

Alert | Health Care & FDA Practice



July 2019

Colorado’s New Psychiatric Advance Directive Process Goes Into Effect Aug. 2, 2019

Effective Aug. 2, 2019, Colorado law pertaining to behavioral health-related advance directives is changing. Under current law, an adult may establish advance medical orders for scope of treatment, allowing an adult to establish directives for the administration of medical treatment in the event the adult later lacks decisional capacity to provide informed consent to, withdraw from, or refuse medical treatment. However, [Colorado House Bill 19-1044](#) will create a new “behavioral health order form” so that an adult may communicate his or her behavioral health history, decisions, and preferences (also referred to as a psychiatric advance directive) in the event that he or she lacks decisional capacity to provide consent to, withdrawal from, or refusal of his or her behavioral health treatment or medication in the future. Below is a summary of the new law and what behavioral health care providers need to know.

Colorado House Bill 19-1044 Summary

What is House Bill 19-1044 and when does it go into effect?	House Bill 19-1044 creates Behavioral Health Orders for Scope of Treatment (aka Behavioral Health Orders Form or Psychiatric Advance Directive). The new law goes into effect Aug. 2, 2019.
--	---

<p>What are Behavioral Health Order Forms?</p>	<p>A Behavioral Health Order Form is a document that outlines that individual’s instructions concerning behavioral health treatment,¹ medication, and alternative treatment decisions, preferences, and history in the event that the individual lacks decisional capacity to provide consent to, withdraw from, or refuse treatment or medication.</p>
<p>What makes a Behavioral Health Order Form valid?</p>	<p>A Behavioral Health Order Form is valid if it (1) is executed by an individual who is 18 years old or older and (2) includes:</p> <ul style="list-style-type: none"> • The individual’s name, date of birth, gender, eye and hair color, and race or ethnic background • Instructions concerning behavioral health treatment; medication, including primary and alternative instructions; alternative treatment; and appointing an Agent² or not appointing an Agent • Signatures/marks and the date signed/marked from the individual and two Disinterested Witnesses³ • The name, address, and telephone number of the individual’s health care provider (if applicable) • The name of the health care facility in which the adult is enrolled (if applicable) <p>If the individual appoints an Agent, the Behavioral Health Order Form must include:</p> <ul style="list-style-type: none"> • The Agent’s name, address, and telephone number • The scope of the Agent’s authority – either: <ul style="list-style-type: none"> – The Agent is limited to executing the individual’s instructions detailed on the Behavioral Health Order Form, or – The Agent has authority to make decisions concerning behavioral health treatment, medication, and alternative treatment on behalf of the individual. • The Agent’s signature and the date he or she signed the form

¹ Behavioral health treatment is defined as “the provision, withholding, or withdrawal of any behavioral health examination, service, procedure, or medication.” C.R.S. § 15-18.7-201(5). “Behavioral health” means “an individual’s mental and emotional well-being and actions that affect an individual’s overall wellness.” C.R.S. § 15-18.7-201(3); C.R.S. § 27-60-100.3(1).

² An Agent is a person who is 18 years old or older who is authorized by the individual executing the Behavioral Health Order Form to make decisions about that individual’s behavioral health treatment, medications, and alternative treatment. C.R.S. § 15-18.7-201(2). An Agent cannot revoke a preexisting CPR directive unless it was originally executed by the Agent. C.R.S. § 15-18.7-204(3)(b).

³ A Disinterested Witness is someone who is NOT the individual’s spouse, civil union partner, domestic partner, romantic partner, child, parent, sibling, grandchild, grandparent, health care provider, or person who has, or knows or believes that she/he has, a claim against any portion of the individual’s estate when the individual dies. *Id.* § 15-18.7-201(6). The Disinterested Witnesses must attest that the individual was of sound mind (able to provide informed consent or refusal of behavioral health treatment or make an informed behavioral health care benefit decision) and free of coercion when he/she signed the form. C.R.S. § 15-18.7-201(6), (10).

<p>Can the individual's health care provider sign as a witness on that individual's Behavioral Health Order Form?</p>	<p>No.</p>
<p>Can an individual revoke or amend their Behavioral Health Order Form?</p>	<p>Yes. An individual may revoke or amend their Behavioral Health Order Form by:</p> <ul style="list-style-type: none"> • Executing a new Behavioral Health Orders Form, or • Marking the existing Behavioral Health Order Form in a way that clearly communicates the intent to amend or revoke all or part of it. <p>In order for the amendment or revocation to be valid, it must include signatures/marks and the date the new form or the amended or revoked form was signed/marked from:</p> <ul style="list-style-type: none"> • The individual • Two Disinterested Witnesses • The Agent (if applicable) <ul style="list-style-type: none"> – Note that the Agent's signature is NOT required for an amendment to be valid if the individual is amending the form to remove the Agent. <p>A properly executed new, amended, or revoked Behavioral Health Order Form controls over a previously executed form.</p>
<p>Does a Behavioral Health Order Form expire?</p>	<p>Yes. The Behavioral Health Order Form is effective for two years from the date the individual signed the form, unless the individual executes a new form or amends or revokes the Behavioral Health Order Form before the originally executed form becomes ineffective.</p>
<p>What happens if there is conflict between an individual's Advance Medical Directive and his/her Behavioral Health Order Form?</p>	<p>If there is a conflict between a Behavioral Health Order Form and an Advance Medical Directive, the document most recently executed controls for the behavioral health treatment, medication, or alternative treatment decision or preference at issue.</p>

<p>What happens if there is a conflict between the Behavioral Health Orders Form and an individual's request?</p>	<p>The Behavioral Health Orders Form controls for the behavioral health treatment, medication, or alternative treatment decision or preference at issue.⁴</p>
<p>Does the Behavioral Health Order Form affect involuntary proceedings?</p>	<p>No. Instructions in a Behavioral Health Order Form that attempt to exempt the individual from an involuntary emergency procedure or commitment authorized by law are void. Similarly, an executed Behavioral Health Order Form does not mean that the individual waived the right to an involuntary commitment hearing before a judge or jury or that the individual consented to a petition for involuntary administration of medication.</p>
<p>If an individual has a Behavioral Health Order Form, what is the health care provider required to do?</p>	<p>Health care providers must:</p> <ul style="list-style-type: none"> • Make a good faith effort to locate and incorporate, as appropriate and desired, the behavioral health treatment, medication, and alternative decisions, preferences or history documented in a Behavioral Health Orders Form. • Comply with a properly executed Behavioral Health Order Form that (1) has been executed in Colorado or another state, (2) is apparent and immediately available, and (3) reasonably satisfies the validity requirements.⁵ <ul style="list-style-type: none"> – Compliance is NOT required, though, if: <ul style="list-style-type: none"> ▪ The instructions on the Behavioral Health Order Form will cause substantial harm to the individual. However, the health care provider must make a good faith effort to consult with the individual's Agent, if applicable, and offer an alternative course of treatment. ▪ The behavioral health treatment, medication, or alternative treatment is prohibited by state or federal law. • Follow generally accepted ethics standards, protocols, or laws for health care providers or health care facilities, including laws concerning euthanasia or mercy killing. • If a health care provider becomes aware of a new, amended, or revoked Behavioral Health Order Form, promptly communicate that fact to the health care provider providing care to an individual who is the subject of the Behavioral Health Orders Form. • If the individual is being transferred, communicate the existence of a known and properly executed and signed Behavioral Health Orders Form to a receiving health care facility and ensure that the Behavioral Health Orders Form or a copy

⁴ C.R.S. § 15-18.7-205(1)(c). Note that a Behavioral Health Order Form only goes into effect when the individual lacks capacity to provide informed consent to, withdraw from, or refuse medical treatment. C.R.S. § 15-18.7-101(1)(b).

⁵ *Id.* § 15-18.7-205(1)(a). Note that compliance cannot affect the criminal prosecution of a person otherwise charged with the commission of a criminal act. C.R.S. § 15-18.7-205(3).

	of the form accompanies the individual upon admission to or discharge from a health care facility.
Can a health care provider be held civilly or criminally liable or be subject to regulatory sanctions for following a Behavioral Health Order Form?	No, if the health care provider complies with a legally executed Behavioral Health Order Form that is apparent and immediately available that he/she/it believes to be the most current version of the form. A person who is authorized to perform an involuntary emergency procedure or commitment pursuant to state law and who complies with the legal requirements for an involuntary emergency procedure or commitment is also not subject to civil or criminal liability or regulatory sanction.
Can a health care provider require an executed Behavioral Health Orders Form as a condition of admission, treatment, or medication?	No.

Healthcare providers should be prepared to comply with this law by Friday, Aug. 2, 2019. If you need assistance in implementing the revised legal requirements into new or existing policies, or have questions regarding compliance with House Bill 19-1044, please contact us as soon as possible.

Authors

This GT Alert was prepared by **Julie A. Sullivan** and **Jennifer M. Little**. Questions about this information can be directed to:

- **Julie A. Sullivan** | +1 303.685.7412 | sullivanjul@gtlaw.com
- **Jennifer M. Little** | +1 303.572.6564 | littleje@gtlaw.com
- Or your **Greenberg Traurig** attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. [~] Houston. Las Vegas. London. ^{*} Los Angeles. Mexico City. ⁺ Miami. Milan. [^] Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul. [∞] Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. [^] Tokyo. [^] Warsaw. ⁻ Washington, D.C.. West Palm Beach. Westchester County.

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of

*Greenberg Traurig, LLP and Greenberg Traurig, P.A. –Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig’s Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig’s Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¢Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig’s Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2019 Greenberg Traurig, LLP. All rights reserved.*