

To: Monica Bharel, MD; Elizabeth Chen, PhD; Elizabeth Kelly; Michael Wagner, MD; Kathryn Downes

From: Members of the MA MOLST Advisory Subcommittee and the MA Guardianship-MOLST Committee

Re: Urgency of Removing Barriers that Prevent Adults from Executing a MA Health Care Proxy

Date: April 16, 2020

In light of the COVID-19 State of Emergency, we respectfully ask the state to remove the barriers of required in-person witnessing that are preventing adults from executing a valid MA Health Care Proxy. This is a critical time for adults to appoint a trusted person as their Health Care Agent to make health care decisions on their behalf in the event of incapacity. Health Care Agents have an essential role in working closely with health care providers to achieve patient care goals and respect their care choices.

As most adults are obeying stay at home advisory orders, and are barred from visitation at hospitals and care facilities, it is often impossible to have two adults physically present to act as witnesses to complete a valid Health Care Proxy.

Audio-visual conferencing and telephonic communications have become standard practice to initiate health care provider-patient conversations and to safeguard the rights of our citizens. Massachusetts health care providers and patients use telehealth to discuss prognosis and care options, complete care planning documents, and make changes to treatment plans as an illness progresses. The MA Supreme Judicial Court allows audio-visual conferencing for emergency hearings and depositions. In executing a Health Care Proxy, tele-communications can successfully offer an adult the protection of two witnesses while removing the obstacles of in-person signing of documents during the pandemic.

In our current public health emergency, large numbers of seriously-ill patients are confronting urgent critical care decisions in which a Health Care Agent's role is crucial to communicate a patient's care goals, values and care choices. In order to avoid any potential for inequitable care for adults with an incapacity or disability, the Health Care Agent can provide timely advocacy and appropriate decision-making in consultation with a treating clinician.

Adults and health care providers are asking for immediate remedies to remove the barriers that are preventing many competent adults in the Commonwealth from exercising their right to appoint a Health Care Agent. Additionally, families are seeking a remedy for adults who have not yet executed a Health Care Proxy and are suffering from COVID-19 or are in need of decision-making. The remedies proposed below do not require a change to MA EMS Protocols.

Therefore, we recommend the following:

1. Where in-person witnesses are not possible, audio-video conferencing between the Principal and two witnesses is sufficient to complete a valid Health Care Proxy(Proxy) when:
 - the witnesses receive a legible copy of the Proxy signature page from the Principal via electronic means on the same day the Principal signs the Proxy;
 - during the audio-video conference, the Principal affirms the contents of Proxy and the witnesses sign and date the Proxy; a copy of the completed Proxy is returned to the Principal.

2. Where there is a telehealth phone call between patients and their treating clinicians and a witness, similar to a telehealth call for verbal consent on a MOLST form, a Proxy can be completed when:

- the patient directs the clinician and a witness to complete a Proxy on the patient's behalf;
- the clinician and witness are allowed to sign the Proxy as witnesses;
- the clinician enters the Proxy into the patient's medical record, and sends a copy to the patient.

3. Where a competent patient in a hospital, long-term care or other facility can give verbal instructions, a Proxy can be completed when:

- the patient can direct the care team to use electronic means, such as an electronic tablet, to sign a Proxy on the patient's behalf, witnessed by staff, as not to contaminate pens and written documents and protect health care workers;
- the proxy is scanned into the patient's medical record and a copy is reserved for the patient.

4. A Health Care Proxy executed in one of these ways should be considered valid by all health care providers and facilities, including after the public health emergency ceases.

5. Where there is no appointed Health Care Agent or Guardian, a health care provider can rely on the informed consent of next of kin or an appointed supported decision-making team as "responsible parties", to make health care decisions on the behalf of incompetent or incapacitated patient, in accordance with Chapter 201D, Sec.16 of the General Laws of Massachusetts, which states:

"In those instances that a health care proxy has not been executed, nothing herein shall preclude a health care provider from relying upon the informed consent of responsible parties on behalf of incompetent or incapacitated patients to the extent permitted by law."

We endorse this approach as members of the MA MOLST Advisory Subcommittee and the MA Guardianship-MOLST Committee, and recommend that all health facilities and health systems in the Commonwealth formally approve these approaches, and communicate that to their clinicians and patients.

We respectfully request that state authorities promptly endorse these alternatives to current regulations, and promulgate that endorsement widely.

Lachlan Forrow, MD, Director, BIDMC Ethics Programs, Beth Israel Lahey Health
Ellen DiPaola, President, Honoring Choices Massachusetts
David Sontag, Managing General Counsel; Beth Israel Lahey Health
Amy Hudspeth Cabell, Esquire, Hudspeth Cabell Law, LLC, Rockland
Diane Dietzen, MD, Baystate Health
Erik Fromme, MD, Dana-Farber Cancer Center, Ariadne Labs
Tara Gregorio, President, Mass Senior Care
Karen Hanesian, Law Office of *Karen Weston Hanesian* Cape Cod
Melissa Hardy, Melissa Hardy, M.S.W., L.C.S.W, Genesis HealthCare
Julie Hauer, MD, Medical Director, Seven Hills Pediatric Center, Boston Children's Hospital
Michelle Horrigan, Assoc. General Counsel, UMass Memorial Health Care, Worcester
Barbara Kravetz, Esquire, Kravetz Law Associates, PLLC, *Franklin*
Pamela Kravetz, Esquire, Kravetz Law Associates, PLLC, *Franklin*
Stephanie L. Lenzi, DO, Palliative Care, Lahey Hospital & Medical Center
Erin Liang, Massachusetts Health & Hospital Association

Helen Magliozzi, Director of Regulatory Affairs, Mass Senior Care
Christine McMichael, Executive Director, Hospice & Palliative Care Federation of MA
Sarah Peterson, Deputy General Counsel, MA Department of Developmental Services
Jennifer Reidy, MD, UMass Memorial Health Care
Eric Reines, MD, Massachusetts Medical Society
Sarah Peterson, Deputy General Counsel, MA Department of Developmental Services
Brandon Saunders, Esquire, RBSK Law Offices, Greater Boston
Leigh Simons Youmans, Massachusetts Health & Hospital Association

References:

Health Care Proxy, M.G.L.c.201D

<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter201D>

Use of Tele-Communications during COVID-19:

Massachusetts: Governor Expands Access to Telehealth Services.

<https://www.mass.gov/doc/march-15-2020-telehealth-order/download>

Massachusetts Supreme Judicial Court Order for the administering of oaths at depositions via remote audio-video communication equipment, March 20, 2020.

<https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-order-for-the-administering-of-oaths-at>

Massachusetts Allows Verbal Consent on MOLST Forms, April 3, 2020.

https://www.mass.gov/info-details/covid-19-guidance-and-directives?mc_cid=5dc55aca69&mc_eid=%5bUNIQID%5d#emergency-responders-&law-enforcement-

New York: Governor's Order Removes Obstacles to Executing health Care proxies and Other Legal Instruments, New York State, April 8, 2020, [Executive Order No. 202.14](#)

<https://www.governor.ny.gov/news/no-20214-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>