Purpose

To help protect the patient's right of self-determination by:

1. Identifying patients who have a valid advance directive,
2. Informing patients of their right to execute an advance directive.
3. Assisting patients who wish to execute an advance directive; and
4. Defining for caregivers the appropriate response to a valid Massachusetts Health Care Proxy or valid equivalent advance directive from another state.

Intent and Background

Patients have the right to make decisions concerning their medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate, at their option, advance directives. An advance directive is a written instruction, such as a living will, durable power of attorney for health care, or a Massachusetts Health Care Proxy, related to the provision of health care when the patient lacks the capacity to make health care decisions. Massachusetts General Law chapter 201D sets forth the following requirements for use of Health Care Proxies:

> Patients have the right to appoint a health care agent by executing a Health Care Proxy. The Health Care Proxy is a document delegating to an agent the authority to make health care decisions. The Health Care Proxy must be in writing and signed by the adult patient or at the direction of that patient, in the presence of two adult witnesses. The witnesses' signatures on the health care proxy affirm that the patient appeared to be at least 18 years old, of sound mind and under no constraints or undue influence. The person named as the health care agent cannot act as a witness to this signing. No individual who is an operator, administrator, or employee of a facility may be appointed as a health care agent by an adult, who, at the time of signing the health care proxy is a patient or resident, or applied for admission to such facility, unless the operator, administrator, or employee of that facility is related to the patient by blood, marriage, or adoption. Every adult shall be presumed to be competent to execute a Health Care Proxy and every health care proxy shall be presumed to be properly executed unless a court determines otherwise.

Policy

Patients shall be informed of their right to execute an advance directive and shall be given the opportunity to complete an advance directive to be maintained in their medical record. A valid Massachusetts Health Care Proxy or valid equivalent advance directive from another state shall be honored in accordance with Massachusetts and federal law. Other types of documents, such as living wills, may be used to assist with determination of the patient's wishes, but are not legally binding on caregivers. No patient is required to execute a Health Care Proxy or other advance directive as a condition of receiving care at Lahey Clinic. An incomplete document may not be altered to make it complete. Unless determined, by a court to be incompetent, each patient is presumed to be competent. Unless determined by a physician, in accordance with this policy, to lack the capacity to make his or her own health care decisions, each patient is presumed to have the capacity to make his or her own health care decisions. This policy applies to both inpatients and outpatients (outpatients outlined in Sec. IIIA), and complies with all relevant state and federal laws.

Procedure

I. Recognizing a Valid Advance Directive

A. Massachusetts Health Care Proxy

A Massachusetts Health Care Proxy is a type of advance directive in which a patient delegates the authority to make health care decisions to another individual, a health care agent, and which is executed in accordance with the requirements Massachusetts law. Massachusetts law does not mandate the use of a particular form. The Health Care Proxy form used at Lahey Clinic contains all elements required by law for a legally valid advance directive. The blank form is available on-line as an attachment to this policy, and completed forms will be scanned and available on-line. A health care proxy addendum is attached to the proxy form used at Lahey to provide the patient an opportunity to express his or her wishes regarding treatment, and to help guide the substitute decision-maker should the patient be determined to be incapacitated. The health care proxy addendum form is not legally binding on the caregivers or the proxy, but is merely intended to assist in the decision-making process.

No person acting as a health care agent in accordance with a Health Care Proxy shall be subject to criminal or civil liability for making health care decisions in good faith pursuant to the Massachusetts Health Care Proxy Law, M.G. L. c. 201D.

No health care provider or employee of the health care provider shall be subject to criminal or civil liability or be deemed to have engaged in unprofessional conduct, for carrying out in good faith health care decisions by an agent in accordance with a health care proxy.

B. Advance Directives Other Than the Massachusetts Health Care Proxy

Documents from other states which purport to name an individual to make decisions for the patient at the time of the patient's incapacity (regardless of the title of the document, such as "durable power of attorney for health care") will be honored under Massachusetts law provided they do not contradict the requirements of the Massachusetts Health Care Proxy law. Contact the Legal Services Department (Monday - Friday 0800 - 1630) if you have a question about a directive you are unfamiliar with. If the matter is urgent during evenings, nights, weekends or holidays, the Nursing Supervisor shall be notified to obtain legal consultation.

II. Obtaining a new Health Care Proxy Form at Lahey Clinic

Any health care provider or employee who receives a request from a patient or family member for advance directive information shall provide them with the Health Care Proxy form, available in MassNet and ECMS, as an attachment to this policy. If a Health Care Proxy form is filled out and presented to a health care provider or employee:

1. A copy of a completed Health Care Proxy will be filed in the patient's Medical Record and/or will be archived in the ECMS electronic system as per the HIM Department. The patient or patient's representative will keep the original copy.

NOTE: Only a copy of the document will be placed in the medical record. The original shall always be returned to the patient.

2. If there is more than one advance directive in the patient's record, the most recently completed document will be honored. If there is an urgent question or problem, the Nursing Supervisor should be notified immediately.

3. Information regarding the advance directive obtained at the time of initial registration or admission will be documented electronically and will print on the registration face sheet.

III. Obtaining Existing Advance Directives

The following are some examples of specific situations in which advance directives are discussed with patients or their representatives:

A. At the Time of Initial Outpatient/ED Registration, Pre-Operative Center Nursing visit, and Hospital Admission registration

1. The patient or the patient's representative will be asked if the patient has an advance directive and informed of the patient's right under state and federal law to execute an advance directive.
2. If the patient or the patient's representative presents an advance directive, a copy shall be filed in the patient's Medical Record and/or will be archived in the ECMS electronic system as set forth in Section II.1 above.
3. **If the patient or the patient's representative states that the patient has an advance directive, but the document is not with him/her**, the patient or patient's representative shall be asked to bring it in at the earliest opportunity for archiving in the electronic ECMS system and/or placement in the medical record. The patient or his/her representative shall be advised that, in order to be honored, a copy of the advance directive must be available to the caregivers.
4. If the patient does not have an advance directive or does not have a readily available copy of his/her advance directive and the patient wishes to execute a Massachusetts Health Care Proxy, the patient will be offered information, forms and the opportunity to execute such document consistent with Section II above.
5. For outpatients who present an advance directive, the physician will review the document. If the physician feels the directive can not be honored (for example, during the outpatient procedure), alternatives will be discussed.

B. At the Time of the Initial Patient Assessment on the Inpatient Units

1. The nurse will verify information about the existence of a patient's advance directive, his/her wish to complete one, or the patient's lack of interest in having an advance directive, in the appropriate section of the Initial Patient Assessment form.
2. **If the patient or the patient's representative states that the patient has an advance directive, but the document is not with him/her**, the patient or patient's representative shall be asked to bring it in at the earliest opportunity for archiving in the electronic ECMS system and/or placement in the medical record. The patient or his/her representative shall be advised that, in order to be honored, a copy of the advance directive must be available to the caregivers.

C. Following Admission to an Inpatient Nursing Unit

A patient who, at the time of admission, was not capable of understanding his/her rights to make health care decisions and/or to execute an advance directive, will be given the opportunity to complete or change the advanced directive form at such time as s/he regains the capacity to do so, even though his/her surrogate was provided with the information at the time of admission.

IV. Health Care Agent

A. A Health Care Agent shall be over 18 years of age.

1. A person is prohibited by law from serving as Health Care Agent if, **at the time the document is executed**, the person named as Health Care Agent is the operator, administrator or employee of a facility where the patient is a patient or a resident, or of a facility to which the patient has made application. **Exception:** Such person may serve as Health Care Agent if he/she is related to the patient by blood, marriage or adoption.

V. Authority of the Health Care Agent

A. Absent a judicial determination to the contrary, **patients are presumed to be competent to make their own health care decisions**. **The person designated as the Health Care Agent has no authority to make health care decisions for the patient unless and until the attending physician (i.e., the physician with primary responsibility or any physician sharing such responsibility) has made a determination that the patient lacks the capacity to make or communicate health care decisions**.

B. Physician's Responsibility

1. Check the medical record/ECMS to determine whether the patient has been identified as having a valid advance directive.
2. Determine in accordance with accepted standards of medical judgment, whether the patient has the capacity to make or communicate health care decisions. Where a patient's lack of capacity to make or communicate health care decisions is due to a mental illness or developmental disability, prior to making a determination that the patient lacks capacity to make and communicate health care decisions, the physician shall have consulted with a health care professional with specialized training or experience in diagnosing or treating mental illness or developmental disabilities of the same or similar nature in making such determination. A physician who has been designated as the Health Care Agent or Alternate Health Care Agent shall not make the determination of the patient's capacity to make health care decisions.

NOTE: There are very few circumstances in which a Lahey Clinic physician, unless related to the patient by blood, marriage or adoption, could legally serve as the patient's Health Care Agent. (See Section III.B above.)

3. Document his/her determination of the patient's lack of capacity to make health care decisions, including:
   a. The cause and nature of the incapacity; **and**
   b. The extent and probable duration of the incapacity.

4. Give prompt oral and written notice regarding the finding that the patient lacks the capacity to make health care decisions to:
   a. The patient (where there is any indication that the patient is able to comprehend); **and**
   b. The Health Care Agent; **and**
   c. The director of the mental health facility (if the patient has been transferred from such facility).

5. Periodically reevaluate the patient to determine and document if the patient has regained the capacity to make or communicate health care decisions.

VI. Scope of the Health Care Agent's Authority

A. Unless limited by the Health Care Proxy document or by court order, the Health Care Agent's health care decisions on behalf of the patient have priority over the wishes of any other person, regardless of relationship to the patient.

B. The Health Care Agent stands in the place of the patient who has been determined to lack the capacity to make or communicate health care decisions. The Health Care Agent may make any health care decision on the patient's behalf which the patient could have made if the patient had the capacity to do so, including decisions to withhold, withdraw or refuse life-sustaining treatment. This authority is subject to:

1. Any limitations expressed in the Health Care Proxy document and
2. Standards of responsible medical practice and
3. A prohibition on the agent's ability to forgo medical interventions deemed necessary by the attending physician to provide comfort care or relieve pain and
4. Any specific court orders overriding the Health Care Proxy

C. The Health Care Agent has no authority to make decisions about organ or tissue donation or about autopsy, as these are not “health care” decisions. The patient’s next of kin, if other than the Health Care Agent, should be approached regarding these issues in accordance with Lahey policy on organ or tissue donation and autopsy.

D. The Health Care Agent shall have the right to receive any and all medical information that the patient would have been entitled to receive, including the patient’s confidential medical information, necessary to make informed decisions regarding the patient’s health care.

E. The Health Care Agent has the responsibility to make health care decisions in accordance with his/her knowledge or assessment of the patient’s wishes and religious and moral beliefs, and if the patient’s health care wishes are unknown, in accordance with the Health Care Agent’s assessment of the patient’s best interests.

F. If the patient, even though determined to lack the capacity to make health care decisions, disagrees with a health care decision made by the Health Care Agent, the patient’s decision prevails unless a court determines that the patient lacks capacity to make health care decisions. (Notify Director, Risk Management/designee [Monday – Friday, 0800-1630] if this situation arises.

G. If the attending physician determines that the patient has regained the capacity to make or communicate health care decisions, the authority of the Health Care Agent ceases until such time that the patient once again is determined to lack capacity, as determined by the physician in accordance with this policy and the patient’s consent for treatment is required.

H. The Alternate Health Care Agent, if one is named, will serve if the Health Care Agent is unavailable after reasonable efforts to contact, is unwilling to serve, is incompetent (and is unlikely to become available, willing or competent to make timely decisions) or has been disqualified for any reason other reason under the Health Care Proxy Law.

I. Lahey Clinic, the patient’s conservator, the patient’s guardian, members of the patient’s family, a close friend of the patient or the Commissioner of the Massachusetts Department of Public Health may commence a special court proceeding regarding any dispute pertaining to the patient’s Health Care Proxy, including, but not limited to:

   1. Determining the validity of the Health Care Proxy;
   2. Having the Health Care Agent removed on the ground that the agent is not reasonably available, willing and competent to fulfill his/her obligations or is acting in bad faith; or
   3. Overriding the agent’s decision about health care treatment on the grounds that the decision was made in bad faith and not in accordance with the patient’s wishes. Contact the Director of Risk Management/designee (Monday - Friday, 0800 - 1630), or the Nursing Supervisor (evenings, nights, weekends and holidays.

VIII. Revocation of the Health Care Proxy

A. The patient shall always be presumed to have the capacity to revoke his/her Health Care Proxy, unless determined otherwise by court order.

B. The Health Care Proxy is revoked when any of the following situations occur:

   1. The patient expresses the intent to revoke the document orally, in writing, or by any act evidencing a specific intent to revoke.
   2. The patient executes a subsequent Health Care Proxy.
   3. Divorce or legal separation of the patient and spouse, if the spouse was designated as the Health Care Agent.

C. The colleague who learns of the revocation of a Health Care Proxy shall immediately notify the attending physician and shall document the revocation and physician notification in the medical record.

D. The physician shall document the revocation in the patient’s medical record and shall notify the Health Care Agent and other health care providers, verbally and in writing, of the revocation (see Attachment II).

IX. Response in the Event of Conflict Between Health Care Agent and Physician

A. If a health care decision of the Health Care Agent is in conflict with the moral or religious views of the physician, the physician shall not be required to honor that decision, provided that the physician would not have honored the same decision had it been made by the patient.

1. The physician shall, in such circumstance, attempt to transfer the patient's care to another Lahey physician who will honor the Health Care Agent's decision in the facility. The physician shall seek, as needed, the assistance of the Section Head, Department Chairman, Division Chairman or Chief Medical Officer to identify an appropriate physician to assume responsibility for the patient's care. An Ethics consultation also may be considered.
2. If unable to find an appropriate physician to assume responsibility for the patient's care in the facility, the physician shall, with the Health Care Agent's consent, arrange to transfer the patient to a physician in another facility reasonably accessible to the patient's family who will honor the Health Care Agent's decision. Appropriate Lahey Clinic personnel shall assist with transfer arrangements. Such transfers shall comply with the Emergency Medical Treatment and Active Labor Act.
3. If unable to transfer the patient, the physician shall either honor the Health Care Agent's decision or seek the assistance of the Director, Risk Management/designee (Monday - Friday, 0800 - 1630) or the Nursing Supervisor (evenings, nights, weekends and holidays) to obtain judicial relief.

B. The fact that a physician has refused to honor a Health Care Agent's decision based on his/her moral or religious views shall not be used as grounds for any detrimental action against the physician, provided the physician has fulfilled all obligations of this section VII.

X. Effect of the Lack of a Health Care Proxy

A. No patient may be required to execute or prohibited from executing a Health Care Proxy.

B. No presumption shall be made about a patient's wishes based on the fact that she or he did not execute a Health Care Proxy.

C. Health care decisions concerning incapacitated or incompetent patients without a Health Care Proxy shall be made by surrogate decision-makers according to the Lahey Clinic Informed Consent Policy.

XI. Staff Education.

A. All staff members are required to be familiar with this Advance Directives policy and the requirements and procedures included herein.

Contact:	Director, Patient Access and Case Management
References:	Massachusetts General Laws, c. 201D; 42 C.F.R. § 489.100 et seq.,; Standards of The Joint Commission; Code of Massachusetts Regulations
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