. I would like the following treatment provider(s) to be contacted when this directive is effective:

Name _____ Contact information _____

Name _____ Contact information _____

Preferences and Instructions About Medications for Psychiatric Treatment

_____ I consent, and authorize my mental health care representative, if appointed on page 1, to consent, to the administration of the following medications:

_____ I do not consent to, and I do not authorize my mental health care representative to consent to, the administration of any of the following medications:

_____ I am willing to take the medications excluded above if my only reason for excluding them is the side effects which include: _____ and these side effects can be eliminated by dosage adjustment or other means.

_____ I am willing to try any other medication the hospital doctor recommends
_____ I am willing to try any other medications my outpatient doctor recommends
_____ I am not willing to try any other medications.

Preferences about voluntary hospitalization and alternatives:

By initialing here, I consent to giving my representative the power to admit me to an inpatient or partial psychiatric hospitalization program for up to ___ days:

_____ (initial if you consent)

I would like the interventions below to be tried before voluntary hospitalization is considered:

_____ Calling someone or having someone call me when needed.
(Name: _____, telephone number: _____)

_____ Staying overnight at a crisis respite (temporary) bed.

_____ Having a mental health care provider come to see me.

_____ Staying overnight with a friend: _____

_____ Seeing a mental health care provider for assistance with medications

_____ Other: _____

If hospitalization is required, I prefer the following hospital(s):

Preferences about emergency interventions

I would like the interventions below to be tried before use of seclusion or restraint is considered (check all that apply)

_____ "Talk me down" one-on-one

_____ More medication

_____ Time out/privacy

_____ Show of authority/force

_____ Shift my attention to something else

_____ Set firm limits on my behavior

_____ Help me to discuss/vent feelings

_____ Decrease stimulation

_____ Other: _____

If it is determined that I am engaging in behavior that requires seclusion,

physical restraint, and/or emergency use of medication, I prefer these interventions in the order I have chosen (choose "1" for first choice, "2" for second choice, and so on)

_____ Seclusion _____ Seclusion and physical restraint
(combined)
_____ Medication by injection _____ Medication in pill or liquid form

_____ I do not consent to any form of restraint or seclusion.

In the event that my attending physician decides to use medication in response to an emergency situation after due consideration of my preferences and instructions for emergency treatments stated above, I expect the choice of medication to reflect any preferences and instructions I have expressed in this form. The preferences and instructions I express in this section regarding medication in emergency situations do not constitute consent to use of the medication for nonemergency treatment.

Preferences and Instructions About Electroconvulsive Therapy (ECT or Shock Therapy)

_____ I wish my mental health care representative to be able to consent to electroconvulsive therapy in his or her complete discretion.

_____ I wish my mental health care representative to be able to consent to electroconvulsive therapy if I display the following symptoms:

_____ I do not authorize my representative to consent to electroconvulsive therapy.

(initial one of the following)

_____ This instruction directive is irrevocable if I have been found under the standards in New Jersey Statutes Annotated 26:2H-108 to lack capacity to directly consent to my care.

_____ I can revoke this instruction directive at all times.

Expiration

This advance directive for mental health care is made pursuant to P.L. 2005, c. 233 of the New Jersey laws and continues in effect for all who may rely on it except those to whom I have given notice of its revocation pursuant to N.J.S.A. 26:2H-106d.(1). If I do not revoke the directive, it will expire on _____, 20___. (leave blank if you do not want it to expire)

Signatures

I have voluntarily completed this advance directive for mental health care.

_____ (signature of declarant)

Address of mental health care representative: _____

Telephone number of mental health care representative

Address(es) of alternate mental health care representative(s)

Telephone number(s) of alternate mental health care representative(s)

Affirmation of first witness (required):

I affirm that the person signing this mental health care advance directive:

- 1. Is personally known to me.
- 2. Signed or acknowledged by his or her signature on this declaration in my presence.
- 3. Appears to be of sound mind and not under duress, fraud or undue influence.
- 4. Is not related to me by blood, marriage or adoption.
- 5. Is not a person for whom I directly provide care as a professional.
- 6. Has not appointed me as an agent to make medical decisions on his or her behalf.

Witnessed by:

_____, 20__

(signature and date)

Affirmation of second witness: (two witnesses are required if the first witness is related to the declarant, entitled to any part of the declarant's estate, or the operator, administrator or employee of a rooming or boarding house or a residential health care facility in which the declarant resides)

I affirm that the person signing this mental health care advance directive:

- 1. Is personally known to me.
- 2. Signed or acknowledged by his or her signature on this declaration in my presence.
- 3. Appears to be of sound mind and not under duress, fraud or undue influence.
- 4. Is not related to me by blood, marriage or adoption.
- 5. Is not a person for whom I directly provide care as a professional.
- 6. Has not appointed me as an agent to make medical decisions on his or her behalf.

Witnessed by:

_____, 20__

(signature and date)

Acceptance of appointment as agent: (optional)

I accept this appointment and agree to serve as agent to make mental health treatment decisions for the principal. I understand that I must act consistently with the wishes of the person I represent, as expressed in this mental health care power of attorney, or if not expressed, as otherwise known by me. If I do not know the principal's wishes, I have a duty to act in what I in good faith believe to be that person's best interests. I understand that this document gives me the authority to make decisions about mental health treatment only while that person has been determined to be incapable as that term is defined in NJSA 26:2H-109.

signature of primary mental health care representative

printed name of primary mental health care representative

signature of first alternate mental health care representative

printed name of first alternate mental health care representative

signature of second alternate mental health care representative

printed name of second alternate mental health care representative

Revocation

Complete this section if you wish to revoke this directive completely. You may also revoke or modify the directive by executing a new document. If you do so, you should tell your mental health care representative and replace the old documents in anyone's possession with your new directive. If you revoke this directive, it will no longer have any legal effect on your treatment.

_____ I revoke the mental health advance directive I executed on or about _____, 20__ in its entirety.

(signature)

(date)

APPENDIX B

Registration

I hereby submit my mental health advance directive to the Division of Mental Health Services in the New Jersey Department of Human Services to be registered. I choose the following password that will permit access for me and anyone with whom I share it.

I further understand that a licensed health care provider who is providing me with mental health care may be able to access my directive if need. No other person will be permitted to see the directive (except as required for administration of the registry) without my permission.

Signature _____

Print name: _____, contact information for confirmation:

Witness:

Dated: _____

Send original to: NJDMHS Registry, 50 E. State St, PO Box 727, Trenton, NJ 08625-0727 and attach a copy of your entire mental health care advance directive. You may also submit other documents to be registered that affect your legal ability to consent, such as a health care advance directive, durable power of attorney, temporary or limited guardianship orders, etc., which the registry will accept in its discretion.