

As a physician, what are my responsibilities regarding the Health Care Proxy?

Benefit to physicians

A patient with a valid Health Care Proxy document gives you a significant benefit. It means that if your patient becomes unable to make their own health care decisions – either temporarily or permanently – you will have a single person to speak with about your patient’s care and from whom to secure consent for treatment. Your patient’s named substitute decision maker is known as the Agent.

Benefit to patients

Patients can be more confident that their own preferences for care will be honored in the event they become incapacitated. After careful consideration, they have chosen an Agent (and also, in most cases, an Alternate Agent) with whom they have shared their preferences for the kind of care they would want under various scenarios. The named Agent might be a spouse or close family member, but can be any adult whether related or not. Unless the patient, known as the Principal, specifically limits the Agent’s authority, the Massachusetts Health Care Proxy law allows the Agent to any and *all* decisions regarding the patient’s physical or mental health, even decisions at the end of life.

What to do with the Proxy document

If your patient presents you with their completed Health Care Proxy, you must place a copy in the patient’s medical record. It would be helpful, of course, to note who the named Agent is. If possible and time allows, you could meet briefly with your patient and their Agent, just to confirm the arrangement and ask if your patient and Agent have talked about the patient’s preferences for care. It is not your obligation to facilitate this conversation between your patient and their Agent. There are many ‘advance care planning’ discussion guides available. But if your patient later become incapacitated, it could be helpful to have been introduced to the Agent and reassuring to all that your patient’s Agent is prepared to assume the role of health care decision maker and work with you in providing care for your patient. (See ‘Tips for Clinicians’ below)

What if my patient loses decisional capacity?

If you, or other members of the clinical staff, suspect that your patient is not able to make their own health care decisions, it is your responsibility as your patient’s attending physician, to assess your patient’s capacity to make health care decisions. The determination of capacity must be in writing, and include your opinion about the cause and nature of the patient’s incapacity as well as its extent and probable duration. This written determination must be made part of the patient’s medical record. If you believe that the incapacity is due to a developmental disability or mental illness, then you must have special training in those areas, or consult with someone who does, to make the determination.

Can other clinicians activate a Health Care Proxy?

No. The Proxy law says that the only person who can make a written determination of a person’s decision making capacity for the purpose of activating a Health Care Proxy is the person’s

attending physician. For other purposes, like completing a Medical Certificate prior to a guardianship hearing, a similar assessment can also be made by a nurse practitioner with experience in this area, a certified psychiatric nurse clinical specialist, or a licensed psychologist.

What effect will my determination have? Your assessment is important for several reasons. Most importantly, your determination that your patient cannot make their own health care decisions strips your patient—either temporarily or permanently— of a key civil right and element of personal autonomy: their right to personal agency and self-determination with regard to health care. Your determination also serves to transfer your patient’s right to make health care decisions to the person they chose as Agent. You must then notify both your patient and their Agent of your determination, and share copies of the written document with both. At that point, you have ‘activated’ or ‘invoked’ your patient’s Health Care Proxy, and the Agent is now the person who becomes your primary point of contact for managing your patient’s care.

Capacity vs. competence

Your written determination of capacity is NOT a determination of legal competence – a determination that can be made only by a judge in a court hearing. Nor is your determination of capacity necessarily a one-time assessment. By law, the Agent acts for your patient only WHEN and FOR AS LONG AS your patient can’t make their own health care decisions. If your patient regains capacity, you must again make a written determination of capacity and notify the Agent that your patient has become able to act on his own again. The Health Care Proxy document remains in effect and does not have to be renewed. And if your patient again loses capacity, the Agent again becomes the decision maker. And so on. (See UPDATE October 2024 below)

Your patient remains a competent person in the eyes of the law, and is presumed to be able to disagree with and reject their own Agent’s decisions, or cancel or revoke their own valid Health Care Proxy, or sign a new Health Care Proxy *at any time* — even if you have found them to be incapacitated for the purpose of making health care decisions. Generally speaking, you must abide by your patient’s or Agent’s decisions. If you don’t agree with the Agent’s decisions, you must facilitate the transfer of your patient’s care to another physician *who will honor the Agent’s decision*. However, if you believe that your patient is truly not making rational decisions about their care, or the Agent is making choices that you know your patient would not have chosen, the Massachusetts Probate Court allows for special proceedings regarding various Health Care Proxy issues. These might include questioning the validity of the Proxy document, your patient’s actual competence (as compared with their decision making capacity), and whether the Agent is acting in good faith with regard to your patient’s care.

Agent vs family

If there is disagreement among multiple members of the family, you can make clear that your patient themselves chose a single person as their substitute decision maker. It is that person, the Agent, who is the sole decision maker for your patient. You can let the family know that you will turn to the Agent for decisions about care, and will also regard the Agent as the primary spokesperson for the other members of the family. Indeed, one of the primary purposes of the Health Care Proxy, and similar documents in other states, was to avoid the conflicts and inaction that often accompany disagreements about the care considered for a now-incapacitated patient.

How should I work with my patient's Agent?

The Agent has the right to request and receive any part of your patient's medical record for the purpose of planning care. You must give your patient's Agent all information they need to give fully informed and voluntary consents (or refusals) for care you recommend for your patient. The information must include your recommended treatment as well as the other options for care and the respective benefits, risks, and likely outcome of each option, including the risks or benefits of doing nothing at all. It must identify major problems, if any, expected in recovering and the time period during which your patient might not be able to resume their usual activities. It must include other information usually given by physicians to patients in similar circumstances, as well as any other information which you know would be important for your patient in making a decision.

How does the Agent decide for my patient?

The Agent's authority is to make the health care choices that your patient would have made if they were able. If the Agent doesn't know what your patient would have wanted in a particular situation, the Agent must decide based on what – in the Agent's assessment– your patient would have wanted under the circumstances. And if the Agent doesn't know, the decision must be based on what the Agent believes would be in your patient's best interest. The *cannot* substitute their own personal preferences for those of your patient.

What is Massachusetts Health Decisions?

Nonprofit Massachusetts Health Decisions convened and led the 16-agency Massachusetts Health Care Proxy Task Force in 1991-1992. The Massachusetts Medical Society was a key participant and supporter. Since then, MHD has been the lead agency to implement the Proxy law in the state. MHD has distributed more than twelve million copies of the Proxy form, and its materials are in use statewide. MHD is a 501(c)(3) charitable organization that conducts professional and public education programs on ethics and health care communication skills.

UPDATE October 2024

Massachusetts Health Decisions is developing online education materials to help physicians and other clinicians assess decision making capacity. MHD hopes to have these self-directed educational materials available in early 2025. If you have specific issues that you believe should be addressed, please let us know. Contact: proxy@masshealthdecisions.org

Other resources for physicians:

The Health Care Proxy law, Massachusetts General Laws, Chapter 201D

<http://masshealthdecisions.org/wp-content/uploads/2016/08/Massachusetts-Health-Care-Proxy-Law-M.G.L.-201D.pdf>

MMS page on Health Care Proxies

<https://www.massmed.org/Patient-Care/Health-Topics/Health-Care-Proxies-and-End-of-Life-Care/Health-Care-Proxy-Information-and-Forms/>

‘Decisions Concerning Your Medical Care’ (description of informed consent process according to Massachusetts law)

<https://masshealthdecisions.org/wp-content/uploads/2016/08/Decisions-Concerning-Your-Medical-Care-Massachusetts-Informed-Consent.pdf>

Order Health Care Proxy forms from MHD & download a copy for personal use

<https://masshealthdecisions.org/get-health-care-proxy-forms/>

Center for Medicare & Medicaid Services - Fact Sheet on Advance Care Planning

<http://masshealthdecisions.org/wp-content/uploads/2024/10/CMS-AdvanceCarePlanning-Fact-Sheet-2024-1.pdf>

Tips for Clinicians

<https://masshealthdecisions.org/wp-content/uploads/2016/08/Tips-for-clinicians.pdf>