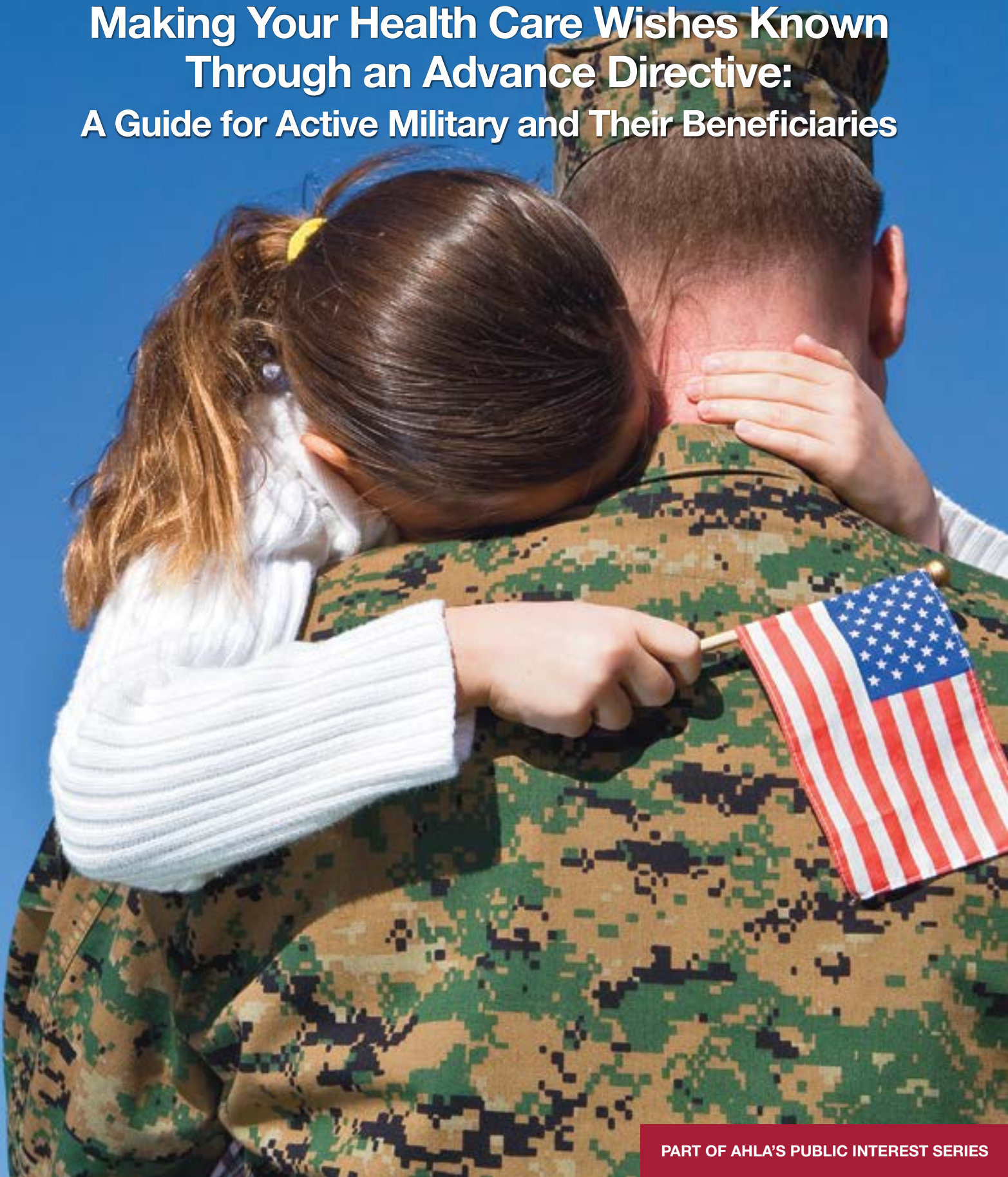


# Making Your Health Care Wishes Known Through an Advance Directive: A Guide for Active Military and Their Beneficiaries



# Making Your Health Care Wishes Known Through an Advance Directive: Guide for Active Military and Military Beneficiaries

The American Health Lawyers Association is grateful to the following individuals for their contributions to this publication.

**Joseph B. Topinka** (Cochair)  
Universal City, Texas

**Teresa A. Williams** (Cochair)  
INTEGRIS Health  
Oklahoma City, Oklahoma

**Joi-lee K. Beachler**  
Polsinelli  
Dallas, Texas

**Harry L. Dadds**  
Stoll Keenon Ogden PLLC  
Lexington, Kentucky

**Rosalind D. Gagliano**  
Fort Sam Houston, Texas

**Mary E. Guararra**  
Catholic Health Services of Long Island  
Rockville Centre, New York

**Marta J. Hoffman**  
Plunkett Cooney  
Bloomfield Hills, Michigan

**Kevin M. Hull**  
Chicago, Illinois

**Raymond J. Liddy**  
Office of the Attorney General, Department of Justice  
San Diego, California

**Melissa L. Markey**  
Hall Render Killian Heath & Lyman PC  
Troy, Michigan

**Kara F. Morse**  
Stoel Rives LLP  
Seattle, Washington

**Cameron R. Nelson**  
Arlington, Virginia

**Jamie M. Rotter**  
Hospital Sisters Health System  
Belleville, Illinois

**Pamela R. Saunders**  
Department of Veterans Affairs Regional Counsel Office  
Minneapolis, Minnesota

**Richard A. Sugarman**  
Boston Medical Center  
Boston, Massachusetts

**Molly J. Timko**  
Children's National Medical Center  
Washington, District of Columbia

---

© 2016 by American Health Lawyers Association

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the express written permission of the publisher. Provided, however, that this publication may be reproduced in part or in whole without permission from the publisher for noncommercial educational purposes designed to improve health in communities and increase access to health care or improve the quality or maintain the cost of health care services. Any such community benefit distribution must be without charge to recipients and must include an attribution to American Health Lawyers Association as follows:

“Copyright © 2016 by the American Health Lawyers Association and reproduced for the benefit of and to promote the health of the community served by the distributing organization.”

This guidebook can be downloaded for free at [www.healthlawyers.org/Military](http://www.healthlawyers.org/Military)

American Health Lawyers Association  
1620 Eye Street, NW, 6th Floor  
Washington, DC 20006  
202-833-1100

[www.healthlawyers.org](http://www.healthlawyers.org)  
[www.healthlawyers.org/PublicInterest](http://www.healthlawyers.org/PublicInterest)

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

—From a declaration of the American Bar Association



# Making Your Health Care Wishes Known Through an Advance Directive: Guide for Active Military and Military Beneficiaries

This guidebook provides important information to active military and military medical beneficiaries/dependents about advance directives. Advance directives allow individuals to express, in advance, their preferences regarding future health care and life-sustaining treatment decisions. It is critical for active military and military beneficiaries to understand how advance directives present an opportunity for clarity in health care decisions, especially during deployments. This guidebook outlines the different types of advance directives, such as living wills, health care proxies, durable powers of attorney for health care, durable powers of attorney for financial matters, do not resuscitate consent forms/orders and mental health advance directives. We hope it will assist you in making decisions about medical care and end-of-life treatment.

## What are advance directives?

An advance directive is a written legal document that lets you specify your wishes about your medical care in the event you become unable to communicate or make your own choices. Your decision to accept or reject medical treatment ultimately depends on your own personal wishes, values and beliefs. An advance directive can give health care providers clear and reliable guidance on your specific health care wishes when you cannot speak for yourself.

Advance directives are governed by state, federal and common law. State laws on this subject take different approaches and specific provisions vary. Military legal assistance attorneys prepare advance directives to comply with state laws.

There are several different types of advance directives. The most effective and commonly used types are described in detail in this guidebook.

You should consider each one to determine which best suit your needs:

- ★ Living will
- ★ Health care proxy (often included as part of a living will)
- ★ Durable power of attorney for health care
- ★ Durable power of attorney for financial matters
- ★ Do not resuscitate consent form
- ★ Mental health advance directive

## Living will

A living will is a type of advance directive that contains your preferences regarding critical health care treatment if you cannot make your own decisions. Certain medical conditions may activate your living will, such as when you are in the end stages of a disease, in a persistent vegetative state, are permanently unconscious or when death is imminent.

A living will may also let you appoint a person to be your health care proxy. A health care proxy has the authority to make routine medical decisions for you in the event you can no longer do so.

A living will allows you to express your wishes in general terms (“Do whatever is necessary to ensure my comfort but nothing further”) or in more specific terms. Specific instructions can include your preferences about the use of artificial nutrition and hydration, mechanical ventilation, cardiopulmonary resuscitation, surgery and certain drugs, such as antibiotics and blood transfusions. Your living will can also contain instructions about organ donation, funeral/burial arrangements and preferences for spending your last days at home (as long as your instructions do not require a health care provider to do something illegal).

Most states have statutory requirements and forms for living wills and recognize them as documents that are legally binding on your health care team, whether military or civilian. Witness and notary requirements vary from state to state. State law may also contain restrictions on withholding or withdrawing life-sustaining treatment if you are pregnant and the fetus is viable.

A living will that is valid in one state may not be

honored in another state if that state does not recognize living wills or if the living will does not satisfy the particular state's statutory requirements or form. However, even if it is not legally binding in a particular jurisdiction, a living will may still help provide your health care team, family and health care proxy or agent (explained below) with guidance about your wishes. This is especially true when a living will is accompanied by a durable power of attorney for health care or other advance directive.

### Health care proxy

Living wills often contain a section allowing you to appoint a person, called a health care “proxy,” to make health care decisions for you if you cannot make them for yourself. Your proxy may have broad decision-making powers, such as selecting and discharging providers, consenting to diagnostic tests or surgical procedures, approving orders not to resuscitate and giving directions to provide, withhold or withdraw artificial nutrition and hydration.

Your health care proxy should be someone you trust and with whom you feel comfortable discussing your wishes for medical care and end-of-life treatment. If your specific wishes are unknown, the proxy must act in your best interest and make decisions based on what he/she understands to be your personal wishes and values. Consequently, you should choose someone who is familiar with your religious and moral beliefs so he/she can make decisions in your best interest, given your particular medical situation. You may want to combine a health care proxy with a living will if you have strong views about specific situations. This will ensure the proxy can rely on your written instructions to make decisions for you. If you do not have someone you trust, you may want to consider another type of advance directive.

### Do not resuscitate consent form

A do not resuscitate consent form is a written document instructing medical professionals not to perform cardiopulmonary resuscitation (emergency treatment to restart your heart or lungs, including mouth-to-mouth resuscitation, external chest compressions and electric shock treatments) when your heartbeat or breathing stops. A do not resuscitate consent form is used only to express your wish to forgo cardiopulmonary resuscitation. It is not used to provide instructions for any other purpose or treatment. Because it is generally effective upon signing (although state regulations may vary on this issue), you should not sign a do not resuscitate consent form unless you are in the end stages of a terminal disease. Like a

living will, the do not resuscitate consent form may not be honored if you are pregnant.

A do not resuscitate order is often suspended by patients or health care providers during a procedure, such as surgery, that is expected to improve health.

### Out-of-hospital do not resuscitate order

Do not resuscitate orders signed in a hospital typically do not apply to care provided outside the hospital. Therefore, most states have enacted out-of-hospital do not resuscitate laws that authorize your attending physician to issue a do not resuscitate order. Typically, these statutes require that the patient have a terminal condition or a physician certify that the patient is approaching the end of his/her life. Most out-of-hospital do not resuscitate laws provide for wristbands or other wearable items that indicate the patient has a valid out-of-hospital do not resuscitate order in place. This allows emergency medical technicians and paramedics to honor the do not resuscitate order, even if the written order cannot be readily produced. Do not resuscitate orders do not preclude the provision of other types of care, so emergency medical services personnel will provide oxygen, intravenous fluids, pain medicines and other interventions intended to make the patient comfortable, if the patient has a pulse and is breathing when the ambulance first arrives. Most jurisdictions will honor a do not resuscitate order from another state.

### Durable power of attorney for health care

A durable power of attorney for health care is another type of advance directive that allows you to give legal authority to a person, called an “agent,” who will make health care decisions for you when you cannot make them for yourself. An agent's authority usually becomes effective when you are unable to make decisions on your own behalf and ceases once you become alert and are able to act on your own behalf. States have different standards to determine when a person is unable to make his/her own health care decisions, but once it becomes effective, this type of advance directive will remain in effect for as long

**Your health care  
proxy should be someone  
you trust . . .**



as that inability exists. All powers of attorney terminate upon death. Because of the risk of your agent becoming incapacitated or being unwilling to act as your agent, you should consider naming an alternate agent, as well.

An agent:

- ★ Must be at least 18 years old
- ★ Must be of sound mind and body during the entire time he/she is in the role
- ★ Should be someone you trust, but does not have to be a family member
- ★ Should be someone who knows you and your specific desires regarding your health care wishes
- ★ If required by state law, should be willing to sign a legal document that he/she acknowledges and accepts his/her responsibilities

The durable power of attorney for health care must define the scope of authority granted to your agent. The agent can make general health care decisions, as well as decisions relating to mental health, that involve accepting or refusing medical treatment (including do not resuscitate orders), admission to a military treatment facility, hospital or nursing home and organ donation after your death. An agent's authority to make decisions concerning organ donation, including whether such donation is limited to certain organs, should be clearly described in your durable power of attorney for health care and in your living will, if you decide to create a living will.

If you are granting your agent the right to withhold or withdraw certain life-sustaining treatment, such as resuscitation, you should clearly spell out that authority in the durable power of attorney for health care and acknowledge that the decisions may lead to your death. If you are relying on your durable power of attorney for health care to set forth your life-sustaining treatment decisions, you should ensure the form also complies with your state's requirements for living wills. It is important to note that military commanders may override certain refusals of treatment by military personnel. Seek guidance from your Judge Advocate General's Corps officer or attorney if you have questions about refusing treatment. More generally, a durable power of attorney for health care can include the same instructions you would put in a living will. It is important that the terms in the two documents and the persons appointed under each document are

consistent to avoid confusion about your exact wishes. If there is a conflict between your living will and your durable power of attorney, state law may dictate which document will be honored.

Regardless of the detail included in the durable power of attorney for health care, your agent is responsible for making decisions consistent with your wishes, whether specifically identified in an advance directive or made known during previous discussions with the agent and/or others. For this reason, you should discuss your wishes with your agent, family members and physicians.

### **Durable power of attorney for financial matters**

While the durable power of attorney for health care authorizes your agent to make health care decisions for you, it generally does not grant authority over your finances or to make financial decisions on your behalf. To ensure your financial matters are properly handled, it is important to designate, in a separate legal document, a trusted individual to serve as your agent for financial matters. The person who holds your durable power of attorney for health care does not have to be the same person who holds your durable power of attorney for financial matters. Both persons can be authorized to act on your behalf in their designated areas of responsibility.

In a durable power of attorney for financial matters, you may grant your agent broad general powers to handle all your finances or only very specific powers. The agent is required to act in your best interest, maintain accurate records and avoid conflicts of interest. As long as you are mentally competent, you can revoke your durable power of attorney for financial matters at any time. You will need to specify under what circumstances your durable power of attorney becomes effective.

Often, unless otherwise specified, the durable power of attorney is effective immediately on the day it is signed and executed. This means that even if you are competent to make your own decisions, your agent will also have legal authority to act on your behalf. Many spouses have financial powers of attorney for each other so that either one is authorized to make decisions in the absence of the other. A "springing" durable power of attorney, on the other hand, becomes effective at a later date, usually when you become incapacitated and cannot make your own financial decisions. Be sure to specify that the power of attorney is "durable" to ensure the agent does not lose his/her authority to act on your behalf upon your inability to make your own decisions. All powers of attorney cease

upon death. You cannot give your agent authority to manage financial matters after your death, such as paying your debts, making funeral or burial arrangements, or transferring your property to the people who inherit it.

### Mental health advance directive

A mental health advance directive, also known as a psychiatric advance directive, is a set of written instructions that explain your wishes for mental health care if you become unable to make your own decisions. It also lets you name an agent to make your mental health care decisions. A mental health advance directive may be useful if you are unable to make health care decisions because of an episodic or progressive mental illness. It is important to remember that a mental health advance directive or the appointment of an agent will only be in effect when you are unable to make your own mental health care decisions.

This means that a mental health advance directive may only be effective for several days or several weeks at a time, during a period of active mental illness, until you regain the ability to make your own decisions about treatment. You may also change or revoke your mental health advance directive at any time you have the adequate mental capacity to do so.

The categories of mental health treatment most commonly covered by a mental health advance directive are:

- ★ The use of electroconvulsive therapy
- ★ The use of psychotropic medications
- ★ The admission into a mental health facility

Approximately 25 states have laws regarding mental

health advance directives. These laws set out the exact requirements for executing a mental health advance directive, including if the use of a specific form is required or preferred, if witness signatures are needed, and who is precluded from acting as a witness. Even if your state does not have a specific law related to mental health advance directives, you can usually add your preferences for mental health treatment to your durable power of attorney for health care. On this issue, you should seek guidance from your supporting Judge Advocate General's Corps officer or attorney.

### How do I complete an advance directive?

Most military advance directive forms simply ask you to enter your specific preferences in designated sections and sign them in the presence of a Judge Advocate General's Corps officer or notary public and, often, in the presence of other witnesses. Your supporting military legal assistance office will be able to prepare an advance directive that should be recognized throughout the United States and in military treatment facilities, in spite of variations in state law. A federal statute requires this method of completion to be honored anywhere, but many people decide to complete the forms before a notary public and three witnesses to ensure the forms will meet the requirements of even the most restrictive states.<sup>1</sup> Hospitals, military treatment facilities and other health care providers may also have statutory advance directive forms that you can complete and execute in a similar manner. Many states have approved statutory forms available on their websites. Private attorneys can also assist you in the preparation and execution of these forms but will likely charge for this service.

Completing the form will require you to make choices

<p><b>Notice: I have an advance directive</b></p> <p>Name: _____</p> <p>My health care agent: _____</p> <p>My health care agent's phone number: _____</p> <p>Location of my advance directive: _____</p>	<p>Specific instructions: _____</p> <p>_____</p> <p>_____</p> <p>My physician's name: _____</p> <p>My physician's phone number: _____</p> <p>Signature: _____</p>
--	---

1 10 U.S.C. § 1044c (Advance Medical Directives of Members and Dependents: Requirement for Recognition by States).



# The value of discussing your health care choices with your spouse, parents and friends cannot be overstated.

regarding how you want to be treated in a particular situation. You should read the form and be confident that you understand the choices you are about to make and that your wishes are clearly stated. If you do not understand some part of the document or how it becomes effective, you should seek advice from your supporting Judge Advocate General's Corps officer or attorney.

## How will my providers know about my advance directive?

It is important you discuss your treatment decisions with your military health care providers and give them a copy of your advance directives to place in your medical records. Military members and their families are fortunate to have a consolidated system of medical records accessible throughout the Military Health System. In most circumstances, having your advance directive on file in your medical record should ensure your providers are aware of it. However, it is best to specifically advise your health care provider that you have an advance directive. Also, having a wallet-size reproduction of your advance directive improves the likelihood that a provider will be aware of your wishes. Many states or nonprofit organizations offer wallet cards, as illustrated on page 4.

Telling your next of kin, emergency contacts and close friends in the military unit about your advance directives also improves the likelihood your wishes will be known and honored. For this reason, you may consider sharing your advance directives with those close to you, but be sure to provide them with updated information should you make any changes.

## Can I change my mind after signing an advance directive?

An advance directive reflects the choices made at the time you completed the form. It can be changed at any time. In fact, people regularly change their mind, so do not be afraid or embarrassed to do so. As you get older or

your personal circumstances change, re-evaluating your preferences for end-of-life treatment makes good sense.

You can change your existing advance directive by simply destroying your existing directive and executing a new one that contains your current choices. It is imperative the new version be added to your medical records and replace your previous advance directive in all locations and with any individuals with whom you shared a copy. In addition, be sure to include a statement in the new one that you are revoking your prior directives. Although many states have laws stating that an advance directive with a more recent date will revoke a prior one, your statement will reinforce the point and further ensure your most current wishes are followed.

## Where should I keep my advance directive?

A copy of your advance directive should be part of your medical records. In addition, for situations where health care providers may not be able to access your medical records, you should keep a wallet-sized copy of your advance directive (like the sample shown on page 4) in the glove box of your car and on your person. You should also keep the original of your advance directive at your residence in a fireproof and waterproof secure location and let a number of people know its location. The individuals named in your advance directive, next of kin and emergency contacts should also know where to find your advance directive and have a copy. Finally, if you are deployed, let someone in your military unit know the existence and location of your advance directive. The value of discussing your choices with your spouse, parents, friends or a trusted co-worker cannot be overstated.

While your choices usually will be honored, in the event of controversy, the testimony of people with whom you have discussed your wishes will help demonstrate that you knew what you were doing and made a free and rational decision. These individuals can provide valuable support to confirm what you indicated on the advance directive forms.

## Do states recognize military advance directives?

Military legal assistance attorneys prepare advance directives to comply with state laws. For instance, a service member who is stationed in Texas, but considers Massachusetts as his/her permanent home state (called a "domicile"), can have an advance directive prepared to comply with Massachusetts state law. Military health care professionals, as well as health care professionals in each state, should recognize an advance directive prepared to comply with a service member's domicile.

As part of the formal process of executing an advance directive, your document may require notarization. Military legal assistance attorneys and certain military paralegals are authorized to notarize any document without using a seal or stamp, and without a state authorizing him/her to act as a notary. This authority is carried out under another Federal Statute 10 U.S.C. 1044c.<sup>2</sup>

An advance directive notarized in this manner should be recognized in all 50 states and U.S. territories. However, health care providers working in a civilian hospital may not be aware of this. Therefore, a service member who thinks his/her advance directive might be used away from a military installation should consider having the advance directive notarized under state law, or witnessed in lieu of being notarized (if permitted by state law). Most military legal assistance offices also employ a state notary. You may seek guidance from your supporting Judge Advocate General's Corps officer or attorney to discuss whether your document should be notarized by a federal or a state notary.

### **Will my advance directive be recognized by the department of veterans affairs facilities?**

The U.S. Department of Veterans Affairs recognizes two types of advance directives: its own forms and forms authorized by state law. If the form you completed during your military service is consistent with your home state's law, the Department of Veterans Affairs will recognize it when you leave military service. If you move to another state, you should either complete an advance directive that is consistent with your new home state's law or complete a Department of Veterans Affairs advance directive form. Department of Veterans Affairs social workers can help enrolled veterans complete advance directive forms.

### **What are the policies of each military branch regarding advance directives?**

Each military branch recognizes a service member's right to name a person who will make his/her health care decisions if the service member is unable to make or communicate those decisions through an advance directive. In fact, the military services encourage service members to complete advance directives and share copies with their health care team.

### **Will my advance directive continue to be valid after I leave the military?**

The fact that you will leave the military and return to civilian life does not invalidate an otherwise valid advance directive. However, advance directives should be periodically reviewed and updated. The older a document becomes, the easier it will be to challenge it, on the basis it does not reflect your current wishes. Even if your wishes do not change, it is prudent to update or re-execute advance directives every few years.

It is also recommended that you re-evaluate your choices after any major life event, such as marriage, birth of a child, divorce, death of a significant loved one, and your transition from military to civilian life.

### **Conclusion**

Documenting your decisions concerning future health care, including life-sustaining treatment decisions, can be complex and overwhelming for both active military and military beneficiaries/dependents. Knowing what questions to ask, whom to ask, understanding the applicable laws, and where to look for information and assistance may be time consuming and confusing. We hope this reference guide provides the information you need to help answer these difficult questions.

**It is critical for you and your loved ones to understand the opportunity advance directives present for clarity in health care decisions, especially during deployments.**

---

<sup>2</sup> 10 U.S.C. § 1044a (Authority to Act as Notary).