

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Department of Health and Human Resources/Bureau for Public Health TITLE NUMBER: 64

RULE TYPE: Interpretive CITE AUTHORITY: W. Va. Code §§ 29A-3-1 et. seq.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

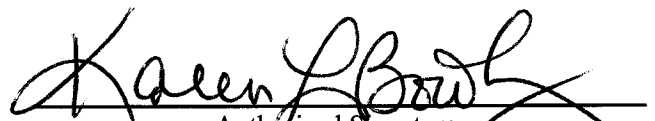
IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 101

TITLE OF RULE BEING PROPOSED: USE OF THE E-DIRECTIVES REGISTRY BY EMERGENCY MEDICAL SERVICES

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 25, 2015 AT 5:00 PM ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Brian J. Skinner, Director, Public Health Regulations
~~West Virginia Department of Health and Human~~
Resources
Bureau for Public Health
~~350 Capitol Street Room 702~~
Charleston, WV 25301
(304) 356-4122 - O
brian.j.skinner@wv.gov

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

TITLE 64
INTERPRETIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BUREAU FOR PUBLIC HEALTH

SERIES 101
USE OF THE E-DIRECTIVES REGISTRY BY EMERGENCY MEDICAL SERVICES

Brief Summary of Rule: This interpretive rule is intended to give direction to emergency medical services (EMS) personnel and agencies in the performance of cardiopulmonary resuscitation and level of medical intervention when a Do Not Resuscitate order or Physician Orders for Scope of Treatment form is located on the e-Directive registry.

Statement of Circumstances: The Bureau for Public Health is promulgating this interpretive rule to set forth the Bureau's interpretation of the provisions of *W.Va. Code* §§16-30-10, 13 &25 and 16-30C-5 & 7 and the applicability of advance directives and medical orders (do not resuscitate or Physician Orders for Scope of Treatment (POST) electronically stored in the e-Directive Registry. The Bureau interprets the provisions of *W.Va. Code* §§ 16-30-10, 13 &25 and 16-30C-5 & 7, that require emergency medical services personnel to comply with advance directives and medical orders contained in a do-not-resuscitate order or POST form, to also include information accessed from a do-not-resuscitate order or POST form electronically stored on the e-Directive Registry, and communicated to emergency medical services personnel by a Medical Command Center during on-line medical direction.

This interpretive rule is intended by Bureau for Public Health to provide information or guidance to the public regarding the agency's interpretation of the provisions of the West Virginia Health Care Decisions Act (*W. VA Code* §§16-30-1 *et. seq.*), specifically §§16-30-10, 13 &25, and the Do Not Resuscitate Act (*W.Va. Code* §§ 16-30C-1 *et. seq.*), specifically *W.Va. Code* §§ 16-30C-5 & 7.

It is the purpose of this interpretive rule to ensure that the right of a person to self-determination relating to cardiopulmonary resuscitation and level of medical intervention is protected. This interpretive rule is intended to give direction to emergency medical services personnel in the performance of cardiopulmonary resuscitation and level of medical intervention when a Do Not Resuscitate order or Physician Orders for Scope of Treatment form is located on the e-Directive registry. This interpretive rule is intended only to provide information or guidance to the public regarding the agency's interpretations, policy or opinions on the provisions of the West Virginia Health Care Decisions Act (*W. VA Code* §§16-30-1 *et. seq.*), specifically §§16-30-10, 13 &25) and Do Not Resuscitate Act (*W.Va. Code* §§ 16-30C-1 *et. seq.*), specifically *W.Va. Code* §§ 16-30C-5 & 7, and is not intended to be determinative of any issue affecting constitutional, statutory or common law rights, privileges or interests.

Relevant Statutes or Regulations: The Bureau for Public Health promulgating this interpretive rule pursuant to the provisions of *W. Va. Code* §§ 29A-3-1 *et. seq.* This interpretive rule is intended by

Bureau for Public Health to provide information or guidance to the public regarding the agency's interpretation of the provisions of the West Virginia Health Care Decisions Act (*W. VA Code* §§16-30-1 *et. seq.*), specifically §§16-30-10, 13 & 25, and the Do Not Resuscitate Act (*W.Va. Code* §§ 16-30C-1 *et. seq.*), specifically *W.Va. Code* §§ 16-30C-5 & 7.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

USE OF THE E-DIRECTIVES REGISTRY BY EMERGENCY MEDICAL SERVICES

Rule Title: _____

Type of Rule: Legislative Interpretive Procedural

Agency: Department of Health and Human Resources/Bureau for Public Health

Address: 350 Capitol Street Room 702
Charleston, WV 25301

Phone Number: (304)558-2971 Email: _____

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This interpretive rule is intended by Bureau for Public Health to provide information or guidance to the public regarding the agency's interpretation of the provisions of the West Virginia Health Care Decisions Act (W. VA Code §§16-30-1 et. seq.), specifically §§16-30-10, 13 & 25, and the Do Not Resuscitate Act (W.Va. Code §§ 16-30C-1 et. seq.), specifically W.Va. Code §§ 16-30C-5 & 7. Consequently, it will have no fiscal impact on the cost or revenues of the agency.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00		0.00
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues	0.00		0.00

Rule Title: _____

Rule Title: _____

- 3. Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

Not applicable

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Not applicable.

Date: 6/25/2015

Signature of Agency Head or Authorized Representative

Karen J. Bow

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: _____

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Department of Health and Human Resources
Bureau for Public Health
Office of the Commissioner & WV State Health Officer

350 Capitol Street Room 702
Charleston, WV 25301

(304)558-2971

LEGISLATIVE RULE TITLE: USE OF THE E-DIRECTIVES REGISTRY BY EMERGENCY
MEDICAL SERVICES

1. Authorizing statute(s) citation W. Va. Code §§ 29A-3-1 et. seq.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

b. What other notice, including advertising, did you give of the hearing?

c. Date of Public Hearing(s) *or* Public Comment Period ended:

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Brian J. Skinner, General Counsel and Director, Public Health Regulations
West Virginia Department of Health and Human Resources
Bureau for Public Health
350 Capitol Street Room 702
Charleston, WV 25301
(304) 356-4122 - O
brian.j.skinner@wv.gov

- g. **IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

- 3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

TITLE 64
INTERPRETIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BUREAU FOR PUBLIC HEALTH

FILED
2015 JUN 25 P 4:25

SERIES 101
USE OF THE E-DIRECTIVES REGISTRY BY EMERGENCY MEDICAL SERVICES

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§64-101-1. General.

1.1. Scope. -- This interpretive rule is intended to give direction to emergency medical services (EMS) personnel and agencies in the performance of cardiopulmonary resuscitation and level of medical intervention when a Do Not Resuscitate order or Physician Orders for Scope of Treatment form is located on the e-Directive registry.

1.2. Authority. -- The Bureau for Public Health promulgating this interpretive rule pursuant to the provisions of *W. Va. Code* §§ 29A-3-1 *et. seq.*

1.3. Filing Date. -- *June 25, 2015*

1.4. Effective Date. --

1.5. Summary. -- The Bureau for Public Health is promulgating this interpretive rule to set forth the Bureau's interpretation of the provisions of *W.Va. Code* §§16-30-10, 13 &25 and 16-30C-5 & 7 and the applicability of advance directives and medical orders (do not resuscitate or Physician Orders for Scope of Treatment (POST)) electronically stored in the e-Directive Registry. The Bureau interprets the provisions of *W.Va. Code* §§ 16-30-10, 13 &25 and 16-30C-5 & 7, that require emergency medical services personnel to comply with advance directives and medical orders contained in a do-not-resuscitate order or POST form, to also include information accessed from a do-not-resuscitate order or POST form electronically stored on the e-Directive Registry, and communicated to emergency medical services personnel by a Medical Command Center during on-line medical direction.

1.6 Applicability. -- This interpretive rule is intended by Bureau for Public Health to provide information or guidance to the public regarding the agency's interpretation of the provisions of the West Virginia Health Care Decisions Act (*W. VA Code* §§16-30-1 *et. seq.*), specifically §§16-30-10, 13 &25, and the Do Not Resuscitate Act (*W.Va. Code* §§ 16-30C-1 *et. seq.*), specifically *W.Va. Code* §§ 16-30C-5 & 7.

1.7. Purpose. -- It is the purpose of this interpretive rule to ensure that the right of a person to self-determination relating to CPR and level of medical intervention is protected. This interpretive rule is intended to give direction to emergency medical services personnel in the performance of CPR and level of medical intervention when a DNR order or Physician Orders for Scope of Treatment form is located on the e-Directive registry. This interpretive rule is intended only to provide information or guidance to the public regarding the agency's interpretations, policy or opinions on the provisions of the West Virginia Health Care Decisions

Act (*W. VA Code* §§16-30-1 *et. seq.*, specifically §§16-30-10, 13 &25) and Do Not Resuscitate Act (*W.Va. Code* §§ 16-30C-1 *et. seq.*), specifically *W.Va. Code* §§ 16-30C-5 & 7, and is not intended to be determinative of any issue affecting constitutional, statutory or common law rights, privileges or interests.

§64-101-2. Definitions.

2.1. "Cardiopulmonary resuscitation" or "CPR" means those measures used to restore or support cardiac or respiratory function in the event of a cardiac or respiratory arrest.

2.2. "Do not resuscitate order" or ("DNR order") means an order issued by a licensed physician that CPR should not be administered to a particular person.

2.3. "e-Directive Registry" means the electronic database, established and maintained by the West Virginia Center for End-of-Life Care (WVCEOLC) through the West Virginia Health Information Network (WVHIN), that electronically stores and makes available to treating health care providers advance directive forms, do not resuscitate cards, and POST forms.

2.4 "Level of medical intervention" means the order on a Physician Orders for Scope of Treatment (POST) form in Section B for comfort measures, additional limited interventions, or full interventions.

2.5. "Medical Command Center" means a designated facility staffed by paramedic communications specialists, operating under medical supervision, who provide on-line advice and direction to emergency medical services personnel regarding treatment, triage and destination decisions under the guidelines of the medical direction system.

2.6. "On-Line Medical Direction" means the medical direction given by personnel at an approved Medical Command Center to emergency medical services personnel at the time of an emergency medical services incident, by voice or other means, as established by Office of Emergency Medical Services protocol and guidelines.

2.7. "Physician orders for scope of treatment form" or "POST" means a standardized form containing orders by a qualified physician that details a person's life-sustaining wishes.

§64-101-3. Background.

West Virginia Health Care Decisions Act.

The West Virginia Health Care Decisions Act ("the Health Care Decisions Act")(*W.Va. Code* §§ 16-30-1 *et. seq.*), is intended to ensure that a patient's right to self-determination in health care decisions be communicated and protected; and to set forth a process for private health care decision making for incapacitated adults, including the use of advance directives, which reduces the need for judicial involvement and defines the circumstances under which immunity will be available for health care providers and surrogate decision makers who make health care decisions. *W.Va. Code* § 16-30-2. In enacting the Health Care Decisions Act, the Legislature

sought to establish an effective method for private health care decision making for incapacitated adults, and to provide that the courts should not be the usual venue for making decisions. *Id.*

Physicians, licensed health care professionals, health care facilities or their employee may not be subject to criminal or civil liability for good-faith compliance with or reliance upon the directions of the medical power of attorney representative in accordance with the Health Care Decisions Act. *W.Va. Code* §16-30-10. Additionally, a health care provider, health care facility or employee may not be subject to criminal or civil liability for good-faith compliance with or reliance upon the orders in a POST form. *Id.*

If a person with an order to withhold or withdraw life-prolonging intervention is transferred from one health care facility to another, the existence of the order must be communicated to the receiving facility prior to the transfer and the written order shall accompany the person to the receiving facility and remain effective until a physician at the receiving facility issues admission orders. *W.Va. Code* § 16-30-13.

When a person with a POST form is transferred from one health care facility to another, the health care facility initiating the transfer must communicate the existence of the POST form to the receiving facility prior to the transfer. *Id.* The POST form must accompany the person to the receiving facility and will remain in effect. *Id.*

Do Not Resuscitate Act

The Do Not Resuscitate Act (“the DNR Act”) (*W.Va. Code* §§ 16-30C-1 *et. seq.*), was enacted by the Legislature to protect the right of a person to self-determination relating to CPR. The intent of the Act is to give direction to emergency medical services personnel and other health care providers in regard to the performance of CPR.

The DNR Act provides that every person “shall be presumed to consent to the administration of CPR in the event of cardiac or respiratory arrest”, unless a health care provider has actual knowledge of a DNR order or a completed POST form. *W.Va. Code* §16-30C-5. “Actual knowledge” means the possession of information of the person's wishes communicated to the health care provider *orally or in writing* by the person, the person's medical power of attorney representative, the person's health care surrogate or other individuals resulting in the health care provider's personal cognizance of these wishes. *W.Va. Code* §16-30-3(a). (*italics added*).

When presented with a DNR order or POST form, emergency medical services personnel must comply with the contents of the order or form. *W.Va. Code* §16-30C-7. The DNR Act also provides for the revocation of a previous request for or consent to a DNR order when the person makes a written, oral or other act of communication to a physician or other professional staff of the health care facility, or destroys the order or POST form and removes any do not resuscitate identification. *W.Va. Code* §16-30C-8(a) & (b).

A health care provider is not subject to criminal prosecution or civil liability for carrying out, in good faith, a do-not-resuscitate order or for actions taken in compliance with the standards and procedures contained in the Act. *W.Va. Code* §16-30C-9(a). Additionally, a health care provider who witnesses a cardiac or respiratory arrest may not be subject to criminal prosecution or civil

liability for providing CPR to a person for whom a DNR order has been issued, provided that the health care provider is:

(1) Reasonably and in good faith unaware of the issuance of a DNR order; or

(2) Reasonably and in good faith believed that consent to the DNR order had been revoked or canceled. *W. Va. Code* §16-30C-9(b).

The e-Directive Registry

The e-Directive Registry is an electronic registry of advance directives and medical orders established and maintained by the West Virginia Center for End-of-Life Care (WVCEOLC) through the West Virginia Health Information Network (WVHIN). With the permission of patients or their legal agents, the electronic registry stores and makes available to treating health care providers advance directive forms, do-not-resuscitate cards, and POST forms, submitted to the registry.

The e-Directive Registry is a password-protected, Health Insurance Portability and Accountability Act (HIPAA) compliant on-line registry that makes accurate, relevant information about patients' advance directives and medical orders available in a medical crisis. It is accessible 24 hours a day, 7 days a week to health care providers, and ensures that patients' wishes will be respected throughout the continuum of health care settings.

Applicability of e-Directive Registry to the DNR Act

Neither the Health Care Decisions Act nor the DNR Act include a reference to the e-Directive Registry nor do they appear to contemplate an on-line database of advance directives and medical orders that is accessible by emergency medical services personnel while responding to an emergency medical services incident. Thus, there is a concern that the lack of an explicit acknowledgement in either Act, that information ascertained from documents stored on the e-Directive Registry and then communicated to emergency medical services personnel during on-line medical direction, constitutes actual knowledge of a DNR order or an order regarding level of medical intervention on a completed POST form.

Because there is a presumption that a person consents to the administration of CPR in the event of cardiac or respiratory arrest unless a health care provider has actual knowledge of a DNR order or a completed POST form, emergency medical services personnel have a duty to perform CPR unless he or she is in possession of information that results in the emergency medical services personnel's personal cognizance of the person's wishes regarding the patient's desire to be resuscitated and for level of medical intervention. As noted above, the definition of "actual knowledge" provides that a person's wishes regarding their desire to be resuscitated be communicated to the health care provider "orally or in writing." Consequently, it is unclear as to whether storage on the e-Directive Registry of a DNR order or a completed POST form, which is accessed by the Medical Command Center and orally communicated to emergency medical service personnel, constitutes "actual knowledge" for the purposes of the Health Care Decisions Act or the DNR Act.

§64-101-4. Interpretive Rule

As it is the intent of the Health Care Decisions Act and the DNR Act to give direction to emergency medical services personnel and other health care providers with regard to the performance of CPR and compliance with the orders on a POST form, the Bureau for Public Health interprets the provisions of *W. Va. Code* §§16-30-10, 13 & 25 and *W. Va. Code* §§16-30C-5 & 7, to include DNR orders or POST forms electronically stored on the e-Directive Registry. Therefore, information contained in a patient's DNR order or completed POST form that is:

- electronically stored on the e-Directive Registry;
- accessed by the Medical Command Center; and
- orally communicated to emergency medical service personnel,

constitutes "actual knowledge" for the purposes of the Health Care Decisions Act and the DNR Act.