

## TALKING POINTS ON ASSISTED OUTPATIENT TREATMENT

### I. Informed Consent

Any meaningful discussion of assisted outpatient treatment must start with the proposition, and practice, that medical practitioners cannot treat patients for any condition unless there is meaningful “informed consent” from the patient agreeing to the treatment. “Informed consent” is a term of art in the law that essentially means that medical practitioner must inform the patient of the treatments, the risks of treatments, and obtain their consent to proceed.

Failure to provide “informed consent” could lead to civil lawsuits, loss of hospital privileges, and loss of licensure.

### II. Lack of Capacity

Medical practitioners obtain “informed consent” in nearly all cases where they provide treatments. What about when the person doesn't have the capacity to give “informed consent” because of mental health, cognitive issue, or other condition?

### III. Advanced Directives

New Mexico provides for advanced directives for mental health treatment.

24-7B-4. Advance directive for mental health treatment.

An adult or emancipated minor, while having capacity, has the right to make the adult or emancipated minor's own mental health treatment decisions and may give an individual instruction. The individual instruction may be oral or written; if oral, it shall be made by personally informing a health care provider. The individual instruction may be limited to take effect only if a specified condition arises.

*An adult or emancipated minor, while having capacity, may execute a power of attorney for mental health treatment that may authorize the agent to make any mental health treatment decision the principal could have made while having capacity.*

The power of attorney for mental health treatment shall be in writing signed by the principal and witnessed pursuant to Subsections I and J of this section. ....Unless related to the principal by blood, marriage or adoption, an agent may not be an attending qualified health care professional or an employee of the qualified health care professional or an owner, operator or employee of a mental health treatment facility at which the principal is receiving care.

#### IV Involuntary Holds and Lengthened In-Patient Commitments

NM Law allows for emergency mental health evaluations. See 43-1-10 These are short term holds that don't involve petitioning the court. They allow police officers to transport persons suffering from mental health conditions to be taken to evaluation facilities to be diagnosed, and a physician or psychologist certifies that the person is a danger to themselves or others.

The court also has the authority to commit a person for evaluation and treatment not to exceed 30 days, if after a hearing the Court finds by clear and convincing evidence that the person presents a likelihood of serious harm to himself or others and is the consistent with the treatment needs and is the least drastic means of obtaining treatment.

#### V. New Mexico Treatment Guardian Law

Since the 80's, New Mexico has had a treatment guardian law. Under the law a treatment guardian takes the place of the individual's own decision-making.

Mental Health Treatment Guardians have the authority to make substitute decisions for the client who is incapable of informed consent for mental health/psychiatric treatment or administering of psychotropic medications under the Mental Health Code Commitment Procedures statute. However, the same Treatment Guardian may also be appointed as a full or limited guardian under the Uniform Probate Code.

There are strict procedures for appointment of a treatment guardian including a petition to the court and a full hearing.

The guardianship program is administered through New Mexico Developmental Disabilities Planning Council. These are somewhat dated numbers but the number of mental health treatment guardians appointed numbered 436 in FY08 and 461 in FY09.

#### VI. Assisted Outpatient Treatment

Assisted outpatient treatment (AOT) is court-ordered treatment (including medication) for individuals with severe mental illness who meet strict legal criteria, e.g., they have a history of medication noncompliance. Typically, violation of the court-ordered conditions can result in the individual being hospitalized for further treatment.

Forty-five states permit the use of assisted outpatient treatment (AOT), also called outpatient commitment. The five states that do not have assisted outpatient

treatment statutes are Connecticut, Maryland, Massachusetts, New Mexico and Tennessee.

Like “treatment guardians,” AOT typically requires that a person apply to the district court, upon the diagnosis of a health care practitioner who would testify at the hearing, for an order for assisted outpatient treatment. Upon clear and convincing evidence the court could order the patient to a mental health evaluation, and would retain jurisdiction to monitor the treatment of the patient.