

GUIDANCE FOR MENTAL HEALTH ADVANCE DIRECTIVES

North Dakota



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Protection & Advocacy Project
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(PAIMI)**

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According to the National Institute of Mental Health, an estimated 26.2 percent of Americans ages 18 and older — about one in four adults — are affected by a diagnosable mental disorder in a given year. In North Dakota, this means about 137,274 adults (U.S. Census Bureau; 2010 population estimate of 523,948 – 18 years and older).

Mental illness is common – the milder conditions are very common. Professionals have made considerable progress in their understanding of mental illness and in their ability to offer effective treatments. The vast majority of affected individuals continue to function in their daily lives. For some individuals, it is a constant struggle.

The Protection & Advocacy Project (P&A) and its Advisory Council for the Protection & Advocacy of Individuals with Mental Illness (PAIMI) have researched ways to more actively involve individuals with mental illness in their treatment planning. Mental Health Advance Directives (also known as Psychiatric Advance Directives) have been one of the more promising innovations in recent years to give individuals with a severe mental illness a greater voice in their treatment. Mental Health Advance Directives are now widely recognized across the country.

A Mental Health Advance Directive is a legal and medical document. Individuals are encouraged to use this tool as a way to inform and collaborate with their treatment providers. The goal is for the individual to receive the treatment most conducive to his or her mental health needs.

Your comments and suggestions are welcomed. Please tell us about your experience(s) in using the Mental Health Advance Directive guidance manual and form. Your feedback will be used to improve the materials in the future.

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Introduction

Many decisions may need to be made for you if you have a mental health crisis or are involuntarily committed¹ and lose capacity to make treatment decisions. For example, the choice of hospital, types of treatment, and who should be notified are decisions that could 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.

If you have a concern that you may be subject to involuntary psychiatric commitment or treatment at some time in the future, you can prepare a legal document in advance to express your choices about mental health treatment. This type of document is commonly referred to as a *mental health advance directive* or *psychiatric advance directive*. Through a mental health advance directive, you may also appoint an alternate decision-maker, or agent, to make treatment decisions for you if you become unable to express choices on your own behalf.²

Mental health advance directives differ from general health care advance directives. Health care directives can cover all health care decisions or can be limited. General health care directives usually dictate decisions only about extraordinary health care measures and end-of-life treatments that the patient has generally not actually experienced. Individuals with mental illness are generally dealing with chronic illnesses and have experience with the treatments. A purpose of a general health care directive may be to help life end in comfort. The goal of a mental health advance directive is to maximize the chances of recovery while minimizing unwanted interventions.

There are many benefits to writing a mental health advance directive. It allows you to make decisions about treatment before the time that you will actually need it. It allows you to make informed decisions when your mental health is at its best and to make your wishes clearly known. It is possible this document could shorten your hospital stay or even prevent the need for a guardian. It will improve communication between you and your doctor. It may prevent forced treatment.

This booklet provides you with information to help you develop a mental health advance directive. You will also find a list of resources if you have questions or want to learn more about mental health advance directives. You may choose to use the form included with this booklet, though it is not required. If you need another copy, you may call P&A at 328-2950/1-800-472-2670 or go to the website for the Protection & Advocacy Project at <http://www.ndpanda.org>.

Frequently Asked Questions

A. What is a mental health advance directive?

A mental health advance directive is a document that includes one or more health care instructions³ for:

- 1) an agent, who is a person you have chosen to make mental health care decisions for you;
- 2) mental health treatment and care;
- 3) a decision-maker authorized under law to make health care decisions for you if you have not legally chosen a decision-maker;

If you appoint an agent, you can choose **WHO** will make health care decisions⁴ concerning your mental health treatment in case you become unable to do so. The statement regarding mental health treatment and care describes **WHAT** you want, or don't want, to happen to you; your desires, instructions, special provisions, and limitations you want followed should you become unable to make these decisions.

B. Why should I have a mental health advance directive?

At a time of crisis, you may not be able to make your wishes known. Others may make decisions that you would not make concerning your well-being. If you have a mental health advance directive in place, your wishes will be clearer to others. If you appoint an agent, you will identify the person who you want to make decisions on your behalf if you cannot do so. Research has shown that use of a mental health advance directive can reduce the length of hospitalization.

C. Who can write a mental health advance directive?

Executing a mental health advance directive is voluntary. In order to write a mental health advance directive, you must have the capacity⁵ to do so. You need to have the ability to understand the decisions you are making, the potential consequences of each decision, and alternative choices. You must be at least eighteen (18) years of age for the document to be legally binding.

If you already have a guardian who has authority to make medical decisions for you, you cannot create a legally binding advance directive. If you have a legally binding advance directive but a court later appoints a guardian for you, the advance directive is legally binding unless a court with appropriate authority decides otherwise.

A "principal" is an adult who has prepared a mental health advance directive. You would be the principal in your own mental health advance directive.

D. If I decide to appoint an agent, who should it be?

An “agent” is an adult to whom you give the authority to make mental health treatment decisions if you become unable to do so. If you decide to appoint an agent, it is very important that you choose someone you trust to make serious decisions. It should be someone to whom you explain your feelings and beliefs about treatment choices. The person you appoint as your agent should clearly understand your wishes and be willing to follow them when making mental health decisions for you. To be effective, the agent must accept the appointment in writing.

A person may NOT act as your agent if the person is:

- your health care provider⁶; OR
- someone who is not your relative, but who is an employee of one of your health care providers; OR
- your long-term care services provider⁷; OR
- someone who is not your relative, but who is an employee of your long term care services provider.

E. When does a mental health advance directive take effect?

A mental health advance directive, including the agent’s authority (if one is appointed), takes effect only if and when you lack capacity to make decisions⁸. You “lack capacity” when your attending physician decides you lack capacity⁹ and puts the conclusion in your medical records. It stops being in effect when your physician decides that you have recovered the capacity to make decisions.

After consulting with your attending physician, and other providers, the agent makes decisions¹⁰ concerning your mental health treatment:

- according to the agent’s knowledge of your wishes and religious or moral beliefs as stated orally or as written in your mental health advance directive; OR
- if your wishes are unknown, your agent must figure out what you would have done, based upon your personal values. If the agent cannot determine what you would have done, the agent must do whatever the agent believes is in your best interest.

If you want to, you may authorize, through a mental health advance directive, that the agent make decisions for you even though you retain the capacity to make decisions. You may revoke your authorization in the same manner as described in the next question and answer.

If the physician cannot locate your agent, someone else may be able to make your health care decisions. This could be a person appointed by the court, a relative, or friend, according to the preferences set out by the Legislature.¹¹

F. What if I change my mind and want to revoke my existing mental health advance directive?

You can revoke the mental health advance directive by:

- telling your agent or a health care provider or long-term care services provider.¹² This can be done orally, in writing (which is recommended), or by any other method that communicates your specific intent to revoke the directive;
- OR putting in place a new version of your mental health advance directive.¹³ The most recently executed advance directive is the one that applies.

G. What if the agent I appoint decides later that he or she doesn't want to do this?

If you (the principal) are not incapacitated, the agent may withdraw by simply letting you know of their decision. If you are incapacitated, the agent may withdraw by giving notice to the principal's attending physician. The physician is to document this in your medical record. If you have chosen an alternate agent, the alternate agent should be contacted.

H. Can my agent have me committed?

If your mental health advance directive says your agent cannot, your agent cannot have you committed. If your mental health advance directive gives this authority to your agent, your agent will have limited authority to commit you without a court order. An agent cannot consent to admission to a mental health facility or state institution for a period of more than forty-five (45) days without a mental health proceeding or other court order.¹⁴

I. Will my agent have access to my medical information?

Unless you put limitations in your advance directive, an agent whose authority is in effect may, for the purpose of making health care decisions:

- request, review, and receive any information (oral or written) regarding your physical and mental health, including medical and hospital records;
- execute any releases or other documents which may be required in order to obtain your medical information; and
- consent to the disclosure of your medical information.

J. What makes a mental health advance directive “legal”?

Your mental health advance directive must:

- a. be in writing;
- b. be dated;
- c. state your name;
- d. be signed when you have the capacity to do so by you or another person you have authorized to sign on your behalf;
- e. contain verification of your signature (or the signature of the person you authorize to sign on your behalf) either by a notary public or by witnesses.¹⁵
- f. include a health care instruction or designation of an agent, or both.

A copy of an advance directive is presumed to be a true and accurate copy of the executed original, unless there is clear and convincing evidence to the contrary, and must be given the same effect as an original.

K. Who is the “attending physician¹⁶”?

The “attending physician” is the doctor who has primary responsibility for the care and treatment of your mental health condition.

L. Do providers have to follow the decisions of my agent and my advance directives for mental health care?

If your health care and/or long-term care service provider knows that you have appointed an agent, they are to follow the health care decisions made by your agent. The same applies for your written instructions for mental health care. If they refuse to comply, they are to take all reasonable steps to transfer care to another provider who is willing to honor the decisions.¹⁷ You cannot require a health care provider to take any action contrary to reasonable medical standards. The health care provider is required by law to follow through on mental health advance directives through the use of available treatment options.

M. Who should have copies of my mental health advance directive?

Your treating professionals need copies of your advance directive. Your agent and any alternate agent need a copy. You should consider giving copies to family members, friends, the hospitals or programs where you might be taken in an emergency, and other service providers. Keep a list of who has copies.

N. Discharge Planning

Discharge planning is an important issue relating to success after discharge from a hospitalization. Information concerning your wishes regarding discharge planning may be included in the Mental Health Advance Directive.

I've Written my Mental Health Advance Directive So Now What?

- Go back and check it over. Look for any errors. If you need to make changes, write your initials by the changes to indicate your consent. If there are any blanks where you do NOT agree with the statement and therefore did NOT put your initials, write in "NO".
- If you added extra pages because you didn't have enough room on the form, be sure to write on the form itself that there are additional pages.
- If you appointed an agent, you are encouraged to review the document with them and discuss any areas of particular concern.
- Make and distribute copies. Keep a list of who you have given copies to – see *Record of Advance Directive*.
- If you make changes, you should give updated copies to everyone who received an original and ask to get the prior copy back or ask that it be clearly marked "void." Keep the original document in a safe and easily accessible place.
- A provider who does not have an updated copy might follow the old advance care directive. If you travel, take a copy with you. Keep the original document in a safe and easily accessible place.

Resources on Mental Health Advance Directives

American Psychiatric Foundation

<http://ps.psychiatryonline.org/article.aspx?articleid=98421>

Bazelon Center for Mental Health Law

<https://www.bazelon.org/Where-We-Stand/Self-Determination/Advance-Directives.aspx>

Duke University Program on Psychiatric Advance Directives

<http://pad.duhs.duke.edu/index.html>

Journal of the American Academy of Psychiatry and the Law Online

<http://www.jaapl.org/cgi/content/abstract/34/1/43>

Mental Health America

<http://www.mentalhealthamerica.net/psychiatric-advance-directives-taking-charge-your-care>

National Alliance on Mental Illness

http://www.nami.org/Content/ContentGroups/Policy/Issues_Spotlights/Psychiatric_Advance_Directives_An_Overview.htm

National Disability Rights Network

<http://www.ndrn.org/en/issues/mental-health/advance-directives.html>

National Resource Center on Psychiatric Advance Directives

<http://www.nrc-pad.org>

North Dakota Century Code Chapter 23-06.5

<http://www.legis.nd.gov/cencode/t23c06-5.pdf?20131210132812>

End Notes

The end notes are references to laws passed by the North Dakota Legislature and in effect as of the date on this document. The Legislature can change these laws or pass new laws. Be sure you use the laws that are current at the time you sign any document.

¹ N.D.C.C. § 25-03.1-33 (1) "No determination that a person requires treatment, no court order authorizing hospitalization or alternative treatment, nor any form of admission to a hospital gives rise to a presumption of, constitutes a finding of, or operates as an adjudication of legal incompetence, or of the inability to give or withhold consent."

² NDCC § 23-06.5-01 "Every competent adult has the right and responsibility to make the decisions relating to the adult's own health care, including the decision to have health care provided, withheld, or withdrawn. The purpose of this chapter is to enable adults to retain control over their own health care during periods of incapacity through health directives and the designation of an individual to make health care decisions on their behalf. This chapter does not condone, authorize, or approve mercy killing, or permit an affirmative or deliberate act or omission to end life, other than to allow the natural process of dying."

³ NDCC § 23-06.5-02 (6) "'Health care instruction' means an individual's direction concerning a health care decision for the individual, including a written statement of the individual's values, preferences, guidelines, or directions regarding health care directed to health care providers, others assisting with health care, family members, an agent, or others."

⁴ NDCC 23-06.5-02 (4) "'Health care decision' means consent to, refusal to consent to, withdrawal of consent to, or request for any care, treatment, service or procedure to maintain, diagnose, or treat an individual's physical or mental condition, including: (a) Selection and discharge of health care providers and institutions; (b) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; (c) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care; and (d) Establishment of an individual's abode within or without the state and personal security safeguards for an individual, to the extent decisions on these matters relate to the health care needs of the individual."

⁵ NDCC § 23-06.5-02 (3) "'Capacity to make health care decisions' means the ability to understand and appreciate the nature and consequences of a health care decision, including the significant benefits and harms of and reasonable alternatives to any proposed health care, and the ability to communicate a health care decision."

⁶ NDCC § 23-06.5-02 (7) “‘Health care provider’ means an individual or facility licensed, certified, or otherwise authorized or permitted by law to administer health care, for profit or otherwise, in the ordinary course of business or professional practice.”

⁷ NDCC § 23-06.5-02 (8) “‘Long-term care facility’ or ‘long-term care services provider’ means a long-term care facility as defined in NDCC § 50.10.1-01.”

⁸ “Capacity to make health care decisions” has a legal definition, provided in endnote 5, above. Many people use several terms interchangeably to identify the lack of capacity, e.g., “incapacitated,” “incompetent,” and “of unsound mind.” Their meanings overlap.

“Incapacitated person” is defined for guardianship proceedings. N.D.C.C. § 30.1-26-01 (2) “‘Incapacitated person’ means any adult person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, or chemical dependency to the extent that the person lacks capacity to make or communicate responsible decisions concerning that person's matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters, or which incapacity endangers the person's health or safety.”

⁹ If you disagree with your physician’s decision that you lack capacity, you can challenge the decision in court. The court presumes that you have capacity. This presumption stands unless there is clear and convincing evidence of incapacity. See N.D.C.C. §§ 23-12-13 (5) and 30.1-28-04 (2) (c). Once you have challenged the physician’s decision, you should be able to make medical decisions unless a court decides otherwise.

NDCC § 25-03.1-33 (1) “No determination that a person requires treatment, no court order authorizing hospitalization or alternative treatment, nor any form of admission to a hospital gives rise to a presumption of, constitutes a finding of, or operates as an adjudication of legal incompetence, or of the inability to give or withhold consent.”

¹⁰ NDCC § 23-06.5-13 (1) “Unless a court of competent jurisdiction determines otherwise, the appointment of an agent in a health care directive executed pursuant to this chapter takes precedence over any authority to make medical decisions granted to a guardian pursuant to NDCC § 30.1-28.

¹¹ NDCC § 23-12-13 (1) State law lists classes of persons, in priority order, that may provide informed consent to health care on behalf of the patient. First priority is given to an agent, followed by a guardian, specific relatives,

and friends. If an agent has been appointed but cannot be located, the physician will proceed to someone in the next class of the priority list.

¹² NDCC § 23-06.5-07 (2) "A principal's health care or long-term care services provider who is informed of or provided with a revocation of a health care directive shall immediately record the revocation in the principal's medical record and notify the agent, if any, the attending physician, and staff responsible for the principal's care of the revocation."

¹³ NDCC § 23-06.5-07 (3) "Unless otherwise provided in the health care directive, if the spouse is the principal's agent, the divorce of the principal and spouse revokes the appointment of the divorced spouse as the principal's agent."

¹⁴ NDCC § 23-06.5-03 (6) "Nothing in this chapter permits an agent to consent to admission to a mental health facility or state institution for a period of more than forty-five days without a mental health proceeding or other court order, or to psychosurgery, abortion, or sterilization, unless the procedure is first approved by court order."

¹⁵ NDCC § 23-06.5-05 (2) "A health care directive must be signed by the principal and that signature must be verified by a notary public or at least two or more subscribing witnesses who are at least eighteen years of age. A person notarizing the document may be an employee of a health care or long-term care provider providing direct care to the principal. At least one witness to the execution of the document must not be a health care or long-term care provider providing direct care to the principal or an employee of a health care or long-term care provider providing direct care to the principal on the date of execution. The notary public or any witness may not be, at the time of execution, the agent, the principal's spouse or heir, a person related to the principal by blood, marriage, or adoption, a person entitled to any part of the estate of the principal upon the death of the principal under a will or deed in existence or by operation of law, any other person who has, at the time of execution, any claims against the estate of the principal, a person directly financially responsible for the principal's medical care, or the attending physician of the principal. If the principal is physically unable to sign, the directive may be signed by the principal's name being written by some other person in the principal's presence and at the principal's express direction."

¹⁶ NDCC § 23-06.5-02 (2) "'Attending physician' means the physician, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient."

¹⁷ NDCC § 23-06.5-09 (1) "A principal's health care or long-term care services provider, and employees thereof, having knowledge of the

principal's health care directive, are bound to follow the health care decisions of the principal's designated agent or a health care instruction to the extent they are consistent with this chapter and the health care directive."

NDCC § 23-06.5-09 (2) "A principal's health care or long-term care services provider may decline to comply with a health care decision of a principal's designated agent or a health care instruction for reasons of conscience or other conflict. A provider that declines to comply with a health care decision or instruction shall take all reasonable steps to transfer care of the principal to another health care provider who is willing to honor the agent's health care decision, or instruction or directive, and shall provide continuing care to the principal until a transfer can be effected."

NDCC § 23-06.5-09 (3) "This chapter does not require any physician or other health care provider to take any action contrary to reasonable medical standards."

NDCC § 23-06.5-09 (4) "This chapter does not affect the responsibility of the attending physician or other health care provider to provide treatment for a patient's comfort, care, or alleviation of pain."



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The Protection & Advocacy Project (P&A) is an independent State agency that protects and advocates for the rights of people with disabilities within established priorities.

P&A serves eligible individuals, of all ages with all types of disabilities, at no cost. P&A also advocates for individuals to receive disability-related assistive technology devices and services.

P&A works exclusively for the person with a disability. P&A's efforts focus on the expressed wishes of the client, within his or her legal rights.

P&A believes that people with disabilities should be empowered to advocate on their own behalf to the extent possible. And individual should have the greatest opportunity to shape his or her personal destiny.

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