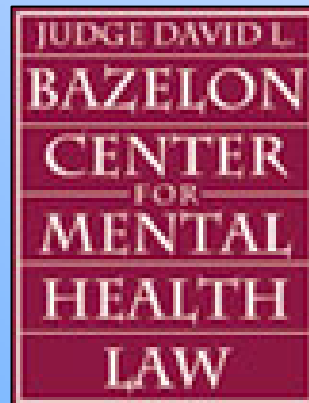


# **Psychiatric Advance Directives: The Challenges of Implementation**

**Robert Bernstein and Edith Coakley  
May 6, 2007**



# **Psychiatric Advance Directives: The Challenges of Implementation**

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- **Introduction**
- **The Law**
- **The National Resource Center  
on PADs (NRC-PAD)**
- **Operational Challenges:  
Experiences & Questions**

# What are Psychiatric Advance Directives (PADs)?

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- Legal documents, governed mainly by state law, that allow competent persons to:
  - consent to, or refuse, psychiatric treatment during a time of future incompetence, *and/or*
  - authorize another person to make psychiatric treatment decisions on his/her behalf during time of future incompetence.
- It is never mandatory to have a PAD.

# What is the hope for PADs?

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- **Allow the consumer voice to be heard**
- **Improve continuity of care and treatment relationships**
- **Reduce coercion**

# Do All States Have Laws Allowing PADs?

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- All states have general advance directive (AD) statutes.
- About half of states also have laws specifically allowing for PADs.

# Federal Law

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**Patient Self Determination Act (PSDA) of 1991 requires hospitals and clinics to assist in the use of all types of advance directives.**

# Two parts of PADs

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- ***Instructional Directive:***
  - Compare living will
  - Documents instructions and consent.
- ***Power of Attorney:***
  - Appoints another person (“agent”) to make decisions during crisis.
  - May be designed with limited or broad powers.
- Depending on state law, a person can have one, the other, or both.

# Instructional Directive

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- Instructions about medications
- Instructions about hospitalization\*
- Instructions about ECT\*
- Background medical or non-medical information
- Non-medical instructions, e.g. whom to contact in case of crisis.

*\* NB: Many state laws limit a person's ability to consent in advance.*

# Instructional Directive: Sample Statutory Language

*Scope, use, and authority of advance instruction for mental health treatment.*

*(a) Any adult of sound mind may make an advance instruction regarding mental health treatment. The advance instruction may include consent to or refusal of mental health treatment.*

*(b) An advance instruction may include, but is not limited to, the names and telephone numbers of individuals to be contacted in case of a mental health crisis, situations that may cause the principal to experience a mental health crisis, responses that may assist the principal to remain in the principal's home during a mental health crisis, the types of assistance that may help stabilize the principal if it becomes necessary to enter a facility, and medications that the principal is taking or has taken in the past and the effects of those medications.*

# Power of Attorney

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**Principal appoints an agent who is:**

- **legally competent;**
- **aged 18 or over; and**
- **(in most states) not also providing healthcare to the principal.**

# Power of Attorney: Agent's Authority

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The agent is authorized, when the principal becomes incompetent, to make mental health treatment decisions on the principal's behalf, subject to:

- Statutory restrictions;
- Limits placed upon his/her authority in the PAD itself.

# Power of Attorney: Sample Statutory Language

- (a) Requirements. – A mental health power of attorney must do the following:*
- (1) Identify the principal and appoint the mental health care agent.*
  - (2) Declare that the principal authorizes the mental health care agent to make mental health care decisions on behalf of the principal.*
- (b) Optional provisions. – A mental health power of attorney may:*
- (1) Describe any limitations that the principal imposes upon the authority of the mental health care agent.*
  - (2) Indicate the intent of the principal regarding the initiation, continuation or refusal of mental health treatment.*
  - (3) Nominate a guardian...*
  - (4) Contain other provisions as the principal may specify regarding the implementation of mental health care decisions and related actions by the mental health care agent.*

# Power of Attorney: Sample Statutory Language (2)

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*Attorney-in-fact: Prohibited acts; duties.*

*1. The attorney-in-fact may not consent to:*

- (a) Commitment or placement of the principal in a facility for treatment of mental illness;*
- (b) Convulsive treatment;*
- (c) Psychosurgery;*
- (d) Abortion;*
- (e) Sterilization;*
- (f) Aversive intervention...; or*
- (g) Any other treatment to which the principal, in the power of attorney, states that the attorney-in-fact may not consent.*

# Power of Attorney: Agent's Duty

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When the principal is declared incompetent, the agent must:

- exercise *substituted judgment* wherever possible; and where not possible,
- act in the principal's *best interests*.

# Agent's duty:

## Sample Statutory Language

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*(5) The health care agent shall act in good faith consistently with the desires of the principal as expressed in the power of attorney for health care instrument or as otherwise specifically directed by the principal to the health care agent at any time. The health care agent shall act in good faith consistently with any valid declaration executed under [the Living Will statute]... In the absence of a specific directive by the principal or if the principal's desires are unknown, the health care agent shall, in good faith, act in the best interests of the principal in exercising his or her authority.*

# Making a PAD: Procedural Requirements

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Varies from state to state. Most commonly:

- Two competent witnesses not employed by the principal's health care provider (additional restrictions on relatives and beneficiaries in will); *and/or*
- Notarization.

# When does the PAD take effect?

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When the treating physician(s) or Court determine the principal incompetent, meaning:

*“unable to make an informed decision about the provision, withholding, or withdrawal of a specific medical treatment because the patient is unable to understand the nature, extent, or probable consequences of the proposed treatment or course of treatment, is unable to make a rational evaluation of the burdens, risks and benefits of the treatment or course of treatment, or is unable to communicate a decision.”*

# Can a PAD be revoked?

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The answer depends on state law.

*Possibilities:*

- Revocable any time;
- Revocable only during competence (“Ulysses” clause);
- Option to choose.

# **Must physicians always honor the PAD?**

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**Four situations in which physicians  
may lawfully disregard:**

- 1. Involuntary inpatient commitment**
- 2. Inconsistent with “generally  
accepted standards”**
- 3. Emergencies**
- 4. Treatments requested are  
unavailable**

# Must physicians always honor the PAD? Sample Statutory Language (1):

*Disregarding advance directives: circumstances*

- A. *The physician or provider may subject an [incapable] principal to mental health treatment...contrary to the principal's wishes as expressed in [his PAD] only:*
- (1) In case of an emergency when the principal's instructions have not been effective in reducing the severity of the behavior that has caused the emergency. An emergency occurs when the principal presents an imminent and significant danger of physical harm to himself or others.*
  - (2) When the leading physician determines that psychotropic medication is essential and after compliance with the following procedures:*
    - (a) ... the director of the treatment facility shall conduct an administrative review...*
- B. *An advance directive shall not limit the authority...to take a principal into protective custody or to involuntarily admit or commit a principal to a treatment facility.*

# Must physicians always honor the PAD? Sample Statutory Language (2):

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*“This chapter does not preclude an attending physician from treating the patient in a manner that is of the best interest of the patient or another individual.”*

**Case Law:**

**Involuntary Commitment and PADs**

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Hargrave v Vermont

340 F.3d 27 (2nd Cir. 2003)

# **National Resource Center on PADs**

**[www.nrc-pad.org](http://www.nrc-pad.org)**

# Operational Challenges

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- Infrastructure
- Consumer knowledge
- Support from professional community
- Practical barriers