

**ACT NO. 2004-194
(HOUSE BILL NO. 2036, SESSION OF 2004)**

**MENTAL HEALTH DECLARATIONS
AND POWERS OF ATTORNEY**

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1. SUMMARY AND INTRODUCTION

Pennsylvania has, for many years, had legislation authorizing individuals to execute “Powers of Attorney” which designated a specified person to make health care decisions for that individual, generally when the individual was unable to do so, because of disability or incapacity. Other statutes allow individuals to establish an Advanced Directive authorizing the termination of life-sustaining treatment in terminal conditions when they lack capacity to make or express that decision, and to establish out-of-hospital DNR orders. In all of these situations, patients state in advance of the event their consent or non-consent to certain medical treatment, or authorize a surrogate to make those decisions for them.

Act No. 2004-194 builds on that background, focusing on mental health treatment. Act 194 authorizes individuals to prepare a “Mental Health Power of Attorney” and/or a related document known as a “Mental Health Declaration.” Through these documents, mentally ill persons, when “competent,” can describe and in some respects control the care they want to receive when in the active phase of their illness, in both outpatient or inpatient settings. The documents essentially allow patients to consent to and/or reject certain kinds of treatment in advance. The bill takes effect on or about January 29, 2005.

The summary below is intended to explain many of the basic rules under the Act. We believe the information is accurate. This material is not, however, intended to provide legal advice to members and/or readers in any particular situation that may be encountered. Many questions, however, cannot be anticipated until they arise in practice under the Act. Other questions can be anticipated but cannot be answered with certainty. Some provisions of the Act are ambiguous, and the interplay between provisions of this Act and the Mental Health Procedures Act (the “MHPA”) provides additional potential conflicts. Courts may construe the provisions of the Act over the next several years, providing their answers to the questions raised.

There are two important issues in which the answers are simply not as clear as we would like. We discuss these at length later in this analysis but highlight them and our best judgment about the correct answers here:

- **Does a Declaration and/or Power of Attorney, including its stated limitations on the treatment that can be provided, apply to an individual who has been involuntarily committed?** We believe it does not and that persons who have been involuntarily committed can be provided, involuntarily if necessary, with routine mental health treatment in accordance with regulations of the Department of Public Welfare. An individual might list “involuntary commitment” as a circumstance that activates a Declaration or Power of Attorney. The effect of the Declaration or Power of Attorney in that event is simply unclear. If you are presented with that situation, we suggest you contact legal counsel.

- **Can a Declaration or Power of Attorney Require a Psychiatrist to Provide Professionally Appropriate Care?** No. Nothing, including a patient's preferences in a Declaration, can require a psychiatrist to provide care he or she believes to be professionally inappropriate and psychiatrists should never do so. However, outside the context of involuntary commitment, a psychiatrist cannot provide care for which a Declaration specifically refuses to provide consent.

2. THE BASIC DOCUMENTS

- **What Is A Mental Health Declaration?** A Mental Health Declaration is a written document that describes the preferences of an individual, known as the "Declarant," regarding the following:
 - the mental health treatment facility he or she wishes to be admitted to in the event inpatient care is needed;
 - medication;
 - ECT;
 - participation in experimental studies or drug trials;
 - and possibly additional matters.

In some respects, the "preferences" must be followed, particularly when they state a non-consent to certain kinds of treatment; in other respects, the preferences are merely that. In no instance is a psychiatrist **required**, because of a Declaration or a Power of Attorney, to provide treatment that he or she believes to be professionally inappropriate but a Declaration can **prevent** a psychiatrist from providing treatment that he or she believes to be professionally appropriate.

- **What Is A Mental Health Power Of Attorney?** A Mental Health Power of Attorney is a written document that authorizes a designated person, referred to as an "agent," to make mental health decisions for a person. The Power of Attorney can include the patient's preferences for the same subjects as a Declaration. The comments in the bullet immediately above regarding preferences and adherence to professional standards apply here in full.
- **How Do Declarations And Powers Of Attorney Differ?** Other than the basic difference -- making treatment decisions in advance or authorizing another to make them -- they are quite similar. The two can be combined in one document, in which case the patient usually states his or her desires in some areas and authorizes the agent to act in others. Unless stated below, the rules discussed below apply to both.

- **Who Can Execute Declarations And Powers Of Attorney?** A person 18 or older, or an emancipated minor, who has not been determined by a court to be incompetent under the guardianship laws or severely mentally disabled under the Mental Health Procedures Act (*i.e.*, who is subject to involuntary care). Except for those limitations, persons are presumed to be capable at the time they execute a Declaration or Power of Attorney. Although patients might ask you to sign an affidavit attesting to their capacity at the time they make the Declaration or POA, the law does not require you to do so and we recommend that you exercise great caution in the event you decide to do so. You simply may not be aware of all relevant facts or the implications for later treatment. An “emancipated minor” is a person under 18 who (1) has graduated from high school, (2) has married, or (3) has been pregnant. Note that even though persons 14 and older can admit themselves for treatment under the Mental Health Procedures Act, the minimum age for making a Declaration or Power of Attorney is 18 (unless the minor is emancipated).

3. WHEN AND HOW THEY BECOME EFFECTIVE

- **When Do Declarations And Powers Of Attorney Become Effective?** The document becomes operative when a copy is provided to an attending physician *and* the criteria for operationalizing it, as stated in the Declaration or Power of Attorney, are met. The default criteria is being “incapable of making mental health care decisions,” but the Declarant can list other criteria (*e.g.*, when a patient exhibits certain symptoms or behavior, such as excessive credit card use in a patient with bipolar disorder). Patients are required to notify their physician of the existence of the Declaration or Power of Attorney.
- **What Does Being “Incapable Of Making Mental Health Care Decisions” Mean?** Being incapable of making mental health care decisions must mean something more than literally being unable to make decisions, since almost all mentally ill persons can **make** a decision. Instead, the phrase must incorporate some component of being able to understand, to a reasonable degree, the nature of the proposed treatment; the treatment alternatives, if any, being presented; and the risks and benefits of treatment. Persons who have been adjudicated incompetent by a court have had their decision-making authority removed from them, and that would seemingly make a Declaration or Power of Attorney effective.
- **Does An Involuntary Commitment Make A Patient Incapable Of Making Mental Health Decisions?** Although the Act is not clear, we believe that involuntary commitment does *not* automatically make a patient incapable of making mental health decisions. Involuntary commitment does, however, destroy the presumption that otherwise applies that an individual is capable of making mental health decisions. This means that involuntary commitment is not **automatically** a triggering

event to making a Declaration or Power of Attorney effective. We expect there to be disagreement on this point, however, and in the future the courts will almost surely address the effect of a Declaration or Power of Attorney in the event of an involuntary commitment. [See also Section 6, page 9.]

- **Who Makes The Decision That An Individual Is Incapable Of Making Mental Health Decisions?** The decision is to be made by two health professionals, one of whom must be a psychiatrist and the other of whom can be a psychiatrist, psychologist, family physician, attending physician or “mental health treatment professional.” One of the two must be a “treating professional” of the Declarant. Although the Act does not address it expressly, the same process would likely apply to determining whether any alternative or additional criteria stated in the Declaration or Power of Attorney have been met. Unlike a determination of incompetency and appointment of a guardian, no court involvement is required.
- **Who Is A “Mental Health Treatment Professional”?** A “mental health professional” is a licensed physician who has successfully completed a residency program in psychiatry; or a person trained and licensed in social work, psychology or nursing who has a graduate degree and clinical experience in mental health.
- **How Is The Decision To Be Made?** The psychiatrist and other physician or mental health professional must, minimally, perform an examination sufficient to allow them to make the determination.
- **What Makes A Declaration Or Power Of Attorney Ineffective Once It Has Been In Effect?** Once in effect, following a finding that the trigger condition(s) have been met, a Declaration or Power of Attorney remains in effect until an attending physician determines the patient is now capable of making mental health treatment decisions. It appears that the requirements for making the decision that the patient is incapable -- two health professionals, each of whom has examined the patient -- do not apply except for any involuntarily committed patients whose advance directives are considered in effect. In any case, the same substantive standard discussed above (“What Does Being “Incapable Of Making Mental Health Care Decisions” Mean?”) would apply.

4. THE SUBSTANCE OF THE DECLARATION OR POWER OF ATTORNEY

- **What Can A Declaration Or Power Of Attorney State Regarding Preferred Medications?** A Declarant can consent either to whatever medications the physician recommends during the period of incapacity, or to recommended medications with enumerated exceptions or preferences. Alternatively, a Declarant can refuse all medications. A Power of

Attorney will give the agent one of those same three alternatives. We do not interpret the first two options as requiring the agent to agree to the use of any and all medications that are recommended but to exercise his or her judgment as to what the patient would consent to if competent to do so. However, regardless of his or her views, the agent cannot consent to medications for which the Declarant has specifically denied consent.

- **Must A Psychiatrist Follow The Prescribing Instructions?** No. First, psychiatrists may entirely ignore any dosage instructions. Second and more important, nothing requires a psychiatrist to prescribe medication that is inappropriate for the psychiatric condition, or contraindicated given other conditions or medications, even if that is what the patient has indicated he or she wants. See the longer discussion on this point in “What Can The Psychiatrist Do If He Or She Believes The Directions In The Declaration Or Power Of Attorney Are Inappropriate?” later in this Summary.
- **Can A Psychiatrist Prescribe In Conflict With The Declaration?** No. If a Declaration, or an agent acting under a Power of Attorney, withholds consent for specified drugs, or all drugs, the psychiatrist must follow that direction unless and until a Court rules otherwise. While a psychiatrist does not have to provide a treatment requested or consented to by a patient in a Declaration, the psychiatrist must honor the patient’s refusal to consent to certain medications. (Exceptions may exist in situations involving emergency involuntary treatment; see Section 6.)
- **Can A Psychiatrist Provide Treatment To Which The Patient Has Neither Expressly Consented Nor Refused?** The answer depends on the terms of each individual’s Declaration or Power of Attorney. If the Declaration or Power Of Attorney authorizes either whatever medications the physician recommends during the period of incapacity or all recommended medications with enumerated exceptions, and the medications are not among the exceptions, no further specific consent is required.
- **What Can A Declaration Or Power Of Attorney State Regarding A Preferred Treatment Facility?** The Declaration or Power of Attorney can state the patient’s preferred and non-preferred facility, but this is purely in the form of a preference, not a mandate. A psychiatrist who disregards that preference should, however, have appropriate reasons for doing so and should document that reason.
- **Can A Declaration Provide Consent To A Voluntary Inpatient Admission?** No. A Declarant cannot in a Declaration consent to voluntary inpatient admission. Instead, the law allows patients to identify preferred and non-preferred facilities in the event that they require

admission to a psychiatric treatment facility. This is clearly a preference and nothing more.

- **Can An Agent Under A Power Of Attorney Provide Consent To Voluntary Inpatient Treatment?** Yes. Unless limited by something specific in the Power of Attorney, an agent can make any mental health care decision and exercise any right and power that the Declarant could have made or exercised. That probably includes the right to consent to a “voluntary” inpatient admission.
- **What Can A Declaration Or Power Of Attorney State Regarding ECT And Participation In Experimental Studies Or Drug Trials?** The Declaration or Power of Attorney can state the patient’s consent or non-consent to ECT, and likewise can consent to participation in experimental studies or drug trials as to which the “treating physician believes the potential benefits ... outweigh the risks” to the patient. The Declarant can alternatively give the agent under the Power of Attorney the power to consent. If a Declarant has refused to consent to ECT, or the agent refuses to do so, the treatment cannot be provided.
- **What Else Can The Declaration Or Power Of Attorney Address?** The Declaration or Power of Attorney may address or describe: activities the Declarant believes help or worsen symptoms; the type of intervention preferred in the event of a crisis; the Declarant’s mental and physical health history, dietary requirements, and religious preferences; the temporary custody of the Declarant’s children; if and how the Declarant’s family should be notified; limitations on the release or disclosure of mental health records; and “other matters of importance.” Most of these are applicable only to inpatient care; are in the nature of preferences, not mandates; and some are inapplicable to psychiatrists *per se*.
- **What Effect Do Limitations In A Declaration Or A Power of Attorney Have On Non-Psychiatric Medical Treatment?** None. The Declaration and Power of Attorney are strictly limited to mental health care issues.
- **How Is An Agent To Decide What Treatment To Consent To?** If the Power of Attorney states specific preferences, the agent must follow them whether or not the agent thinks they are correct or optimal. In other situations, the Power of Attorney authorizes the agent to make the decision but provides no direction. In that instance, the agent is to make the decision he or she believes the Declarant would make if competent to do so. If the agent cannot determine what the Declarant would want, he or she should make the decision the agent determines is in the patient’s best interest.

5. CONFLICTS BETWEEN THE DECLARATION AND/OR POWER OF ATTORNEY AND PROFESSIONAL STANDARDS

- **How Does The Existence Of A Declaration Or Power Of Attorney Affect The Standard Of Care Or The Clinical Decision-Making Authority Of The Provider Of Care?** It does not affect those at all.
- **Must A Psychiatrist Provide Care He Or She Believes To Be Medically Inappropriate?** No. There are many situations in which following directives could be inconsistent with standards of care. These include prohibiting the use of any medication when medication is indicated; prohibiting use of the medication of professional choice; or requiring, either directly or indirectly, the use of a medication that will result in an increased risk of adverse drug interactions, serious side effects, or which is inappropriate given the patient's other medical conditions. The Act contains somewhat conflicting provisions about a psychiatrist's obligations in that event.

On the one hand, there is a provision stating that psychiatrists "shall comply" with the directions of the Declaration or Power of Attorney. There is also a provision relating to transfer efforts (described in the bullet below) that states, "While the transfer is pending, the patient shall be treated consistent with the Declaration." These suggest that the instructions in a Declaration or Power of Attorney are mandatory on a psychiatrist.

We strongly believe, however, that nothing requires the psychiatrist to provide care he or she believes to be medically inappropriate just because a patient has indicated he or she wants it, and psychiatrists should not do so. We understand that patient advocates who participated in the drafting of the bill support that view. In general, there is nothing in the Act explicit enough to override the firmly established principle that patients cannot require physicians to provide care the physicians believe to be medically inappropriate.

Various provisions in the Act support that conclusion. One provision states that a psychiatrist need not provide the care as directed if the psychiatrist cannot "in good conscience" follow the directives because doing so would contravene "accepted clinical practice and medical standards"; the directed treatment is not available; or the psychiatrist's policies prevent compliance. Yet another provision, concerning "Liability," provides that a physician cannot be held liable, including before a professional licensing board, for refusing to comply with a Declaration that "violates accepted clinical standards or medical standards of care." Finally, another provision states that the existence of a Declaration or Power of Attorney does not affect either the standard of care or the clinical decision-making authority of the care provider. These strongly suggest that the psychiatrist cannot be required to provide treatment that he or she thinks is inappropriate.

At the same time, a psychiatrist generally cannot provide care that he or she believes to be medically appropriate if the Declarant has specifically refused it or the agent does so. Similarly, if, for example, the patient has expressed a choice among drugs that are, in general, appropriate for a psychiatric condition, the preferences in the Declaration must be followed.

- **What Should A Psychiatrist Do If He Or She Determines Not To Follow The Directives?** First, the psychiatrist must notify, as appropriate to the circumstances, the Declarant, unless he or she has been adjudicated incompetent; or a guardian or other legal representative if the patient has a court-appointed guardian; and/or if there is a Power of Attorney, the agent named in it. Second, the psychiatrist must “document the reasons for noncompliance.” Third, the psychiatrist must make “every reasonable effort” to arrange a transfer to a physician who will comply. If “reasonable efforts to transfer” the patient fail, the patient may be discharged from the facility and/or from treatment.
- **What Should A Psychiatrist Do While Transfer Efforts Are Underway?** The psychiatrist should not provide treatment that is inconsistent with professional standards or that, for other reasons, has caused the transfer efforts. Absent an emergency situation, the psychiatrist should not provide care to which the patient has refused to consent. (See also Section 7, “How Should Psychiatrists Respond to a Psychiatric Emergency?”)
- **What Are “Reasonable Efforts To Transfer”?** The Act does not define what constitutes “reasonable efforts” and, in general, the inquiry is case specific. It would seemingly include such things as contacting other facilities or psychiatrists to determine their willingness and ability to provide care consistent with the limitations of the Declaration or Power of Attorney.
- **Can Restrictions In A Declaration Or Power Of Attorney Be Invalidated And The Patient Treated Contrary To The Advance Directives?** Yes, but in general only by court order. The standard is that following the directions in the Declaration or Power of Attorney “may cause potential irreparable harm or death.” That is a high standard, although use of the words “may cause” means that certainty is not required. Circumstances in which the directives prevent effective treatment of a serious mental illness with substantial adverse consequences -- for example, a serious suicide risk in a depressed patient or substantially prolonged illness-- and/or when the directives threaten serious and adverse drug interactions or side effects would likely meet the standard. We believe that treatment restrictions that prevent meaningful treatment and result in “warehousing” also meet these standards, because

on-going, non-treated mental illness should be viewed as resulting in irreparable harm.

- **Who Makes This Decision And How?** A Court must decide. An “interested party” may file a Petition to initiate this process. The Act does not define who an “interested party” is but it would likely include family members and, at least in some cases, a treating physician. The Petition should probably be filed in the Court of Common Pleas where the patient lives or is being treated. The Court may invalidate some or all of the directives in the Declaration or Power of Attorney and issue orders authorizing treatment that is inconsistent with the Declaration or Power of Attorney. The Court is supposed to rule within 72 hours from the filing of the Petition. It is simply unclear how courts will handle these matters and the process may vary from county to county and over time.

6. HOW DO DECLARATIONS AND POWERS OF ATTORNEY AFFECT ADMISSIONS AND TREATMENT DURING EMERGENCIES AND INVOLUNTARY COMMITMENTS?

Introductory Comments: Whether a Declaration or Power of Attorney controls treatment in the event of involuntary commitment is simply unclear. If they do, then involuntarily committed patients can, if they so choose, prevent effective treatment, leading to what is often described as “warehousing.” Of even more concern is to how to treat agitated patients in mental health emergencies and protect other patients and staff when the patients have, through a Declaration, refused the appropriate treatments. Presently, DPW regulations permit treatment to be provided, involuntarily if necessary, in those situations.

Some persons analyzing the new Act think that Declarations and Powers of Attorney control even when a patient is subject to involuntary commitment. Our best judgment is that they do not. We expect further guidance and/or clarification on this issue from Courts and others in the future. For the present, there is no clear-cut answer. The information below addresses these issues.

- **How Does The Existence Of A Declaration Or Power Of Attorney Affect Admission Or Commitment Under The Mental Health Procedures Act (“MHPA”)?** A Declaration or Power of Attorney does not affect either the standards or procedures for voluntary admission or involuntary commitment, except that agents under a Power of Attorney can consent to a voluntary admission for the Declarant. Persons who are “severely mentally disabled” as defined in the MHPA can be subject to involuntary commitment as before. An individual whose Declaration or Power of Attorney states a preference for voluntary and/or outpatient care nevertheless may be involuntarily committed when the MHPA standards are met, and to any appropriate facility.

- **How Does The Existence Of A Declaration Or Power Of Attorney Affect The Treatment Psychiatrists Can Provide To A Person Who Has Been Involuntarily Committed?** Medication preferences should always be honored to the extent it is professionally responsible to do so, even as to involuntarily committed patients. At the same time, however, *we do not believe that treatment limitations in a Declaration, Power of Attorney, or expressed by an agent acting under a Power of Attorney for an involuntarily committed patient must be honored.* We believe that involuntary commitment has two primary effects under the Act: (1) it destroys the presumption that an individual is capable of making mental health decisions; and (2) it prevents that person from revoking or amending a Declaration or Power of Attorney unless two physicians find him or her to have regained capacity. We do not believe that an involuntary commitment *per se* is a “triggering event” established by the Act for making a Declaration or Power of Attorney operative. If it were, the conclusion in this paragraph might differ. This is an issue on which the Act is quite unclear and different groups and individuals may come to different conclusions.

If our conclusion is correct – that involuntary commitment does not trigger the applicability of an Advance Directive or POA - then DPW regulations providing that patients committed under Sections 303-305 of the MHPA (but not Section 302) “may ... be required to accept routine medical, psychiatric, psychological, and educational programs. ...” will apply. The regulations also provide that in an emergency, which would include Section 302 commitments, “patients may ... be required to accept the minimal sufficient diagnostic procedures and treatment necessary to alleviate the emergency.”

- **How Should Psychiatrists Respond To A Psychiatric Emergency?** No provision of the Act specifically addresses emergency care. In emergencies, existing law generally provides an exception to the usual requirement for consent prior to providing treatment. However, the ability to treat in the absence of consent does not necessarily allow a physician to act in contravention of an explicit prohibition against treatment made by a person with capacity. Thus, if a patient needs emergency care and you are unaware of an advance directive and/or its contents, you should render the treatment you believe to be appropriate.

If at the time of the emergency you ARE aware of a Declaration or Power of Attorney that refuses to consent to the treatment that would be effective in the emergency, your decision is less clear. If a Declaration or Power of Attorney is *not effective* as to involuntarily committed patients, as we believe, then DPW regulations provide that those patients can be “required to accept the minimal sufficient diagnostic procedures and treatment necessary to alleviate the emergency.” If the patient is a voluntary

admission at the time of the emergency, and if the applicable standards for involuntary commitment are met (which appears likely in a psychiatric emergency), the patient can also be converted to involuntary status.

If a Declaration or Power of Attorney **is effective** as to involuntarily committed patients, as others believe, and you are aware of its prohibition against effective treatment, the procedure in the Act to invalidate treatment limitations during emergencies is via the court Petition and Order described earlier. In the interim, the facility has a responsibility to make certain the patient does not harm other patients. Very difficult questions relating to suicide attempts and harm to self may arise and, in our view, will require further word from either the legislature or the courts. Courts can be requested to provide emergency relief on a timetable appropriate to the circumstances that are presented.

- **What Happens If The Declaration Or Agent Acting Under A Power Of Attorney Refuses All, Or All Appropriate, Medications?** This raises very complicated legal issues concerning the ability to provide treatment involuntarily. In that instance, the patient's refusal results in the deprivation of freedom without care, or "warehousing." That may be an appropriate instance to seek court orders to overturn aspects of the Declaration or the agent's decisions and/or to consult legal counsel.

7. A PSYCHIATRIST'S OBLIGATIONS

- **May A Psychiatrist Refuse To Treat A Patient Who Has A Declaration Or Power Of Attorney?** No. Psychiatrists can neither require patients to have Declarations or Powers of Attorney nor refuse, solely on that basis, to treat patients who have them. But, as discussed earlier, psychiatrists are not required to provide care they believe to be medically inappropriate and can discharge patients who insist on that care. Nothing prevents psychiatrists from discharging patients on any of the bases on which they have previously done so (*e.g.*, non-adherence to recommended treatment, disruptiveness, failure to pay, routine failure to keep appointments), but any discharge must comply with normal rules regarding patient abandonment.
- **May Psychiatrists Serve As An Agent Under A Power Of Attorney?** Not for any patient they are treating, unless the psychiatrist is related to the patient by blood, marriage, or adoption.
- **Are There Special Record-Keeping Requirements?** Yes. Copies of pertinent documents, including revocations and amendments, must be placed in the medical record. In the absence of documents, notice of the existence of these documents should be placed in the record. Results of determinations that an individual is or is not capable of making mental health decisions and changes in that determination also should be placed

in the record. Decisions not to comply with certain directives or even preferences should be explained in the records. Although not required, it probably makes sense to chart that the psychiatrist asked the patient if he or she had a Declaration or Power of Attorney and informed patients being discharged from treatment about their availability.

- **What Other Obligations Do Psychiatrists Have?** They are required to: ask patients if they have a Declaration or Power of Attorney and inform patients being discharged from treatment about the availability of a Declaration or Power of Attorney. Psychiatrists do not have the responsibility to provide patients with the forms or help them complete them, but doing either or both of these things may prove to be good practice. When psychiatrists are notified of the revocation of a Power of Attorney, they are to enter that fact or a revocation document into the medical record.
- **Do These Rules Apply To Both Outpatient And Inpatient Care?** Yes.

8. IMMUNITIES AND LIABILITIES

- **What Liability Could Psychiatrists Face For Providing Care Contrary To That Outlined In A Directive?** Providing care for which the patient has specifically refused consent is a battery. There could be liability and damages even in the absence of medical harm and even if the care was consistent with the standard of care. As we have written several times in this Summary, a psychiatrist, at least outside the context of involuntary commitment or Court action, cannot provide care that he or she believes to be medically appropriate if the Declarant has specifically refused it or the agent does so.
- **What Immunities Does The Act Establish?** Physicians are immune from civil and criminal liability, including professional licensure actions, for the following categories of acts:
 - Complying with a direction or decision of a person the physician believes, in good faith, has authority to act as a principal's mental health care agent, provided the direction or decision is not clearly contrary to the terms of the mental health power of attorney (which the physician should have);
 - Refusing to comply with a direction or decision from an individual based on a good faith belief that the individual lacks authority to act as the agent;
 - Complying with a Declaration or Power of Attorney under the assumption that it was valid;

- Disclosing mental health care information to another person based upon a good faith belief that the disclosure is authorized or required;
- Refusing to comply with the direction or decision of an individual due to conflicts with a provider's contractual network or payment policy restrictions;
- Refusing to comply with a Declaration or Power of Attorney which violates accepted clinical standards or medical standards of care;
- Making a determination that causes a Declaration or Power of Attorney to become effective; and
- Failing to determine that a patient lacks capacity to make mental health decisions and thereby preventing the Declaration or Power of Attorney from becoming effective.

Although not expressly listed in the Act, we believe that physicians cannot be held liable for providing care as requested in a Declaration or a Power of Attorney if it meets the standard of care. The first immunity listed above clearly provides immunity for a physician who acts in conformity with a decision of an agent who is acting under a Power of Attorney. It makes no sense to provide that immunity but not to provide immunity for following the directives of a Declaration. There is also immunity for complying with an invalid Declaration under the assumption that it was valid. It is hard to imagine how there could not also be immunity for complying with an valid Declaration. It is possible to imagine a situation in which a patient sued a physician who followed directives in a Declaration on the basis that the physician should have advised that doing so was contrary to sound medical practice, but we think that unlikely. *At the same time, we recommend that psychiatrists not provide care, even at the Declarant's request, that they are concerned presents a meaningful risk of harm to the patient or that is otherwise professionally inappropriate. We recognize that in some instances, it will be a "close call" whether the treatment the patient has consented to, although not optimal, may still be beneficial.*

- **What Happens If A Psychiatrist Acts Without Knowledge Of The Declaration Or Power Of Attorney?** A Declaration or Power of Attorney must have been provided to a physician to be effective. Good faith actions taken without knowledge of a Declaration or Power of Attorney are unlikely to result in any liability. The rules that will apply in "shared care" situations -- such as hospital, group practice, or covering call -- will need to worked out. Psychiatrists have an obligation to ask whether a patient has a Declaration or Power of Attorney. We do not think that needs to be the first thing a psychiatrist does, particularly if

presented with an actively psychotic patient. However, the patient should be questioned about the existence of a Declaration or Power of Attorney before treatment proceeds unless circumstances truly prevent that from occurring. Facilities will likely want to have an established procedure to check medical records for the existence of a Declaration or Power of Attorney.

- **What Criminal Violations Does The Act Establish?** The Act establishes criminal penalties, for:
 - Concealing, canceling, altering, defacing, obliterating or damaging a Declaration or Power of Attorney without consent;
 - Using undue influence, fraud or duress to cause a person to execute a Declaration or Power of Attorney; and
 - Falsifying or forging a Declaration or Power of Attorney.

These should, in general, not involve psychiatrists.

9. TERMINATION, REVOCATION, AND AMENDMENT OF DECLARATIONS AND POWERS OF ATTORNEY

- **How Long Do Declarations And Powers Of Attorney Remain Valid?** The general rule is that both Declarations and Powers of Attorney automatically terminate two years from when they were signed (not from when they became operative) unless revoked or amended previously. But they remain in effect beyond that date if the Declarant is, at that time, incapable of making mental health care decisions, involuntarily committed and has not been determined to be capable, or has a guardian. Under that circumstance, the Declaration or Power of Attorney would terminate when the individual recovered his capacity to make mental health decisions, or, if based on involuntary commitment or appointment of a guardian, whenever those conditions ended.
- **How Do Individuals Revoke Or Amend Declarations Or Powers Of Attorney?** They can be revoked or amended orally or in writing at any time, unless the Declaration or Power of Attorney requires it be done in a specific way (*i.e.*, in writing). A revocation can be in full or in part; in the latter event, it is essentially an amendment. A revocation does not, apparently, need to be “witnessed” in the same fashion as the Declarations and Powers of Attorney do when originally executed. All portions of a Declaration or Power of Attorney that are not revoked or amended remain in force. We recommend that if the amendment or revocation is verbal, that the change be memorialized on the Declaration or Power of Attorney (which should be in the patient’s chart) and a notation be made in the medical records.

- **Are There Limits On An Individual's Ability To Revoke Or Amend A Declaration Or Power Of Attorney?** Yes. An individual cannot revoke or amend the Declaration or Power of Attorney while it is in effect, *i.e.*, when the triggering conditions have been met or when the individual has been involuntarily committed and not found to be capable. As discussed earlier, an involuntarily committed patient may revoke or amend a Declaration or Power of Attorney if a psychiatrist and other mental health professional examine the patient and find that he or she is capable of making mental health decisions.

A patient who does not like the prospect of being found incapable might attempt to revoke the Declaration or Power of Attorney between when the first professional has reached a judgment and before the second professional does so. While it is not entirely clear, we believe a patient cannot do that. Once the process to decide whether the patient is incapable of making mental health decisions has begun, the process must continue to a conclusion.

- **When Do Revocations And/Or Amendments Become Effective?** They become effective when they are communicated to the psychiatrist or other mental health provider by the patient or someone who witnessed the revocation/amendment. When information on revocation is provided by a "witness," it is appropriate to be cautious and to require some supporting evidence of the fact of revocation before accepting it as true.