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Information Bulletin 98-4

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Federal Law Regarding Advance Directives

Note: This information Bulletin supersedes **Information Bulletin 96-2**. The document on "Questions and Answers Regarding Minnesota Law on Advance Directives" has been updated and is now available in Regular Print or Large Print versions.

The Patient Self-Determination Act (PSDA) is a federal law passed by Congress in 1990 which requires providers to inform all adult patients about their rights to accept or refuse medical or surgical treatment and the right to execute an "advance directive." An "advance directive" is a written instruction such as a living will or durable power of attorney for health care recognized under state law relating to the provision of health care when the individual is incapacitated.

The PSDA and the final rule require you to:

Give written information to all adults receiving services of their rights under State law to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and to formulate advance directives. In November, 1991, the Minnesota Department of Health (Department) provided a uniform description of Minnesota law on advance directives entitled "Questions and Answers Regarding Minnesota Law on Advance Directives" to be used by providers in meeting the requirement to provide a description of state law concerning advance directives. This mailing includes a revised description based on 1998 Minnesota law.

You must begin using this revised description no later than January 1, 1999. ALL MEDICAID PROVIDERS MUST DISTRIBUTE THIS WRITTEN DESCRIPTION OF STATE LAW. You may reprint or reformat the material and you may **supplement it with written material of your own. YOU MAY NOT CHANGE THE CONTENT OF THE WRITTEN DESCRIPTION OF THE WRITTEN DESCRIPTION OF STATE LAW.**

The PSDA and the final regulations specifically mandate the use of the State-developed description of state law to be distributed by Medicaid providers. Medicare-only providers are also required to provide a description of state law but may provide their own description instead of the one provided with this bulletin. The Department suggests the use of the State-developed description by Medicare-only providers for uniformity among providers.

The written information must be provided to an individual upon each admission to a medical facility and each time an individual comes under the care of a home health agency, personal care provider, or hospice. If the patient is incapacitated at the time of admission and is unable to receive information or articulate whether he or she has executed an advance directive, the provider should give advance directive

information to the patient's family or surrogate. The provider still must provide this information to the patient once he or she is no longer incapacitated or unable to receive such information.

Maintain written policies and procedures concerning advance directives for all adults receiving care or services and inform the individual, in writing, of these policies. The policies must include a clear and precise explanation of any objection a provider or provider's agent may have, on the basis of conscience, to honoring an individual's advance directive. The provider's statement of limitation, if any, should:

1. Clarify any differences between institution-wide conscience objections and those that may be raised by individual physicians;
2. Identify the State legal authority permitting such objection; and
3. Describe the range of medical conditions or procedures affected by the conscience objection.

Only those conscience objections permitted under State law may be included in the policy. The Department is unable to give specific guidance on conscience objections permitted under State law because the law is not clear on the extent to which a provider can object to an advance directive on the basis of conscience. The Minnesota living will statute states that providers must comply with a living will to the fullest extent possible, consistent with reasonable medical practice and other applicable law, or comply with the notice and transfer provisions of sections 145B.06 and 145B.07. The statute allows providers to decline to comply with the terms of a living will but the permissible reasons for declining are not set forth. The health care power of attorney statute requires providers to provide the directed health care to the extent the provider is capable, and if unable or unwilling, to transfer the individual to another health care provider willing to provide the care.

The Minnesota Constitution, Article I, Section 16 provides for the exercise of freedom of conscience. This provision has been construed by Minnesota courts generally to apply to matters of religion. Since this provision has not been construed by the Minnesota Supreme Court in a case involving a conscience objection to advance directives, it is not clear the extent to which a provider could rely on this constitutional provision. The Department suggests that providers consult with their own legal counsel for advice on whether a particular conscience objection is permitted under state law.

Document in the medical record whether or not an individual has executed an advance directive.

Inform individuals that they may file a complaint with the Department concerning a provider's noncompliance with advance directive requirements. Complaints may be directed to the Office of Health Facility Complaints at 651-201-4201 or 1-800-369-7994.

Home health agencies must notify clients that the toll-free home health hotline can be used for complaints regarding advance directives. The hotline number is 1-800-369-7994.

Not discriminate against an individual based on whether he or she has executed an advance directive. This means specifically that the provider cannot condition the provision of care or otherwise discriminate against the individual based on whether an advance directive has been executed.

Ensure compliance with requirements of State law regarding advance directives.

Provide staff and community education on advance directives. This education must minimally include what an advance directive is, emphasizing that an advance directive is designed to enhance an incapacitated individual's control over medical treatment, and describe applicable State law concerning advance directives.

The Patient Self-Determination Act, 42 U.S.C. 1395cc(f)(1), 1396a(w)(1) and the Health Care Financing Administration's final rule, published in the Federal Register, Vol. 60, No. 123, pp. 33262-33294, should be consulted for the exact requirements of the law on advance directives.

Any questions on this bulletin should be directed in writing to:

**Health Regulation Division Director
Minnesota Department of Health
85 East Seventh Place
P.O. Box 64900
St. Paul, Minnesota 55164-0900.**

Questions and Answers About Health Care Directives

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Minnesota Law

Minnesota law allows you to inform others of your health care wishes. You have the right to state your wishes or appoint an agent in writing so that others will know what you want if you can't tell them because of illness or injury. The information that follows tells about health care directives and how to prepare them. It does not give every detail of the law.

What is a Health Care Directive?

A health care directive is a written document that informs other of your wishes about your health care. It allows you to name a person ("agent") to decide for you if you are unable to decide. It also allows you to name an agent if you want someone else to decide for you. You must be at least 18 years old to make a health care directive.

Why Have a Health Care Directive?

A health care directive is important if your attending physician determines you can't communicate your health care choices (because of physical or mental incapacity). It is also important if you wish to have someone else make your health care decisions. In some circumstances, your directive may state that you want someone other than an attending physician to decide when you cannot make your own decisions.

Must I Have a Health Care Directive? What Happens if I Don't Have One?

You don't have to have a health care directive. But, writing one helps to make sure your wishes are followed.

You will still receive medical treatment if you don't have a written directive. Health care providers will listen to what people close to you say about your treatment preferences, but the best way to be sure your wishes are followed is to have a health care directive.

How Do I Make a Health Care Directive?

There are forms for health care directives. You don't have to use a form, but your health care directive must meet the following **requirements** to be legal:

- Be in writing and dated.
- State your name.
- Be signed by you or someone you authorize to sign for you, when you can understand and communicate your health care wishes.
- Have your signature verified by a notary public or two witnesses.
- Include the appointment of an agent to make health care decisions for you and/or instructions about the health care choices you wish to make.

Before you prepare or revise your directive, you should discuss your health care wishes with your doctor or other health care provider.

Information about how to obtain forms for preparation of your health care directive can be found in the Resource Section of this document.

I Prepared My Directive in Another State. Is It Still Good?

Health care directives prepared in other states are legal if they meet the requirements of the other state's laws or the Minnesota requirements. But requests for assisted suicide will not be followed.

What Can I Put in a Health Care Directive?

You have many choices of what to put in your health care directive. For example, you may include:

- The person you trust as your agent to make health care decisions for you. You can name alternative agents in case the first agent is unavailable, or joint agents.
- Your goals, values and preferences about health care.
- The types of medical treatment you would want (or not want).
- How you want your agent or agents to decide.
- Where you want to receive care.
- Instructions about artificial nutrition and hydration.
- Mental health treatments that use electroshock therapy or neuroleptic medications.
- Instructions if you are pregnant.
- Donation of organs, tissues and eyes.
- Funeral arrangements.
- Who you would like as your guardian or conservator if there is a court action.

You may be as specific or as general as you wish. You can choose which issues or treatments to deal with in your health care directive.

Are There Any Limits to What I Can Put in My Health Care Directive?

There are some limits about what you can put in your health care directive. For instance:

- Your agent must be at least 18 years of age.
- Your agent cannot be your health care provider, unless the health care provider is a family member or you give reasons for the naming of the agent in your directive.
- You cannot request health care treatment that is outside of reasonable medical practice.
- You cannot request assisted suicide.

How Long Does a Health Care Directive Last? Can I Change It?

Your health care directive lasts until you change or cancel it. As long as the changes meet the health care directive requirements listed above, you may cancel your directive by any of the following:

- A written statement saying you want to cancel it.
- Destroying it.
- Telling at least two other people you want to cancel it.
- Writing a new health care directive.

What If My Health Care Provider Refuses to Follow My Health Care Directive?

Your health care provider generally will follow your health care directive, or any instructions from your agent, as long as the health care follows reasonable medical practice. But, you or your agent cannot request treatment that will not help you or which the provider cannot provide. If the provider cannot follow your agent's directions about life-sustaining treatment, the provider must inform the agent. The provider must also document the notice in your medical record. The provider must allow the agency to arrange to transfer you to another provider who will follow the agent's directions.

What If I've Already Prepared a Health Care Document? Is It Still Good?

Before August 1, 1998, Minnesota law provided for several other types of directives, including living wills, durable health care powers of attorney and mental health declarations.

The law changed so people can use one form for all their health care instructions.

Forms created before August 1, 1998, are still legal if they followed the law in effect when written. They are also legal if they meet the requirements of the new law (described above). You may want to review any existing documents to make sure they say what you want and meet all requirements.

What Should I Do With My Health Care Directive After I Have Signed It?

You should inform others of your health care directive and give people copies of it. You may wish to inform family members, your health care agent or agents, and your health care providers that you have a health care directive. You should give them a copy. It's a good idea to review and update your directive as your needs change. Keep it in a safe place where it is easily found.

What if I believe a Health Care Provider Has Not Followed Health Care Directive Requirements?

Complaints of this type can be filed with the Office of Health Facility Complaints at 651-201-4200 (Metro Area) or Toll-free at 1-800-369-7994.

What if I Believe a Health Plan Has Not Followed Health Care Directive Requirements?

Complaints of this type can be filed with the Minnesota Health Information Clearinghouse at 651-201-5178 or Toll-free at 1-800-657-3793.

How To Obtain Additional Information

If you want more information about health care directives, please contact your health care provider, your attorney, or:

Minnesota Board on Aging's Senior LinkAge Line®
1-800-333-2433.

A suggested health care directive form is available on the internet at: <http://www.mnaging.org/>.