

Insights

Indiana's New Advanced Health Care Directive

August 10, 2021

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On July 1, 2021, Indiana significantly broadened the options for an individual to make health care wishes known through an “Advanced Directive for Health Care Decisions” (an “Advanced Directive”). Senate Enrolled Act No. 204 (“SEA 204”), effective as of July 1, allows individuals to make their wishes known regarding their health care and health care information through one written declaration. An Advanced Directive allows an individual to appoint a health care representative to make health care decisions for them if that individual lacks the capacity and to consult with providers even if the individual has capacity. The health care representative is also given access to the individual’s health care information. Finally, the Advance Directive makes known the individual’s wishes concerning end-of-life treatment and post-death planning (e.g. disposition of remains or making anatomical gifts).

Prior to SEA 204, individuals would often be required to execute three, separate documents (a health care power of attorney, appointment of health care representative, and living will) to make these decisions known. With the adoption of SEA 204, the document has been “streamlined,” allowing all decisions to be made known under one document, the Advanced Directive.

For individuals looking to create an Advanced Directive, there is no required language or official or mandatory form. An Advanced Directive can contain direction to a health care representative on a broad range of health care decisions, including decisions on life-prolonging procedures or palliative care, post-death planning, mental health treatment, and applying for public benefits (such as Medicaid and the CHOICE program).

There are, however, execution requirements for an Advanced Directive. An Advanced Directive must be signed by the individual (or an individual may direct someone else to sign for him or her in that individual’s direct presence), and such signing must be in the presence of two witnesses or a notarial officer (such as a notary public). The Advanced Directive can be executed on paper or electronically.

The difficulty in executing documents during the COVID-19 pandemic resulted in SEA 204 allowing for remote execution options for Advanced Directives. Under these options, an individual can sign an Advanced Directive electronically through videoconference that includes the individual and two adult witnesses or a notary public. However, for a document to be notarized remotely, an Indiana notary public must comply with Indiana law and regulations concerning “remote notarial acts” (See I.C. 33-42-17). Paper copies of the Advanced Directive can also be signed in counterparts over videoconference that includes the individual and two adult witnesses or notary public (must still comply with Indiana law concerning “remote notarial acts”), as long as the counterparts are assembled into one document within ten (10) business days of the receipt of all counterparts. Further, an Advanced Directive can also be signed during a live teleconference that includes the individual and two witnesses, which witnesses must be able to confirm the identity of the individual executing the Advanced

Directive and that individual's capacity.

If an individual has already executed a health care power of attorney, appointment of health care representative, and/or living will, such documents are still legally valid.

Once a health care provider is provided with an Advanced Directive, the provider must place a copy of the document in the individual's medical record and may rely on health care decisions made in accordance with that Advanced Directive unless the provider has actual knowledge that the Advanced Directive has been revoked. Further, a health care provider that acts in good faith reliance on the Advanced Directive is immune from liability to the individual signing the Advanced Directive (and that individual's heirs or other successors in interest). Notwithstanding the following, a health care provider can refuse to follow an Advanced Directive, or the decisions of a health care representative thereunder, if the health care provider concludes that carrying out such decisions would be medically inappropriate or contrary to an individual's best interest. If a health care provider is unwilling to comply with the Advanced Directive or directions from a health care representative, and that representative directs transfer, then the provider should take all steps necessary to transfer the responsibility of the individual's health care to another health care provider, as designated by the health care representative.

Health care providers should be familiar with the execution of Advanced Directives and update their policies to reflect the new law. If health care providers are issuing Advanced Directive forms to their patients prepared by their in-house or outside counsel, such health care providers should consult with their counsel to review and update their forms that reflects the new law, especially as it relates to signature requirements and remote execution. If you have any questions regarding SEA 204 or the new Advanced Directive, please contact **Rodney S. Retzner, Thomas N. Hutchinson, or Micah J. Nichols.**

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