

Mental Health Directives in Estate Planning Engagements

What if a client has a history of mental illness? Are advance directives sufficient to honor a client's treatment wishes and preferences in that moment? There is a greatly underutilized advance directive for such clients—the psychiatric advance directive (PAD).

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Trusts and Estates

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Trusts and estates attorneys devise estate plans that will protect their clients during their lifetimes and upon death. To do that we have our mainstay tools: wills, trusts and powers of attorney for asset protection and health care proxies and livings wills for health care decisions.

But what if a client has a history of mental illness? Are these advance directives sufficient to honor our client's treatment wishes and preferences in that moment? There is a greatly underutilized advance directive for such clients—the psychiatric advance directive (PAD).

The key is to open the conversation to mental illness and not rely on the client to volunteer that information given the stigma that often surrounds mental illness. Psychiatric issues

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do not relate to a small part of the population, with one in five persons in the United States suffering from any mental illness and one in 20 persons suffering from serious mental illness according to the National Alliance for Mental Illness (NAMI). According to the World Health Organization, suicide is the second leading cause of death in the world among 15-29 year-olds.

Very likely, the taboo of mental illness hinders medical treatment and also likely hinders our legal work with clients. In my initial client meetings, I used to ask my clients whether they were struggling with any underlying health issues. My clients would often proceed to chronicle a litany of illnesses from high blood pressure and diabetes to arthritis and atrial fibrillation. There was no feeling of embarrassment or shame in these discussions of what might be considered more “traditional” and socially acceptable ailments.

But clients would almost never volunteer any history of mental health struggles. For our part as attorneys, we can help in this area by specifically asking about mental health issues in our client meetings. By matter-of-factly asking about any history of mental illness, we can try to help normalize it, keeping shame at bay and creating a trusting environment for clients to share their struggles in this area. We can then brainstorm with our clients about how to plan in the event of a future mental health episode. In doing so, we could help our clients come to understand that they are entitled to control their mental health care.

For clients willing to document their psychiatric treatment preferences, such a directive will typically include:

1. The person authorized to make psychiatric decisions in the event of an episode;
2. The preferred hospitals and providers;
3. Effective treatment therapies and medications to be administered; and
4. Ineffective therapies and medications that are not to be administered.

A fully developed PAD can serve as both a medical history of the patient and informed consent for future treatment. It equips the authorized agent with clear and convincing evidence of the principal's wishes, thus allowing the agent a means to advocate for specific care. With current medical research showing a strong correlation between prompt treatment and better health outcomes, a PAD that allows for swift administration of treatment could be lifesaving.

The most controversial section of any PAD relates to a person creating a *binding* treatment directive, such as "administer antipsychotics to me even if during a psychotic episode I state that I do not want them." Such provisions have come to be known as "Ulysses" clauses, in reference to the Homeric hero who wanted to hear the Siren's singing but knew he risked not being able to resist the call of the siren that would lead to crashing his ship. To avoid this catastrophe but still

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hear the Siren's singing, Ulysses directed his crew not to listen to him at that moment and to keep sailing, even if it were against anything he directed them to do later.

The Nebraska legislature describes the need for mental health specific directives, as well as binding "Ulysses" provisions, in the legislative intent section of its PAD statute:

(a) Issues implicated in advance planning for end-of-life care are distinct from issues implicated in advance planning for mental health care;

(b) Mental illness can be episodic and include periods of incapacity which obstruct an individual's ability to give informed consent and impede the individual's access to mental health care;

(c) An acute mental health episode can induce an individual to refuse treatment when the individual would otherwise consent to treatment if the individual's judgment were unimpaired.

Advance Mental Health Care Directives Act, NE Rev. Stat. 30-4402(a)-(c).

PADs will always be subject to review and potential override if they would cause a physician to administer an improper standard of care. But at least with a PAD in place, the treatment team is provided with background history, as well as potentially effective and ineffective therapies for the

patient and can thereby develop a more informed care plan for the patient.

While some states have enacted PAD-specific statutes, New York has a broad general healthcare directive statute that allows a principal to create an advance directive relating to any type of healthcare decision. NY PHL §2981(5)(b). For this reason, it is generally thought that a PAD specific statute is not needed in New York. Whether this is true or not will be determined likely many years from now once PADs are more fully adopted and in use. At that point in time, there will then be more data on whether current law is meeting the needs of those wishing to set and have honored their psychiatric needs.

For those interested in incorporating PADs into an estate planning practice, there are several available resources, including the National Resource Center on Psychiatric Advance Directives. Further, the Mental Health Committee of the New York State Bar Association's Elder Law and Special Needs Section developed a PAD template.

In the area of trusts and estates, where many of our legal instruments such as trusts and wills are rooted in centuries old laws and statutes, the ability to use a new legal instrument to support our clients is an exciting development.

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