

# **DO NOT RESUSCITATE ORDERS**

## **THE PROPOSED LEGISLATION AND REPORT OF THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW**



**The New York State  
Task Force on Life  
and the Law**

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# INTRODUCTION

This revised pamphlet states and answers questions about the do-not-resuscitate (DNR) law, and the 1991 amendments to the law. The amendments establish policies for DNR orders in community settings, such as private homes, and refine technical procedures in *the* original DNR law. The DNR law is Article 29-B of the Public Health law. The regulations can be found at Section 405.43 of Title 10 of the Codes, Rules and Regulations of the State of New York.

The New York State Department of Health has prepared a pamphlet entitled, "Deciding about CPR: Do-Not-Resuscitate Orders — A Guide for Patients and Families" to educate patients and their family members or others close to them about the law. All medical facilities are required to distribute copies of the brochure to patients or others who request a copy. You can obtain the brochure by writing to:

**The New York State Department of Health**  
**Box 2000**  
**Albany, NY 12220**

Many parts of the law are based on recommendations by the New York State Task Force on Life and the Law. If you want information about the ethical, legal, and policy considerations underlying the law, you can obtain a copy of the Task Force's report on DNR orders by sending a check or money order for \$8.50 (includes cost of shipping) to:

**Health Education Services**  
**P.O. Box 7126**  
**Albany, NY 12224.**



# Hospital DNR Orders

## *Summary of Steps*

The following procedures apply to CPR decisions in hospitals, nursing homes, and certain mental health facilities.

### **PATIENTS WITH CAPACITY**

*To enter a DNR order for an adult patient who has decision-making capacity:*

1. **Discuss the order with patient** and inform patient about his/ her condition, risks and benefits of CPR, and consequences of DNR order.
2. **Seek the patient's oral or written consent:**
  - Oral consent must be witnessed by two adults, one of whom is a physician affiliated with the hospital.
  - Written consent must be signed by two adult witnesses.
3. **Record decision in chart.**
4. **Enter DNR order in chart.**

### **PATIENTS WHO LACK CAPACITY:**

Decisions By Health Care Agents

*To enter a DNR order for an adult patient without capacity who has appointed a health care agent by written proxy:*

1. **Determine that the patient lacks capacity as required by the health care proxy law:**
  - Attending physician must find to a "reasonable degree of medical certainty" that the patient lacks capacity and make chart entry describing cause, nature, extent, and probable duration of incapacity.
  - Attending physician must consult with another physician to confirm the determination of incapacity, and record consultation in chart. Special rules apply for patients who lack capacity due to mental illness or developmental disability. See p. 30.
2. **Seek health care agent's oral or written consent:**
  - Oral consent must be witnessed by two adults, one of whom is a physician affiliated with the hospital.
  - Written consent must be signed by two adult witnesses.
3. **Record decision in chart.**

## DETERMINING INCAPACITY

*To determine that a patient lacks capacity to decide about resuscitation;*

All adults are presumed to have capacity unless determined otherwise by the procedure set forth in the Law or by a court order.

1. Attending physician must find "to a reasonable degree of medical certainty" that the patient lacks capacity and make chart entry describing nature, cause, and probable duration of incapacity,
2. Second physician, authorized by hospital, must concur, after personally examining the patient, and make chart entry. Special rules apply for patients who lack capacity due to mental illness or developmental disability. See *p. 30*.
3. Inform the patient of determination of incapacity, if patient can understand the information and inform surrogate decision maker.

## PATIENTS WHO LACK CAPACITY: Surrogate Decisions

*To enter a DNR order for an adult patient who lacks capacity and too not \ appointed a health care agent:*

1. **Determine that the patient lacks capacity**, as described above.
2. **Medical findings.**
  - Attending physician must find that *one* of the following conditions exists and make chart entry:
    - patient has a *terminal condition*; or
    - patient is *permanently unconscious*; or
    - resuscitation would be *medically futile*; or
    - Resuscitation would impose an *extraordinary burden* on the patient in light of the patient's medical condition and the expected outcome of resuscitation for the patient.
  - Second physician, authorization by hospital, must concur, after personally examining the patient, and make chart entry.
3. **Identify surrogate.**
  - Inform surrogate about patient's condition, risks and benefits of CPR, and consequences of DNR order.
4. **Seek surrogate decision maker's oral or written consent:**
  - Oral Consent must be witnessed by two adults, one of whom is a physical affiliated with the hospital.
  - Written consent must be signed by the surrogate before one adult witness.
5. **Inform patient**, if patient is capable of understanding information.
6. **Enter DNR order in chart.**

## PATIENTS WHO LACK CAPACITY AND FOR WHOM NO SURROGATE IS AVAILABLE

*To enter a DNR order for an adult patient who lacks capacity when there is no surrogate and no prior consent by the patient:*

1. **Determine that the patient lacks capacity**, as described above.
2. **Attending physician** must find that resuscitation would be medically futile, as defined by the law, and make chart entry.
3. **Second physician**, authorized by hospital, must concur and make chart entry.
4. **Inform patient**, if patient is capable of understanding information
5. **Enter DNR order in chart.**

## MINOR PATIENTS

*To enter a DNR order for a minor patient*

1. **In consultation with parents, attending physician may find that minor has capacity.**
2. **Medical findings:**
  - Attending physician must find that one of the following conditions exists and make chart entry:
    - patient has a *terminal condition*; or
    - patient is *permanently unconscious*; or
    - resuscitation would be *medically futile*; or
    - resuscitation would impose an *extraordinary burden on* the patient in light of the patient's medical condition and the expected outcome of resuscitation for the patient.
    - Second physician, authorized by hospital, must concur, after personally examining the patient, and make chart entry.
3. **Discuss the order with the parent and** inform parent about patient's condition, risks and benefits of CPR, consequences of DNR order.
4. **Seek parent's oral or written consent**
  - Oral consent must be witnessed by two adults, one of whom is a physician affiliated with the hospital.
  - Written consent must be signed by a parent before one adult witness.
5. **Seek minor's consent**, if minor has capacity.
6. **Attempt to notify other parent**, if other parent is not aware that DNR order will be entered.
7. **Enter DNR order in chart.**

# Nonhospital DNR Orders

## *Summary of Steps*

The following procedures apply to CPR decisions for patients at home or in the community. The nonhospital orders may be issued while the patient is hospitalized or at home.

### **PATIENTS WITH CAPACITY**

To enter a *nonhospital DNR order for an adult who has decision-making capacity within or outside a health care facility*:

1. **Discuss the order with patient** and inform patient about his/her condition, risks and benefits of CPR, and consequences of DNR order.
2. **Seek the patient's oral or written consent:**
  - For patients at home or in the community, oral consent must be given to the attending physician. If oral consent is given while hospitalized, the consent may be given to the attending physician or to two adult witnesses, one of whom is a physician affiliated with the hospital.
  - Written consent must be signed by two adult witnesses.
3. Record decision and order in chart.
4. Issue order on Department of Health nonhospital DNR form

**PATIENTS WHO LACK CAPACITY:  
Decision By Health Care Agents**

*A health care agent may consent to a nonhospital DNR order for patients in outside of a health care facility:*

1. **Determine that the patient lacks capacity** as required by the health care proxy law:
  - Attending physician must find "to a reasonable degree of medical certainty" that the patient lacks capacity and make chart entry describing nature, cause, extent, and probable duration of incapacity.
  - Attending physician must consult with another physician to confirm the determination of incapacity and record consultation in chart.
2. **Seek health care agent's oral, or written consent:**
  - Inform agent about patient's condition, risks and benefits of CPR, and consequences of DNR order.
  - For patients at home or in the community, oral consent must be given to the attending physician. if oral consent is given while hospitalized, the consent may be given to the attending physician or to two adult witnesses, one of whom is a physician affiliated with the hospital.
  - Written consent must be signed by two adult witnesses.
3. **Record decision and order in chart.**
4. **Issue order on Department of Health nonhospital DNR form and keep with patient.**

**PATIENTS WHO LACK CAPACITY:**

**Surrogate Decisions**

*A nonhospital DNR order for an adult who lacks capacity and has not appointed a health care agent may only be issued during hospitalization in a hospital, nursing home, or certain mental health facilities.*

*As of September 1, 1992, nonhospital DNR orders based on surrogate consent may become available for patients prior to, during, or after admission to a health care facility. Provider administrators should be consulted on developments in this area.*

**1. See box for Hospital DNR Orders — Patients Who Lack Capacity: Surrogate Decisions.**

**2. Issue order on Department of Health nonhospital DNR form and keep with patient.**

**PATIENTS WHO LACK CAPACITY AND FOR WHOM  
NO SURROGATE IS AVAILABLE**

**1. See box for Hospital DNR Orders — Patients Who Lack Capacity and for Whom No Surrogate Is Available.**

**2. Issue order on Department of Health nonhospital DNR form and keep with patient.**

**MINOR PATIENTS**

**1. See box for Hospital DNR Orders — Minor Patients.**

**2. Issue order on Department of Health nonhospital DNR form and keep with patient.**

# UNDERSTANDING THE BASICS — Hospital and Nonhospital DNR Orders

**Q:** *Where does the law apply?*

The law applies to decisions about CPR (cardiopulmonary resuscitation) in:

- Hospitals;
- Nursing homes;
- At home and in other community settings;
- Mental hygiene facilities operated or licensed by the Office of Mental Health; and
- Specific residential developmental centers operated by the Office of Mental Retardation and Developmental Disabilities.

**Q:** *What do “DNR order” and “CPR” mean?*

Under the law, a DNR order is “an order not to attempt CPR in the event a patient suffers cardiac or respiratory arrest.” CPR means measures to restore cardiac function or to support ventilation in the event of a cardiac or respiratory arrest. Examples listed in Health Department regulations include: mouth-to-mouth rescue breathing, direct cardiac injection, intravenous medications, electrical defibrillation, and open chest cardiac massage.

The definition of CPR *excludes* “measures to improve ventilation and cardiac functions in the absence of an arrest.” Thus, a patient who is experiencing an arrhythmia or respiratory distress can be given cardiac or respiratory support, even if there is a DNR order.

**Q:** *Does the DNR law require health care professionals to perform CPR on every patient who arrests and who does not have a DNR order?*

No. Although there is a presumption that every patient who does not have a DNR order consent to CPR, that consent does not create any new duty to provide CPR. The obligation to perform

CPR is defined by evolving standards of care, professional guidelines, and when applicable, Health Department regulations.

Thus, in an emergency, when the DNR law's requirements cannot be fully satisfied and the physician justifiably concludes that resuscitation would be futile, resuscitation may be withheld.

Under the law, futility means that "CPR will be unsuccessful in restoring cardiac and respiratory function or that the patient will experience repeated arrest in a short time period before death occurs." Decisions made on this basis should not be so frequent that they become a policy of unwritten DNR orders. Physicians should seek advance consent from the patient, agent, or surrogate whenever possible. See p. 28 on medical futility.

**Q:** *What is the difference between a "nonhospital" and "hospital" DNR order?*

When passed in 1987, the DNR law only applied to DNR orders in health care facilities — hospital DNR orders. In 1991, the New York State Legislature amended the DNR law to include DNR orders outside health care facilities — nonhospital DNR orders. A nonhospital DNR order may be issued when a patient is at home or in another community setting. Use orders can also be issued when a patient is in a health care facility to be honored when the patient is transferred home. A hospital DNR order cannot be transferred to the home setting.

**Q:** *Does consent to a DNR order affect other care and treatment?*

No. Consent to a DNR order by or for a patient is *not* consent to forgo other treatments; it is strictly a decision about CPR. However, nothing in the DNR law *prohibits* decisions to withhold or withdraw other life-sustaining treatments. Indeed, it is often advantageous to discuss CPR with patients or family members as part of a comprehensive discussion about the course of treatment.

**Q:** *Does a DNR order in long-term care mean that a resident should not be transferred to receive CPR?*

Yes. Under Health Department regulations, CPR is defined to include "the transfer of a patient to another facility if solely for the purpose of providing cardiopulmonary resuscitation." Hence, long-term care residents who have a DNR order should not be transferred to receive CPR. However, the DNR order does not affect decisions to transfer residents to receive other treatments.

**Q:** *Must a DNR order be in writing?*

Yes. A DNR order must be in writing in the patient's chart, although the writing may be an entry indicating that the attending physician issued the order over the telephone.

Nonhospital DNR orders must, be issued on a standard Department of Health form. The form must be kept with the patient at home or in other community settings.

**Q:** *Does the law require health care professionals to fill out particular forms?*

The law requires physicians to write certain information in the patient's chart. Many facilities have developed forms to facilitate compliance with the law, but forms are *not* required by the law.

The law requires physicians to issue the nonhospital DNR order on a standard Department of Health form.

**Q:** *What is an attending physician under the law?*

The attending physician is the physician selected by or assigned to a patient who has primary responsibility for the treatment and care of the patient. When more than one physician shares this responsibility, any such physician can be considered the attending physician.

**Q:** *Can a physician write a partial hospital DNR order, such as an order not to intubate the patient in the event of arrest?*

Yes, with consent from the patient, agent, or surrogate.

**Q:** *Can a physician write a hospital DNR order that does not apply in certain settings, such as the operating room?*

Yes, if the patient, agent, or surrogate consent. Prior to an operation, physicians should discuss CPR with the patient, agent, or surrogate for any patient who has a DNR order and determine if they wish to consent to suspend the order during surgery.

**Q:** *Can a physician write a hospital DNR order that remains in effect over a series of discharge and readmissions to the hospital?*

Yes, if the patient, agent, or surrogate gives informed consent to such an order which states specifically that it is effective whenever the patient receives care in the hospital. The attending physician must review the order each time he or she examines the patient, whether in the hospital or elsewhere, although this review need not occur more than once every seven days. This review does not require the physician to reobtain the patient's, agents, or surrogate's consent.

**Q:** *Can the attending physician direct the entry of a DNR order by telephone?*

Yes, if the order is followed by written confirmation.

**Q:** *Do advanced age and infirmity alone justify a DNR order?*

No.

***Q:** Can a DNR order written in a hospital or nursing home apply to a home care setting?*

A hospital DNR order does not cover DNR decisions for patients at home. The patient or surrogate must specifically consent to a nonhospital DNR order if the patient is to be cared for at home or in other community settings.

***Q:** Can a hospital DNR order apply in an outpatient clinic of a hospital?*

Yes.

***Q:** Can a nonhospital DNR order apply in an outpatient clinic of a hospital?*

Yes, hospital emergency personnel can honor the order.



## II.

# DNR ORDERS IN HEALTH CARE FACILITIES: Hospital DNR Orders

### A. Patients with Capacity

*Q: How is a decision made and recorded at a health care facility?*

An adult patient in a health care facility can consent to a DNR order orally or in writing. The law does not require any particular form of recording the patient's consent, although many health care facilities have prepared forms. A patient's decision should not be delayed for lack of forms.

Oral concern *must* be witnessed by two adults, one of whom must be a physician affiliated with the facility. An "affiliated" physician includes any doctor permitted to treat patients in the facility.

Written consent must be witnessed by the patient and witnessed by two adults – neither witness must be required to be a physician. The oral or written decision must be included in the patient's medical chart.

*Q: How is a decision made and recorded prior to admission to a health care facility?*

An adult may consent to forgo resuscitation prior to admission to a health care facility in writing, signed by the adult, and witnessed by two adults. A living will can provide this consent if it is clear from the document that the adult wishes to forgo CPR. Consent may also be expressed in the form of a nonhospital DNR order. See p. 33 on nonhospital DNR orders.

**Q: *May an adult set conditions for consent to a DNR order?***

Yes. Before or during admission to a health care facility, an adult may consent to a DNR order *conditionally*. For example, a patient may conclude that, if and when she becomes terminally ill and unable to make decisions directly, she wants a DNR order entered. Before entering a DNR order in these circumstances, the attending physician must conclude, to a reasonable degree of medical certainty, that these conditions are satisfied. That conclusion must be stated in the patient's chart.

**Q: *What are the attending physician's obligations when a patient consents to a DNR order?***

The attending physician must record the decision in the patient's chart. The physician then must either;

- Issue the order (or issue the order when any conditions specified in the decision are met); or
- Promptly inform the patient of any objection to the order, and then make all reasonable efforts to arrange to transfer the patient to another physician, if necessary; or
- Promptly inform the patient of any objection to the order and refer the matter to the facility's dispute mediation system.

**Q: *What is a therapeutic exception?***

If the attending physician determines that an adult patient would suffer "severe and immediate injury" from a discussion about CPR, the physician need not seek the patient's consent, but must then follow an alternative procedure for entering the DNR order, "Severe and immediate injury" is a strict standard. For example, the standard is met if the patient would suffer a heart attack or become suicidal as a result of the discussion.

The alternative procedure involves several steps. The attending physician must;

- Consult with and seek the written concurrence of another physician that the patient would suffer severe and immediate injury. The second physician must be a physician designated by the facility, and must personally examine the patient;
- Ascertain the wishes of the patient to the extent possible without subjecting the patient to the risk of severe injury;

- Set forth the reasons for not consulting the patient in the patient's chart; and
- Seek the consent of a surrogate, unless the order is entered based on the patient's previous consent.

**Q:** *Must a physician make specific medical findings before entering a DNR order for a capable patient?*

No. The patient's informed consent is sufficient. In contrast, medical findings are required when a surrogate consents, unless the person deciding has been appointed as agent under the health care proxy law.

**Q:** *Must a living will or other written statement specifically refer to CPU or a DNR order in order to provide consent?*

No. For example, a wish to forgo "heroic measures" or "extraordinary life-saving measures" may be sufficient. If health care professionals are uncertain about the patient's intent, they should ask the patient's surrogate. The surrogate must consider the living will or other written statement when deciding about CPR for the patient.

**Q:** *What if the patient says, "Doctor, you decide"?*

The statement, if witnessed and recorded in the patient's chart, can be regarded as consent to a DNR order.

**Q:** *What if a patient consents to a DNR order, loses capacity, and then the patient's family opposes the order?*

The physician's obligation is to honor the patient's decision. However, a dispute about whether the patient actually consented or had the capacity to do so may be addressed by the facility's dispute mediation system.

**Q:** *Must the patient sign a form to consent to a DNR order?*

No. A patient can consent orally if two adult witnesses sign the patient's medical chart or a consent form attached to the chart.

## ***C. Patients Who Lack Capacity: Decisions by Health Care Agents***

### ***B. Determining Incapacity***

***Q: What is "capacity" to make decisions?***

The DNR law defines capacity as the ability to understand and appreciate the nature and consequences of a DNR order, including the benefits and disadvantages of the order, and to reach an informed decision. A patient may lack capacity due to reach an informed decision. A patient's disagreement with the physician's recommendation is *not*, by itself, proof of incapacity (nor is agreement with a physician proof of capacity).

***Q: How is incapacity determined?***

All adults are presumed to have capacity unless determined otherwise by the procedure described below, or by a court order. The DNR law does not require any determination or documentation that a patient *has* capacity.

The attending physician must determine that the patient lacks capacity "to a reasonable degree of medical certainty." A finding of incapacity for purposes of the DNR law does *not* establish the patient's lack of capacity for any other purpose.

The law requires a concurring opinion by, a second physician, selected by a person with authority from the facility to make the selection. The second physician must examine the patient.

For patients who lack capacity because of a mental illness or developmental disability, special rules apply. See *p. 30* on mental illness, developmental disabilities, and mental health facilities.

***Q: How is the determination of incapacity recorded?***

The attending physician and the concurring physician must write their findings about incapacity in the patient's medical chart. The entry must state the physicians' opinion about the cause and nature of the patient's incapacity, as well as its probable duration. The entry can be made in the chart directly, or physicians can use a form.

*Q: Who must be informed that the patient lacks capacity?*

Health care professionals must inform the patient of the determination and give the patient a copy of the brochure describing the law, unless it is clear that the patient cannot understand the information.

The patient's health care agent, if any, otherwise the person highest on the surrogate priority list, must be told about the determination of incapacity. This will ordinarily happen as a matter of course, since the same person must be contacted to decide about CPR for the patient. Only one person on the surrogate list must be required to be informed, unless the patient is from a mental health facility. More than one person may be informed.

*Q: Are specific medical tests and procedures required for determining a patient's lack of capacity.*

No. The persons who make the determination should follow generally accepted practices in ascertaining whether the patient meets the standard for incapacity in the DNR law.

*Q: What if the patient alternates between periods of capacity and incapacity?*

Some patients, especially in long-term facilities, may be lucid and able to decide about treatment during one part of the day and confused at other times. In such cases, health care professionals should try to seek the patient's decision about CPR when the patient is capable of deciding.

## ***C. Patients Who Lack Capacity: Decisions by Health Care Agents***

**Q:** *What is a health care agent?*

Under the health care proxy law, adults have a right to appoint someone they trust — a health care agent — to make decisions for them once they can no longer decide for themselves. An agent can make all health care decisions a competent adult can make, including decisions to discontinue life-sustaining treatment such as CPR.

**Q** *What is the difference between a health care agent and a person on the surrogate list under the DNR law?*

A health care agent can generally decide about all treatment. A surrogate under the DNR law can only decide about CPR. Once an agent's decision-making authority begins (according to the proxy law), the same requirements apply to the health care agent that apply to adults with capacity under the DNR law.

**Q:** *When does the agent's decision-making authority begin?*

Under the health care proxy law, an agent's authority to make health care decisions begins when a physician determines that a patient has lost the capacity to decide for himself or herself. Two physicians must determine that the patient has lost capacity for decisions about life-sustaining treatment, including CPR.

**Q.** *If a patient has appointed a health care agent, must the proxy form contain the patient's wishes about CPR in order for the agent to decide?*

No, the agent can decide about all treatment without specific written information.

**Q:** *Who has priority to decide about CPR, an agent appointed under the proxy law, or a surrogate authorized by the DNR law?*

A health care agent, unless the patient's written proxy states that the agent should not make decisions about CPR.

**Q:** *Is surrogate consent to a DNR order required if a health care agent is available?*

No. The agent's consent is sufficient, even if a surrogate is available. The agent's decision takes priority over any other surrogate decision maker.

**Q:** *If the agent consents to a DNR order, must the physician review the order every seven days?*

Yes. The rules that apply to DNR orders issued for adults with capacity apply to DNR orders issued with the consent of an agent.

**Q:** *If a patient has appointed an agent, should the patient still be involved in decisions about CPR?*

Yes. Whenever possible and appropriate, the physician should speak to the patient to seek consent for a DNR order, even if the patient has appointed a health care agent.

**Q:** *What access does an agent have to medical records?*

The agent has the right to receive medical information and medical records necessary to make an informed decision about CPR and other treatments.

## ***D. Patients Who Lack Capacity: Surrogate Decisions***

***Q: When is a surrogate's consent required?***

If the patient lacks capacity to make CPR decisions and there is no health care agent, the attending physician must seek the consent of a surrogate decision maker, if one is available, before issuing a DNR order.

***Q: What if the patient has appointed a health care agent under the health care proxy law?***

The health care agent should act as the decision maker. Special rules apply. See p. 12 on decisions by health care agents. The same rules that apply to the competent adult making DNR decisions apply to the health care agent.

***Q: Who's is the surrogate?***

The surrogate — the person who has legal authority to consent to a DNR order for a patient lacks capacity and has not appointed a health care agent -- is a person in the highest category on the following list who is reasonably available, willing, and competent to decide about CPR.

1. A committee of the person or an Article 17-A guardian. This is a person appointed by a court, to manage the personal affairs of on adult who is incompetent, developmentally disabled, or mentally retarded. The DNR law and regulations do not require the appointment of any such committee or guardian.
2. The spouse.
3. A son or daughter 18 years of age or older.
7. A parent.
8. A brother or sister 18 years of age or older.
9. A close friend. A "close friend" is any person who presents an affidavit to an attending physician stating: (i) that he or she is A close friend of Ore patient and that he or she has maintained such regular contact with the patient as to 'be familiar with the patient's activities, health, and religious or moral beliefs; and (ii) the facts and circumstances that demonstrate such familiarity. Thus, a dose friend might include a relative of the patient who is not on the priority list, such as a grandparent, a patient's unmarried partner, or a health care professional who has 3 close personal relationship with the patient.

A person on the surrogate list is “reasonably available” if he or she can be contacted with diligent efforts by an attending physician or another person acting on behalf of the attending physician or the hospital. The name of the surrogate must be entered in the patient’s medical chart.

**Q:** *Under what circumstances may a surrogate consent to a DNR order?*

A surrogate can consent to a DNR order *only if two physicians determine that one* of the following conditions exists:

- The patient has a terminal condition. A "terminal condition," for this purpose, is an illness or injury for which there is no hope of recovery, and which reasonably can be expected to cause death within one year; or
- The patient is permanently unconscious; or
- Resuscitation would impose an extraordinary burden on the patient in light of the patient's medical condition and the expected outcome or resuscitation for the patient. This encompasses cases in which the patient is so frail, debilitated, or ill that CPR Would cause more harm than benefit; or
- Resuscitation would be medically futile. “Medically futile” means that CPR will be unsuccessful in restoring cardiac and respiratory function or that the patient will experience repeated arrest in a short time period before death occurs.

The attending physician and another physician selected by the hospital must determine, to a reasonable degree of medical certainty, that the patient meets one of these conditions. Both determinations must be based on personal examination of the patient and must be included in the patient's medical chart.

**Q:** *How does a surrogate make a decision about CPR?*

The surrogate must decide about CPR based on the patient's wishes, including consideration of the patient's religious and moral beliefs; or, if the patient’s wishes are unknown and cannot be ascertained, based on the patient's best interests, using an evaluation of the benefits versus the burdens of CPR.

If a physician or family member is convinced that the surrogate has not applied thesis standards in making the decision, he or she may start the facility's dispute mediation process.

**Q:** *What access does a surrogate have to medical information?*

The surrogate has the same right as the patient to receive medical information and medical records necessary to make an informed decision about CPR. Health care professionals should ensure that the surrogate has information about CPR, the patient's diagnosis, and the prognosis following CPR.

**Q:** *What form does a decision by a surrogate take?*

The surrogate may consent to a DNR order orally or in writing. Oral consent must be given to two adults, one of whom must be a physician affiliated with the facility in which the patient is treated. Written consent must be dated and signed in the presence of one witness 18 years of age or older, who must also sign. Any health care professional or adult family member may act as a witness.

**Q:** *What is an attending physician's obligation to respect a surrogate decision?*

When a surrogate requests or consents to a DNR order, and one of the four medical conditions **is** met, the physician then has the same options that he or she would have if the patient consented to the order. The physician must either:

- Issue the order; or
- Promptly inform the surrogate of any objection to the order and make all reasonable efforts to transfer the patient to another physician, if necessary; or
- Start the dispute mediation process.

If the attending physician knows that any person on the surrogate list opposes the DNR order authorized by any other person on the list, the physician must submit the matter to dispute mediation. While dispute mediation is occurring, the physician cannot issue the order and any existing order must be suspended.

**Q:** *Must the patient be informed of a surrogate's consent to a DNR order?*

If a surrogate consents to a DNR order, the patient must be informed about the decision only if the patient can understand the information. However, the patient should not be informed if the discussion would cause severe and immediate injury to the patient.

**Q:** *Is a surrogate's consent to a DNR order required if the patient, before losing capacity, consented to an order?*

No. If the patient made his or her wishes known, a surrogate's decision is not necessary and should *not* be sought. For example, if a patient signs a document stating, "in the event I become terminally ill I do not want CPR," and later becomes terminally ill, the physician may enter a DNR order based on the patient's prior consent.

**Q:** *What "diligent efforts" are required to locate a person on the surrogate list before moving to persons in the next level?*

The efforts required depend on the circumstances. For example, in an urgent situation, the inability to contact a person on top of the list by telephone can justify seeking a decision from the next person on the list. The diligence requirement does not mandate unreasonable attempts to locate a patient's long-lost relatives.

**Q:** *What if there is more than one person in the priority category who is available, willing, and competent to make a DNR decision? Who decides?*

Any of those persons — for example, any of the patient's adult children or siblings — can be the surrogate. There is no obligation to seek consent from all persons in the priority category.

*Q: Must a surrogate be at the hospital to consent to a DNR order?*

No. The law requires the surrogate's oral or written consent, but does not require the surrogate's physical presence. A physician can enter a DNR order based on a telephone conversation with the surrogate if consent is given to the physician and an adult witness.

*Q: May a physician be a surrogate?*

Yes, as long as the physician is not one of the two physicians who confirm that the patient meets medical requirements for entering the order.

## **E. Patients Who Lack Capacity and for Whom No Surrogate is Available**

***Q:*** *When can physicians enter a DNR order for a patient who lacks capacity and has no person available to act as surrogate?*

A DNR order may be issued if the attending physician determines in writing that to a reasonable degree of medical certainty CPR would be medically futile. Under the law, “medically futile” means that CPR will be unsuccessful in restoring cardiac and respiratory function or that the patient will experience repeated arrest in a short time period before death occurs.

A second physician selected by the hospital after personal examination of the patient must review and concur with the determination of medical futility, and write that determination in the patient’s chart.

***Q:*** *What if the patient has no surrogate but, prior to losing capacity, left instructions to withhold CPR under certain circumstances?*

If the patient consented to a DNR order, the order may be entered when the attending physician finds that the circumstances identified by the patient, such as the onset of terminal illness, have occurred.

***Q:*** *What if CPR is not medically futile but physicians believe that a DNR order is appropriate?*

The hospital may seek judicial approval for the order.

## *F. Minor Patients*

**Q:** *Who is a minor?*

A "minor" is a person less than 18 years old, who is neither married nor the parent of a child. A "parent" means a parent who has custody of the child.

**Q:** *Must physicians seek parental consent before entering a DNR order for a minor?*

Yes. The attending physician must seek the consent of a minor's parent or legal guardian before issuing a DNR order for a minor patient. The consent may be written or oral. A written consent must be signed and witnessed by one adult. Consent may be given orally to two adults, one of whom is a physician affiliated with the facility in which the minor is being treated, line order must be entered in the patient's chart.

**Q:** *Should minors be consulted about CPR?*

In contrast to adults, minors are not presumed to have the capacity to decide about CPR. However, if the attending physician determines that the minor patient has capacity to decide about CPR, he or she must seek the minor's consent — as well as the parent's consent — to the DNR order. The attending physician must make the determination about the minor's capacity in consultation with the minor's parent or legal guardian. There is *no* requirement of a concurring opinion.

The law does not specify any writing or witnessing requirement to evidence the minor's consent. There should, however, be a chart entry.

**Q:** *Must the physician notify the other parent?*

If the attending physician has reason to believe that there is another parent, including a noncustodial parent, who has not been informed of a decision to issue a DNR order for the minor, the attending physician or someone acting for the attending physician must make a reasonable effort to determine if the uninformed parent or noncustodial parent has maintained substantial

and continuous contact with the minor and, if so, must make diligent efforts to inform that person of the DNR order prior to issuing the order.

**Q:** *What are the standards for parental decision making?*

A parent, like other surrogates, may consent to a DNR order only if the order is based on: (i) specified medical findings; and (ii) a judgment about the minor's wishes and interests.

**Q:** *Does the attending physician have to determine and document a minor patient's lack of capacity?*

No. For minors, the physician only needs to determine and document that a patient *has* capacity.

**Q:** *What if a parent consents to a DNR order but the physician knows that another parent opposes the order?*

The physician must submit the matter to dispute mediation. While mediation is occurring, the physician cannot issue the order and any existing order must be revoked.

**Q:** *What if neither parent changes his or her mind through the dispute mediation process?*

Once the dispute mediation process is completed, as long as one parent consents, the physician may enter a DNR order based on that consent, but is not obligated to do so.

## ***G. Managing the DNR Order***

***Q:*** *How is consent to a DNR order revoked?*

### **By the patient or health care agent**

A patient or agent may revoke consent to a DNR order at any time by either:

- An oral or written statement to a physician or nurse; or
- Any other act that shows an intention to revoke consent.

### **By surrogate or parent**

A surrogate, parent, or legal guardian may revoke his or her consent to a DNR order by either.

- A written statement to a physician or nurse at the facility; or
- An oral statement to the attending physician at the facility, in the presence of one adult witness.

### **Obligation to cancel order**

Any physician who is informed about the revocation of a DNR order should immediately:

- Include the revocation in the patient's chart;
- Cancel the DNR order; and
- Inform the staff responsible for the patient's care of the cancellation.

If a member of the nursing staff is first informed of or provided with the revocation, she or he should immediately tell a physician.

***Q:*** *When must a physician review a DNR order?*

The attending physician must review DNR orders at least every 7 days for hospital patients and at each visit but at least every 60 days for nursing home patients, to determine if the order is still appropriate in light of the patient's condition. For an outpatient whose DNR order is effective while the patient receives care at the hospital, the attending physician must review the chart each time he or she examines the patient, whether in a hospital or elsewhere, although this review need not occur more often than once every 7 days. This review does *not* require the physician to reobtain a patient's, agent's, or surrogate's consent.

A physician's failure to review the order on time does not make the order ineffective; the patient's or surrogate's consent to the DNR order should not be disregarded in those circumstances. The order – and the immunity of staff for following it – remain valid.

*Q: Does the 7-day or 60-day review apply to a patient on alternate level of care (ALC) status?*

The 60-day requirement applies to all ALC patients.

*Q: What happens if the patient's condition improves?*

If the attending physician determines that a DNR order is no longer appropriate because the patient's medical condition has improved, he or she must immediately inform the person who consented to the order (i.e., the patient or the surrogate). In general, if that person refuses to revoke consent to the order, the physician must either:

- Leave the order in place; or
- Make reasonable efforts to arrange for the transfer of the patient to another physician; or
- Submit the matter to the facility's dispute mediation process.

*Q: What happens if the patient regains capacity?*

If a DNR order was entered upon the consent of an agent or surrogate, and the patient at any time gains or regains capacity, the attending physician should seek consent from the patient. If consent is obtained immediately, the previously entered DNR order may be continued without interruption.

If consent is not obtained from the patient, the physician must promptly:

- Cancel the order;
- Inform the person who consented to the order; and
- Inform all hospital staff directly responsible for the patient's care of the cancellation.

## ***H. Transferring the Patient Between Facilities: Status of the DNR Order***

*Q: What are the obligations of facilities and ambulance personnel when patients are transferred from one facility to another?*

### **The transferring facility**

When the transferring facility sends a patient who has a DNR order to another facility, it must inform both the ambulance personnel and the receiving hospital of the DNR order. The transferring facility should tell the ambulance personnel and receiving facility about the order, and include a photocopy of the DNR order or written statement of the order with any records that travel with the patient.

### **The receiving facility**

When a patient who has a DNR order is transferred from one facility to another, the order is effective at the receiving facility, and remains effective until the attending physician examines the patient and either:

- Issues an order to continue the prior DNR order; or
- Cancels the DNR order.

If the attending physician decides not to continue the order, he or she must promptly inform the person who consented to the order and the hospital staff directly responsible for the patient's care. The physician may continue the prior order without seeking consent from the patient or other person who consented to the order.

### **The ambulance**

A DNR order is binding on emergency services personnel during transfer of a patient from one facility to another. If a patient who has a DNR order experiences cardiac or respiratory arrest during a transfer from one facility to another, he or she should not be resuscitated.

Special requirements apply for patients picked up by ambulance at home or in other community settings. See p. 33 on nonhospital DNR orders.

*Q: If the attending physician at the receiving facility cancels a DNR order, what are his or her obligations if the patient or surrogate opposes that decision?*

Just as in other disputes, the attending physician must either make all reasonable efforts to transfer the patient to another physician or refer the matter to dispute mediation.

## *I. Mediating Disputes*

**Q:** *What is the dispute mediation process?*

Each facility must establish a process to mediate disputes about the issuance of DNR orders. Facilities have broad flexibility in creating a process. However, the process must meet special requirements when disputes involve patients who have a mental illness or developmental disability.

**Q:** *What is the role of the dispute mediation process?*

The dispute mediation process can *mediate*, not decide, disputes. That is, it can advise, recommend, convey information, and take other steps to facilitate agreement. While the mediation process should help identify the decision that is most consistent with the patient's wishes and interests, mediators cannot issue or impose a decision about CPR.

**Q:** *What is the required mediation procedure?*

The DNR law does not include particular procedures for dispute mediation. The process should, at least, include a recognized means to initiate mediation (i.e., a person or office to contact) and an opportunity for those involved to present their views.

**Q:** *What is the effect of mediation on the DNR order?*

Once a matter has been submitted to dispute mediation, a DNR order cannot be issued — or if already issued, must be suspended — until:

- The dispute has been resolved; or
- The process has concluded its efforts to resolve the dispute; or
- 72 hours have elapsed from the time of the submission of the dispute.

*Q: What if dispute mediation fails to resolve the following sorts of disputes:*

- A patient or surrogate insists upon a DNR order but the attending physician believes one should not be entered?

The attending physician must either enter the DNR order, promptly transfer the patient to another physician or hospital willing to honor the patient's or surrogate's decision, or seek a court order overriding the decision.

- A surrogate insists upon CPR and a person lower on the priority list opposes it?

CPR should be provided unless the objecting person lower on the list goes to court to contest the surrogate's decision or two physicians determine that CPR would be medically futile as defined by the law.

- Two or more persons who are in the highest category on the surrogate list — for instance, the adult son and daughter of an elderly patient — disagree about the resuscitation decision?

The attending physician may follow the instructions of either person, and should base the decision on an assessment of what the patient would have chosen, or if that is not known, on a judgment about the patient's best interests.

## ***J. Medical Futility***

***Q:*** *What is the definition of “medically futile” CPR under the DNR law?*

"Medically futile" means that CPR will be unsuccessful in restoring cardiac and respiratory function or that the patient will experience repeated arrest in a short time period before death occurs.

***Q:*** *When can the attending physician enter a DNR order based on medical futility:*

If the physician determines that CPR would be medically futile, the physician may enter a DNR order on that basis provided that he or she takes the following steps:

- The physician must discuss the DNR order with the patient, agent, or surrogate, if possible, if possible;
- The judgment of futility must be confirmed by a second physician authorized by the hospital to render concurring opinions on DNR matters; and
- The physician must enter the order in the patient’s chart and inform the patient, agent, or surrogate. The order will not require the consent of the agent or surrogate.

DNR orders based on futility should be reviewed in the same manner as other DNR orders.

Special procedures apply for patients who lack capacity and have no available surrogate. See p. 19 on incapable patients for whom no surrogate is available.

***Q:*** *What if the health care agent or surrogate refuses to consent to a DNR order and the physician believes that CPR would be futile for the patient?*

The attending physician must seek a second opinion. If the second physician concurs that CPR will be futile, as futility is defined by the law, and the concurrence is written in the chart, the attending physician may enter the order on grounds of futility, but must inform the agent or surrogate.

***Q:** What happens in an emergency if there is no opportunity to discuss CPR with the patient?*

If the physician concludes that CPE would be medically futile, the patient should not be resuscitated.

***Q:** What if CPR is not futile but the physician believes it is harmful or not in the patient's best interests?*

The physician cannot override the patient's, agent's, or surrogate's refusal to consent to the order. The physician may seek dispute mediation or transfer the patient on grounds of conscience to the care of another physician willing to honor the decision.

## ***K.Mental Illness, Developmental Disabilities, and Mental Health Facilities***

***Q: How is mental illness defined?***

For the purposes of the DNR law, the term “mental illness” covers conditions such as schizophrenia and psychosis. It does not cover dementias, such as those resulting from Alzheimer’s Disease.

***Q: How is a determination of incapacity made for a patient who has a mental illness?***

If the attending physician of a patient in a general hospital determines that a patient lacks capacity because of mental illness, the concurring determination must be provided by a physician certified or eligible to be certified by the American Board of Psychiatry and Neurology. This requirement only applies to general hospitals -- not to mental hygiene facilities or nursing homes.

***Q: How are developmental disabilities determined and how does that determination affect the determination of capacity?***

If the attending physician, in any facility, determines that a patient lacks capacity because of a developmental disability, the concurring determination of incapacity must be provided by a physician or psychologist;

- Employed by one of the state-operated developmental centers listed in Section 13.17 of the Mental Hygiene Law; or
- Employed for a minimum of two years by a facility operated or licensed by the Office of Mental Retardation and Developmental Disabilities; or
- Approved by the Office of Mental Retardation and Developmental Disabilities. OMRDD regulations require that the concurring physician or psychologist possess specialized training or three years' experience in treating developmental disabilities.

**Q.** *What is the role of the facility director?*

When a patient is in or transferred from a mental health facility, the facility director must be informed of the following events:

- A determination that the patient lacks capacity; and
- Consent by the patient, health care agent, or surrogate to the DNR order, or entry of an order for an adult patient who lacks capacity and has no surrogate.

Notice of the decision to enter a DNR order must be given to the director prior to the issuance of the order. However, the attending physician need not wait for a response from the director before entering the order.

A facility director may commence dispute mediation to challenge consent to the issuance of a DNR order, or commence a special proceeding in court upon the conclusion of dispute mediation.



# **DNR Orders At Home And In The Community: Nonhospital DNR Orders**

*Q: What is a nonhospital DNR order?*

A nonhospital DNR, order applies to patients outside hospitals, nursing homes, and certain mental health facilities. A nonhospital order instructs emergency personnel not to perform CPR for patients at home and in the community. Nonhospital orders may be issued for patients while they are in a health care facility or when they are at home. Many of the rules that apply to hospital DNR orders apply to nonhospital DNR orders.

*Q: Can a nonhospital DNR order be issued for all patients?*

Generally, nonhospital DNR orders can be issued for all patients. However, for patients who lack capacity and have not appointed a health care agent, surrogates can give consent only when the patient is in a hospital, nursing home, or certain mental health facilities See p. 14 on the procedures for entering a DNR orders with surrogate consent.

As of September 1, 1992, nonhospital DNR orders based on surrogate consent may become available for patients prior to, during, or after admission to a health care facility Provider administrators should be consulted on developments in this area.

*Q: How is a decision made and recorded for nonhospital DNR orders?*

## **At home and in the community:**

A patient with capacity or a health care agent may consent to a nonhospital DNR order orally or in writing in any setting: at home, in a doctor's office, or in a health care facility. Oral consent must be given to the patient's physician by the patient or the health care agent. Written consent must be signed by two adult

witnesses, The order must be issued on the standard Department of Health form for nonhospital DNR orders. In addition to the form, the patient's DNR status may be indicated by a standard bracelet in a design approved by the Department of Health. No person shall be required to wear such a bracelet.

Nonhospital DNR orders may be issued for patients who lack capacity and have not appointed a health care agent while the patient is in a hospital, nursing home, or certain mental health facilities, to take effect after discharge.

**In hospitals, nursing homes, or certain mental health facilities:**

Nonhospital DNR orders may be issued for all patients in hospitals, nursing homes, or certain mental health facilities. Oral consent may be given to the attending physician by the patient or the health care agent or to two adult witnesses, one of whom is a physician affiliated with the facility. Written consent must Resigned by two adult witnesses.

Surrogate consent to a nonhospital order may be sought for patients who lack capacity and have not appointed a health care agent. See p. 14 on surrogate decisions.

The orders must be issued on the standard Department of Health form for nonhospital DNR orders.

*Q: Are emergency medical technicians required to honor non-hospital DNR orders?*

Yes, except in rare cases when they believe that consent to the order has been revoked or cancelled, or when family members or others at the scene insist on CPR and physical confrontation appears likely.

*Q: Will hospital emergency mom personnel honor nonhospital DNR orders?*

Yes, Hospital emergency service physicians and personnel must honor nonhospital DNR orders unless they identify a compelling medical reason not to do so.

***Q: If a patient is admitted to a hospital with a nonhospital DNR order, will the DNR order apply in the hospital setting?***

The order is treated as a hospital DNR order for a patient transferred from another facility. See p. 24 on transferring patients between facilities.

***Q: How are nonhospital DNR orders revoked?***

Nonhospital DNR orders may be revoked at any time by the patient, health care agent, or surrogate, by any statement or act that indicates intent to revoke or cancel the order. Any health care professional informed of a revocation of a nonhospital order must inform the attending physician. The physician must note that the order has been revoked in the patient's medical chart and make an effort to retrieve the standard form issuing the order, and the standard bracelet, if any.

***Q: Must the attending physician be present to issue a nonhospital DNR order?***

No. The patient or health care agent may consent to the non-hospital DNR order by telephone to the patient's physician. He or she may also consent in writing in the presence of two adult witnesses.

***Q: How are nonhospital DNR orders reviewed?***

The patient's physician must review the appropriateness of the nonhospital DNR order each time he or she examines the patient, but at least every 90 days.

***Q: Can the review of the DNR order take place by telephone?***

Yes, for patients under the care of a registered nurse. The patient's physician can direct a registered nurse who provides direct care to the patient to record the review in the patient's medical chart over the telephone. However, the physician must confirm the review of the order in the chart within 14 days.



# Sample NYS Health Department Form for Nonhospital DNR Order

State of New York  
Department of Health

## Nonhospital Order Not to Resuscitate (DNR Order)

Person's Name \_\_\_\_\_

Date of Birth        /        /

**Do not resuscitate the person named above.**

Physician's Signature \_\_\_\_\_

Print Name \_\_\_\_\_

License Number

Date                /        /

It is the responsibility of the physician to determine, at least every 90 days, whether this order continues to be appropriate, and to indicate this by a note in the person's medical chart. The issuance of a new form is **NOT** required, and under the law this order should be considered valid unless it is known that it has been revoked. This order remains valid and must be followed, even if it has not been reviewed within the 90-day period.

