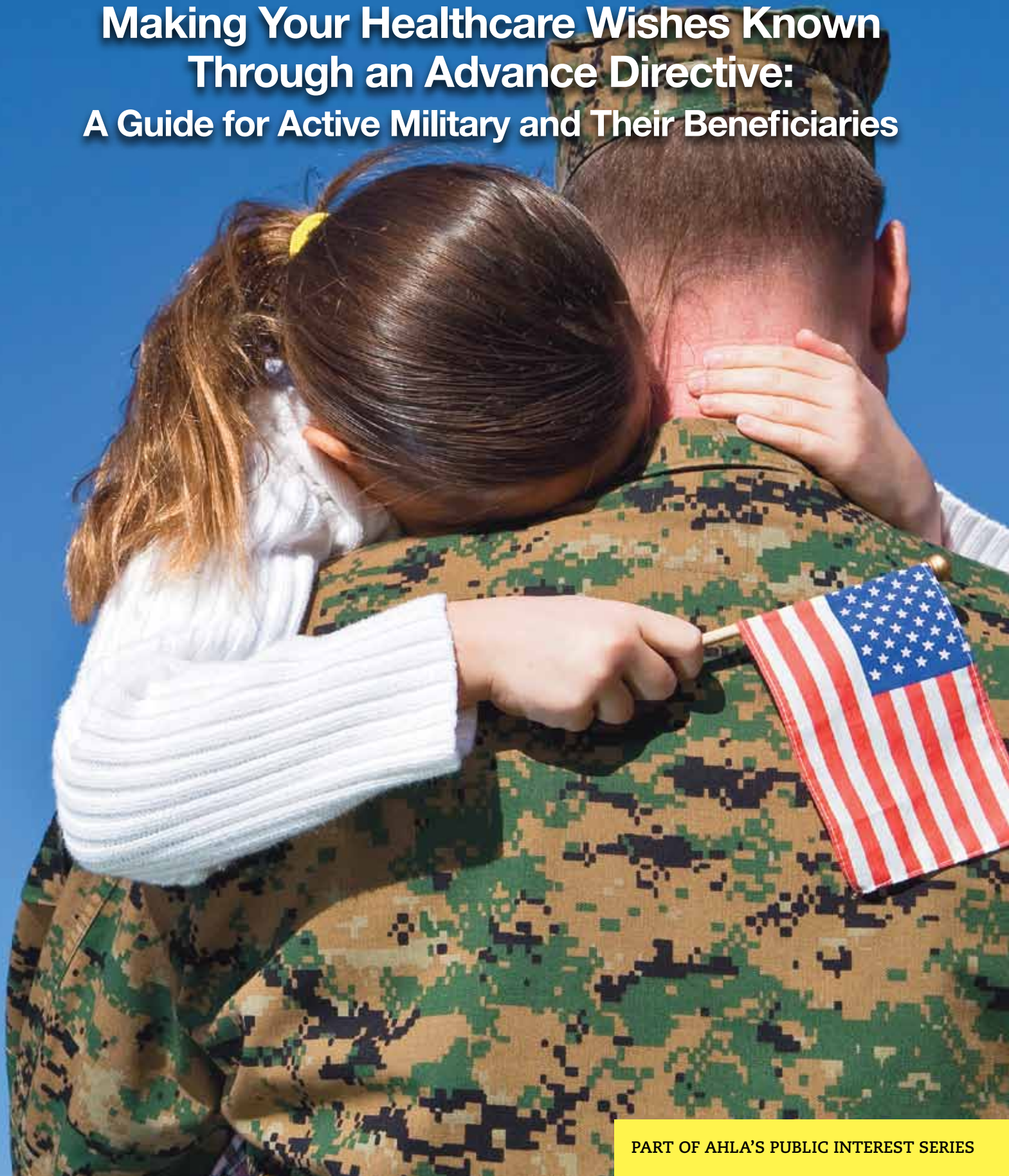


Making Your Healthcare Wishes Known Through an Advance Directive: A Guide for Active Military and Their Beneficiaries



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—From a declaration of the American Bar Association



Making Your Healthcare Wishes Known Through An Advance Directive: Guide For Active Military And Military Beneficiaries

This informational guidebook seeks to provide important guidance to active military and military medical beneficiaries/dependents about Advance Directives. Advance Directives allow individuals to express in advance their preferences regarding future healthcare, including life sustaining treatment decisions. It is critical for active military and military beneficiaries to understand the opportunity Advance Directives present for clarity in healthcare decisions, especially during deployments. This guidebook outlines the different types of Advance Directives, such as Living Wills, Healthcare Proxies, Durable Powers of Attorney for Healthcare, Durable Powers of Attorney for Financial Matters, Do Not Resuscitate (DNR) 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?

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

An Advance Directive is a written legal document that allows you to communicate your wishes about what medical care you want to receive if you become unable to make or communicate 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 provide clear and reliable guidance on your specific healthcare wishes when you cannot speak for yourself.

There are several types of Advance Directives. Each one

is a little different. The most effective and commonly used types are described in detail in this guidebook. You should consider each one to determine which one(s) best suits your needs:

- ★ Living Will;
- ★ Healthcare Proxy (often included as part of a Living Will);
- ★ Durable Power of Attorney for Healthcare;
- ★ Durable Power of Attorney for Financial Matters;
- ★ Do Not Resuscitate (DNR) Consent Form; or
- ★ Mental Health Advance Directive.

Living Will

A Living Will is a type of Advance Directive that contains your preferences regarding healthcare 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 death is imminent. A Living Will may also contain a section allowing the appointment of a Healthcare Proxy who 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 (CPR), surgery, 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 healthcare provider to do something illegal.

Most states have statutory requirements and statutory forms for Living Wills and recognize them as documents that are legally binding on your healthcare 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 it 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 to provide your healthcare team, family, and healthcare Agent (explained in more detail below) with guidance about your wishes. This is especially true when a Living Will is accompanied by a Durable Power of Attorney for Healthcare or other Advance Directive.

Healthcare Proxy

Living Wills often contain a section allowing you to appoint a Healthcare Proxy. A Healthcare Proxy is a person you appoint to make healthcare decisions for you if you cannot make them yourself. The Proxy may have broad powers to make healthcare decisions for you, such as selecting and discharging providers; consenting to diagnostic tests/surgical procedures; approving orders not to resuscitate; and giving directions to provide, withhold or withdraw artificial nutrition and hydration.

Your Healthcare 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 that decision based on what he/she understands to be your personal 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 based on the particular situation that may exist at that time. You may want to combine a Healthcare Proxy with a Living Will if you have strongly held views about specific situations. This will ensure that 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 (DNR) Consent Form is a written document instructing medical professionals not to perform CPR (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 DNR is used only to express your wish to forgo CPR. 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 DNR Consent Form unless you are in the end stages of a terminal disease. Like a Living Will, the DNR Consent Form may not be honored if you are pregnant. It is often suspended by patients or healthcare providers during a procedure, such as surgery, that is expected to improve health.

Out-of-Hospital Do Not Resuscitate Order

DNR orders signed in a hospital typically do not apply to care provided outside of the hospital. Therefore, most states have enacted Out-of-Hospital Do Not Resuscitate statutes that expressly authorize a patient's attending physician to issue a DNR order. Typically, these statutes require that the patient have a terminal condition or that a physician certify the patient is approaching the end of his or her life. Most Out-of-Hospital DNR statutes provide for wristbands or other wearable items that indicate the patient has a valid Out-of-Hospital DNR Order in place. This allows emergency medical technicians and paramedics to honor the DNR Order even if the written order cannot be readily produced. DNR Orders do not preclude the provision of other types of care, so emergency medical services personnel will provide oxygen, intravenous (IV) 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 honor a DNR Order from another state.

Durable Power of Attorney for Healthcare

A Durable Power of Attorney for Healthcare is another type of Advance Directive that allows you to give legal authority to a person, an "Agent," who will make healthcare decisions for you when you are unable to make your own healthcare decisions. 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 for determining under what medical conditions a person is unable to make his or her own healthcare decision but once it becomes effective, this type of Advance Directive will remain in effect for as long 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.

**Your Healthcare
Proxy should be someone
you trust . . .**



An Agent:

- ★ Must be at least 18 years old;
- ★ Must be of sound mind and body during the entire time he or 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 healthcare wishes; and
- ★ Should be willing to sign a legal document that he/she acknowledges and accepts his/her responsibilities, if required by state law.

The Durable Power of Attorney for Healthcare must define the scope of authority granted to your Agent. The Agent can make general healthcare decisions, as well as decisions relating to mental health, that involve accepting or refusing medical treatment (including DNR orders); admission to a Military Treatment Facility (MTF), 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 also be clearly described in the Durable Power of Attorney for Healthcare 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 Healthcare and acknowledge that these decisions may lead to your death. If you are relying on your Durable Power of Attorney for Healthcare to set forth your life sustaining treatment decisions, you should ensure the form also complies with your state's Living Will requirements. It is important to note here that military commanders may override certain refusals of treatment by military personnel. Seek guidance from your Judge Advocate General Corps (JAGC) officer or attorney if you have questions about refusing treatment.

More generally, a Durable Power of Attorney for Healthcare 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 Healthcare, 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 others who know you. 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 Healthcare authorizes your Agent to make decisions for you regarding healthcare, it generally does not grant any authority to control your finances or make financial decisions for you. To ensure your financial matters are properly handled, it is important to designate a trusted individual to serve as your Agent for financial matters in a separate legal document. The person who holds your Durable Power of Attorney for Healthcare does not have to be the same person who holds your Durable Power of Attorney for Financial Matters. Both persons are authorized to act on your behalf in their designated areas of responsibility.

In a Durable Power of Attorney for Financial Matters, the Agent's powers are defined in and limited to that document. You may grant your Agent broad general powers to handle all of 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 in the Durable Power of Attorney under what circumstances it 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 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 incompetence or 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 explains your wishes for mental healthcare if you become unable to make your own decisions. It also lets you name an Agent to make your mental healthcare decisions. A Mental Health Advance Directive may be useful if you are unable to make healthcare 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 under this type of directive will only be in effect during periods when you are unable to make your own healthcare 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 (ECT);
- ★ The use of psychotropic medications; and
- ★ Admission to a mental health facility.

Approximately twenty-five 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 may usually add some of your preferences for mental health treatment to your Durable Power of Attorney for Healthcare. On this issue, you should seek guidance from your supporting JAGC officer or attorney.

How Do I Complete An Advance Directive?

Most military Advance Directive forms simply require you to enter your specific preferences in designated sections and sign them in the presence of a JAGC 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 MTFs in spite of variations in state law. A federal statute requires this method of completion to be honored anywhere, but in the alternative, many persons decide to complete the execution process before a Notary Public and three witnesses to ensure the forms will meet the requirements of even the most restrictive states.¹ Hospitals, MTFs, and other healthcare providers may also have statutory Advance Directive forms that you can complete and execute in a similar manner. Many states have their approved statutory forms available on state 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 about 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 being asked to make. Your choice will be memorialized by adapting or modifying the Advance Directive form to reflect your wishes. You should read the completed form to make certain 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 JAGC officer or attorney.

Notice: I Have an Advance Directive

Name: _____

My Healthcare Agent: _____

My Healthcare Agent's Phone Number:

Location of My Advance Directive:

Specific Instructions: _____

My Physician's Name: _____

My Physician's Phone Number:

Signature: _____

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



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

How Will My Providers Know About My Advance Directive?

It is important you discuss your treatment decisions with your military healthcare providers and give a copy of your Advance Directives to them to place in your medical records. Military members and their families are fortunate to have a consolidated system of medical records that is accessible throughout the Military Health System (MHS). Thus, 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 healthcare provider that you have an Advance Directive.

In the event you are unable to notify a healthcare provider that you have an Advance Directive (for example, if you are unconscious), having a wallet size reproduction of your Advance Directive improves the likelihood that your provider will be aware of your wishes. Many states or nonprofit organizations offer wallet cards as illustrated on page 5.

Finally, having your next of kin, emergency contacts, and even your close friends in the military unit know 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 if you change your mind about what you want done in a specific situation. In fact, people change their minds regularly, 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 statutes that recognize 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 healthcare 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 5) 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 fire-proof and water-proof secure location and let a number of people know of 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 of the existence and location of your Advance Directives.

The value of actually discussing your choices with your spouse, parents, friends or even 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 will be able to provide valuable support for what you have indicated in writing 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 (technically, a "domicile"), can have an Advance Directive prepared to comply with Massachusetts law. Military healthcare professionals, as well as healthcare professionals in each state, should recognize an Advance Directive prepared to comply with a service member's domicile.

As part of the formal process involved with 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.² An Advance Directive notarized in this form should be recognized in all fifty states and U.S. territories. However, because healthcare providers working in a civilian hospital may not understand this, a service member who thinks that his/her Advance Directive can be used away from military installations should consider having his/her 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 want to seek guidance from your supporting JAGC 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 (VA) 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 VA 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 VA Advance Directive form. VA social workers will help enrolled Veterans complete Advance Directive forms.

What Are the Policies of Each Military Branch on Advance Directives?

Each military branch recognizes a service member's right to name a person who will make his/her healthcare decisions if the service member is unable to make or communicate those decisions through a properly executed Advance Directive. In fact, the military services encourage service members to complete Advance Directives and share copies of those forms with their healthcare team.

Will My Advance Directive Continue to be Valid After I Leave the Military?

The mere fact that you have left the military and returned to civilian life will not invalidate an otherwise valid Advance Directive. However, Advance Directives should be periodically reviewed and updated because the older a document becomes, the easier it will be to challenge it on the basis it does not reflect your current wishes. Accordingly, 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 events 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 healthcare, 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 healthcare decisions, especially during deployments.

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