

Checklist #5: Adult Patients Without Medical Decision-Making Capacity Who Do Not Have a Health Care Proxy, and Do Not Have a Developmental Disability and the MOLST Form is Being Completed in the Community

In the community, Public Health Law surrogates (surrogates selected from the surrogate list) can consent to a nonhospital DNR order or a nonhospital DNI order, on behalf of patients who lack medical decision-making capacity. If MOLST is being completed in the community for a patient who does not have a health care proxy, the physician, nurse practitioner, or physician assistant may issue medical orders to withhold life-sustaining treatment – other than DNR and DNI – only if there is clear and convincing evidence of the patient’s wishes to refuse the treatment (see Glossary for definition of “clear and convincing evidence”).

This checklist does not apply to patients with developmental disabilities (see Step 8 herein and use the OPWDD Checklist instead).

Complete each step and check the appropriate lines as indicated.

Step 1: Assess health status and prognosis. ____

Step 2: Check all advance directives known to have been completed.

__ Health Care Proxy __ Living Will __ Organ Donation __ Documentation of Oral Advance Directive

(If there is a health care proxy and the health care agent can make the decision, stop filling out this checklist. Use Checklist #2 for adults with a health care proxy).

Step 3: If there is no health care proxy, assess capacity to complete a health care proxy.

A patient who lacks the capacity to consent to medical orders for life-sustaining treatment may still have the capacity to choose a health care agent and complete a health care proxy. Any patient with that capacity should be counseled to complete a health care proxy if he/she has not already completed one.

Document the result of patient counseling. **Check one:**

- ____ Patient retains the capacity to choose a health care agent and completes a health care proxy. (If the patient completes a health care proxy, use Checklist #2 for adults with a health care proxy.)
- ____ Patient retains the capacity to choose a health care agent but chooses not to complete a health care proxy.
- ____ Patient lacks capacity to choose a health care agent.

Step 4: Determine the patient’s medical decision-making capacity. Check appropriate lines under (A) and (B) (if a required item cannot be checked because the patient has capacity, use Checklist #1 for patients with capacity.):

(A) Attending Physician, Nurse Practitioner, or Physician Assistant Determination
Check both:

- ____ The attending physician, nurse practitioner, or physician assistant has determined in writing to a reasonable degree of medical certainty that the patient lacks capacity to understand and appreciate the nature and consequences of *DNR and Life-Sustaining Treatment orders*, including the benefits and burdens of, and alternatives to, such orders, and to reach an informed decision regarding the orders.

___ The determination contains the attending physician's, nurse practitioner's or physician assistant's assessment the cause and extent of the patient's incapacity and the likelihood that the patient will regain medical decision-making capacity. The determination is documented in the patient's medical record.

(B) Assessment for Mental Illness and Concurring Determination Check (i) or (ii) and all line(s) underneath:

___ (i) The attending physician, nurse practitioner, or physician assistant has determined that the patient's lack of medical decision-making capacity is **not due** to mental illness; and
___ A health or social services practitioner has independently determined that the patient lacks medical decision-making capacity. The concurring determination includes an assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain medical decision-making capacity. Such determination is also included in the patient's medical record.

___ (ii) The attending physician, nurse practitioner, or physician assistant has determined that the lack of medical decision-making capacity **is due** to mental illness (this does not include dementia) and **Check both:**

___ A health or social services practitioner has independently determined that the patient lacks medical decision-making capacity. The concurring determination includes an assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain medical decision-making capacity. Such determination is also included in the patient's medical record.

___ Either the attending physician or the health or social services practitioner who determined that the patient lacks medical decision-making capacity is a qualified psychiatrist. The determination by the qualified psychiatrist is documented in the medical record.

Step 5: Notify the patient. Check one:

___ Notice of the determination that the patient lacks medical decision-making capacity, and that any decision to issue a DNR or DNI order will be made by a surrogate, has been given to the patient (the patient may be able to comprehend such notice).

___ Notice of the determination that the patient lacks medical decision-making capacity, and that any decision to issue a DNR or DNI order will be made by a surrogate, has not been given to the patient, because there is no indication of the patient's ability to comprehend the information.

Step 6: Identify and notify the appropriate Public Health Law surrogate for DNR/DNI order. Check both:

___ The attending physician, nurse practitioner, or physician assistant has identified a person **from the class highest in priority** who is reasonably available, willing, and competent to serve as a surrogate decision-maker. Such person may designate any other person on the list to be surrogate, provided no one in a class higher in priority than the person designated objects. **Check one:**

- ___ a. Patient's guardian authorized to decide about health care pursuant to Mental Hygiene Law Article 81
- ___ b. Patient's spouse, if not legally separated from the patient, or the domestic partner
- ___ c. Patient's son or daughter, age 18 or older
- ___ d. Patient's parent

- ___ e. Patient's brother or sister, age 18 or older
- ___ f. Patient's actively involved close friend, age 18 or older

___ The attending physician, nurse practitioner, physician assistant has notified at least one person on the surrogate list **highest in order of priority** who is reasonably available that he/she will make health care decisions related to DNR and/or DNI orders because the patient has been determined to lack medical decision-making capacity.

Step 7: Document where the MOLST form is being completed. Check one:

___ Community (see Glossary for definition)

Step 8: Be sure you have selected the appropriate legal requirements checklist, based on who makes the decision and the setting. Check one:

This is checklist #5 for adults without medical decision-making capacity in the community, who do not have a health care proxy. If this is the appropriate checklist, proceed to Step 9 below. If this is the wrong checklist, find and complete the correct checklist. All checklists can be found on the Department of Health's website at https://www.health.ny.gov/professionals/patients/patient_rights/molst/.

- ___ Checklist #1 - Adult patients with medical decision-making capacity (any setting)
- ___ Checklist #2 - Adult patients without medical decision-making capacity who have a health care proxy (any setting)
- ___ Checklist #3 - Adult hospital, hospice or nursing home patients without medical decision-making capacity who do not have a health care proxy, and decision-maker is Public Health Law Surrogate (surrogate selected from the surrogate list)
- ___ Checklist #4 - Adult hospital, hospice or nursing home patients without medical decision-making capacity who do not have a health care proxy and for whom no surrogate from the surrogate list is available
- ___ Checklist #5 - Adult patients without medical decision-making capacity who do not have a health care proxy and do not have a developmental disability, and the MOLST form is being completed in the community
- ___ Checklist #6 - OPWDD Checklist – Adult patients with a developmental disability who do not have medical decision-making capacity and do not have a health care proxy

Step 9: Discuss goals for care with the Public Health Law surrogate. ___

Step 10: For DNR and/or DNI orders, surrogate has given informed consent Check all:

- ___ Surrogate has been fully informed about the patient's medical condition and the risks, benefits, burdens, and alternatives of possible life-sustaining treatment.
- ___ Surrogate has consented to the DNR and/or DNI orders.
- ___ Surrogate's decision is *patient-centered*, in accordance with the patient's wishes, including the patient's religious and moral beliefs; or if the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the patient's best interests. The surrogate's assessment is based on the patient's wishes and best interests, not the surrogate's, and includes consideration of:

- the dignity and uniqueness of every person;
- the possibility and extent of preserving the patient's life;
- the preservation, improvement or restoration of the patient's health or functioning;
- the relief of the patient's suffering; and
- any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider.

Step 11: Surrogate's DNR and/or DNI decision complies with clinical standards, as determined by the physician, nurse practitioner, or physician assistant with independent physician, nurse practitioner, or physician assistant concurrence Check (i) and/or (ii) and (iii):

- ___ (i) CPR and/or intubation would be an extraordinary burden to the patient **and** an attending physician, nurse practitioner, or physician assistant determines, with the independent concurrence of another physician, nurse practitioner, or physician assistant, that, to a reasonable degree of medical certainty and in accord with accepted medical standards,
 - the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided **or**,
 - the patient is permanently unconscious.

- ___ (ii) The provision of CPR and/or intubation would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances, **and** the patient has an irreversible or incurable condition, as determined by an attending physician, nurse practitioner, or physician assistant with the independent concurrence of another physician, nurse practitioner, or physician assistant to a reasonable degree of medical certainty and in accord with accepted medical standards.

- ___ (iii) The concurring physician's, nurse practitioner's or physician assistant's determination is documented in the medical record.

Step 12: For medical orders other than DNR and DNI, secure and document "clear and convincing evidence" of the patient's wishes. (If only DNR and/or DNI orders are entered on the form, go to Step 13.) Check all:

- ___ There is clear and convincing evidence (see Glossary for definition) of the patient's wishes, the evidence has been documented, and the documentation is in the medical record.
- ___ The Public Health Law surrogate has been notified and has been given an opportunity to present any additional evidence.
- ___ Check the "Based on clear and convincing evidence of patient's wishes" box in addition to the "Public Health Law Surrogate" box if a medical order other than DNR and DNI is being issued based on clear and convincing evidence of the patient's wishes.

Step 13: Witness requirements are met. Check one:

Two witnesses are always recommended. The physician, nurse practitioner, or physician assistant who signs the orders may be a witness. To document that the attending physician, nurse practitioner, physician assistant witnessed the consent, the attending physician, nurse practitioner, or physician assistant just needs to sign the order and print his/her name as a witness. Witness signatures are not required – printing the witnesses' names is sufficient.

___ The surrogate consented in writing.

___ The surrogate consented verbally, and the attending physician, nurse practitioner, or physician assistant witnessed the consent.

Step 14: If the surrogate is a close friend, verify the age and relationship with the patient.

___ The surrogate is 18 or older and has signed a statement that he or she is a close friend of the patient, or a relative of the patient (other than a spouse, adult child, parent, brother, or sister), who has maintained such regular contact with the patient as to be familiar with the patient's activities, health, and religious or moral beliefs. A copy of the signed statement is in the medical record.

Step 15: Physician, Nurse Practitioner, Physician Assistant Signature

___ The attending physician, nurse practitioner, or physician assistant has signed the MOLST form.

Step 16: Notify Director of Correctional Facility.

___ For adult patients who are inmates in, or are transferred from, a correctional facility, the attending physician, nurse practitioner, or physician assistant has notified the director of the correctional facility of the determination that the inmate lacks medical decision-making capacity, and the inmate has MOLST orders.