

**FOCUS:
MENTAL HEALTH LAW**



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When it comes to advanced planning for an adult individual's unexpected medical needs, practitioners in New York State counsel clients on the execution of health care proxies and living wills. These advanced directives allow an individual to express their medical treatment preferences. However, the focus is generally on end-of-life decisions, such as palliative care and life-sustaining treatment. For individuals whose medical needs include mental health conditions, a Psychiatric Advanced Directive ("PAD"), which sets forth the client's preferences for mental health treatment, should be considered. To date, the PAD has not been codified under New York law or declared

Psychiatric Advanced Directives in Mental Health Planning

to be valid by New York courts. Nonetheless, it may still prove to be useful and beneficial to clients, the courts, and medical professionals, in several ways.

Public Health Law, Article 29-C was enacted in 1991 and governs health care proxies in New York State.¹ It closely coincided with the Patient Self-Determination Act of 1990 passed by the U.S. Congress, which requires all states receiving Medicare and Medicaid funds to inform individuals of their right to execute advanced directives for future health care decision making.

A health care proxy allows a competent adult, known as the principal, to appoint an agent to serve as their medical decision-maker in the event of their future incapacity. This provides the principal with an opportunity to express their wishes and ensures that when the principal lacks the capacity to make medical decisions, the medical decisions made on their behalf are consistent with those previously expressed wishes.

The public health law provides a standard health care proxy form which includes the language that the health care agent is appointed "to make any and all health care decisions for me."² Health care decisions are defined as

"any decision to consent or refuse to consent to health care," and health care is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."³ While mental health decisions are considered to be health care decisions, the treatment of mental health conditions is unique in that a health care agent in New York cannot consent to the administration of psychotropic medications over the principal's objection.

When an individual is involuntarily admitted to a hospital pursuant to Mental Hygiene Law, Article 9, mental health treatment is governed by the rules and regulations of the Office of Mental Health ("OMH"). The OMH regulations prohibit the treatment of involuntarily admitted adult psychiatric patients absent court authorization.⁴ The court authorization is obtained through a special proceeding, colloquially known as a *Rivers* hearing, wherein the court must determine whether a patient who is refusing treatment has "the capacity to make a reasoned decision with respect to the proposed treatment" prior to the administration of medication over the patient's objection.⁵ Accordingly, in New York State, a health care proxy cannot

empower a health care agent to consent to mental health treatment for an incapacitated principal.

The PAD is designed to provide a competent principal with the ability to state their mental health treatment wishes. As with a health care proxy, the PAD can provide for the designation of a health care agent to make decisions in the event of a future incapacity due to an acute mental health episode. The concept of the PAD is to provide authority for the health care agent to consent to the administration of certain psychotropic medications over the principal's subsequent refusal when acutely ill. Conversely, the PAD may be utilized to notify future treatment providers of the principal's history with treatment and identify any psychotropic medications the principal does not want in their course of treatment, or those medications which caused adverse reactions or side effects. The PAD may also identify the principal's preferences for providers and facilities if inpatient care is required, and likewise, preference for alternatives to an inpatient hospitalization.

While many states' laws allow for the usage of a PAD, it is not prescribed by New York State law and upon information and belief, the courts

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have never ruled on the validity of the PAD. As the PAD is not provided for under New York law, the ability of an individual to set forth their mental health treatment directives and preferences in the PAD is comparable to the living will.

The living will allows an individual to set forth in detail their preferences for medical treatment, including preferences for various medical procedures or end-of-life treatment. Like the PAD, the living will is not a product of New York statute. However, unlike the PAD, the living will has gained widespread use and acceptance across the state as an advanced planning directive for medical decision-making and it has been recognized by the courts, including New York's highest court, the Court of Appeals.⁶

The living will has been judicially declared to be akin to an informed medical statement which, among other items, authorizes further medical treatment and constitutes “a clear and convincing demonstration that while competent the petitioner clearly and explicitly expressed an informed, rational and knowing decision... .”⁷ As with the living will, the PAD can be an expression of a mentally ill individual's treatment wishes when an individual has capacity, which may aide a court in reaching its decision whether to grant or deny a *Rivers* application as the court is also required to determine, in part, the benefits to be gained

from the proposed treatment, the adverse side effects of the proposed treatment, and any less intrusive treatment available.⁸ The PAD may also demonstrate that an individual's refusal of mental health treatment is consistent with the wishes and desires they expressed while competent to do so.

The legislature has recognized the living will as a planning document in that the Court Evaluator in a Mental Hygiene Law Article 81 Guardianship proceeding is mandated to report to the court whether the subject of the proceeding, the Alleged Incapacitated Person, ever executed a living will.⁹ Prior to the enactment of Mental Hygiene Law, Article 81, when asked to recognize the validity and binding effect of a living will, the Supreme Court, Nassau County noted that “only the legislature has the authority to enact a statute recognizing the validity of living wills, prescribing the means of execution of such documents, and the general guidelines that may be applicable to a broad range of situations.”¹⁰ The same holds true for the PAD. Unless and until the legislature enacts a statute providing for the validity of the PAD, legal, ethical, and medical concerns regarding the PAD call its use and application into question.

If the PAD is codified by statute, there are many considerations that will need to be considered, including the following: what constitutes capacity for a person suffering from

a cyclical mental illness to sign the PAD; who is eligible for appointment as the health care decision-maker; who may serve as a witness; how and when can the PAD be revoked; should the PAD be indefinite or limited in duration; should the PAD provide for directives in addition to treatment, such as the care of the principal's minor children or dependents in the event of an involuntary hospitalization, and who should be notified in the event of an involuntary hospitalization; how will the PAD be enforced; and will the PAD carry a private right of action or immunity from liability.

Further public education on the PAD led by legal practitioners will help to thrust the PAD into the spotlight, to expand knowledge of this planning tool, and to garner widespread acceptance. A mental health lawyer is able to guide individuals and families with the execution of advanced directives to best address psychiatric care and treatment. The PAD has the potential to guide the judiciary in a Mental Hygiene Law, Article 9 proceeding for treatment over an individual's objection, and importantly, to inform mental health treatment providers of that individual's competent treatment preferences as the first encounter may be when the individual is in an acutely psychotic state unable to advocate on their own behalf. The uncertainty of the enforceability of a PAD in New York State has resulted

in the PAD's underutilization. While its validity remains in question, practitioners should not overlook its potential practical applications and the real possibility that the execution of a PAD will empower a client suffering from a mental health condition to participate in their own care and treatment. ⚖️

1. Pub. Health Law Article 29-C.
2. Pub. Health Law §2981(5)(d).
3. Pub. Health Law §2980(6); and Pub. Health Law §2980(4).
4. 14 N.Y.C.R.R. §527.8(c)(4); *Rivers v. Katz*, 67 N.Y.2d 485 (1986).
5. *Rivers*, 67 N.Y.2d at 497.
6. *In re M.B.*, 6 N.Y.3d 437 n.1 (2006) (“A person can also express his or her wishes regarding life-sustaining treatment in what is known as a ‘living will.’”); see also, *In re Westchester County Med. Ctr. (O'Connor)*, 72 N.Y.2d 517, 531 (1988) (“The ideal situation is one in which the patient's wishes were expressed in some form of a writing, perhaps a ‘living will,’ while he or she was still competent.”).
7. *Saunders v. State*, 129 Misc.2d 45, 54 (Sup. Ct. Nassau Co. 1985).
8. *Rivers*, 67 N.Y.2d at 497-498.
9. Mental Hygiene Law §81.09(c)(5)(xi).
10. *Saunders*, 129 Misc. at 53.



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FOCUS: LABOR AND EMPLOYMENT LAW



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On December 14, 2021, the New York City Council voted to make it an unlawful discriminatory practice for an employer not to post the minimum and maximum salary ranges in job advertisements. This new law becomes effective May 15, 2022, and amends the New York City Human Rights Law (NYAC §§8-102 and 8-107) and is on par with recent legislation in Connecticut, Colorado, and Rhode Island.

Specifically, the law provides that it is “an unlawful discriminatory practice to not include in job listings

NYC Salary Law Aims to End the Wage Gap

the minimum and maximum salary offered... The range for the listed maximum and minimum salary would extend from the lowest salary to the highest salary that the employer in good faith believes it would pay for the advertised job, promotion, or transfer... .”¹ The law also applies to employers' internal postings for current employees. If an employer violates the law, it can be subject to a civil penalty up to \$125,000, or up to \$250,000 for a willful violation. The law was introduced by Councilwoman Helen K. Rosenthal who, based on her own experiences as a female in the workforce, “learned [her] salary was \$5,000 less than [her] white male counterpart in [her] first city government job.”²

Economic and legal experts have thus far applauded this new law.³ New York City is known to have some of the most progressive employment laws in the country, and this addition strengthens the City's goal to eliminate discrimination in the workplace. Based upon this addition

of transparency, employers may find themselves with better candidates who appreciate not being kept in the dark about salaries.⁴ Now more than ever, employees feel and deserve to be treated with respect, and are willing to leave one job for another with a better work environment. Having this pay transparency from the start, potential employees will get a fresh perspective of the employer, which can ultimately save everyone time and lead to employees sticking around for the long haul.

Additionally, women will be on a more even playing field as they negotiate salaries with a more transparent scope of compensation. Women will be able to see what the real market value is of their experience and skill. As Economist Teresa Ghilarducci has explained, women can be “tied to a particular location or a commute schedule because of their family. So they're reluctant to do market check... and to see what they actually are worth... If pay was transparent, the employer

would have to kind of fess up that they're probably paying their male workers more.”⁵ Also, negotiations involving a woman with a more ambitious personality (which has unfortunate negative connotations) “disproportionately end in impasse”⁶ meaning that women who are more outspoken or more “empowered” in negotiations may not have the same positive outcome as men.⁷ The expectation is that, armed with a range of the salary the potential employer can offer, women will end negotiations at or near where a male would, not at an impasse or making less. This can help change the pay disparity in many job fields, including the legal field where women are often paid less than their male counterparts.⁸

Although the law has a noble purpose, there are issues that may leave innocent employers with questions and exposed to liability. For example, the law establishes a “good faith” standard regarding the calculation of the salary range. Good