



39th Annual Meeting

*Mastering Person-Centered Care
Through Improved Communication, Care Transitions, and Palliative Care*

Palliative Care and Decision Making Capacity

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Disclosure

I have no relevant financial relationships with commercial interest to disclose.

Learning Objectives

At the end of this presentation, attendees will have the ability to:

- Determine whether someone has capacity to make a medical decision
- Apply concepts to determine the best surrogate decision maker
- Improve the management of patient's end of life decisions

Palliative Care

- Palliation of symptoms
- Adjustment to advanced illness
- Team approach to care
- Involvement of significant others
- At times it involves a shift in goals of care

Goals of Care

Shift in goals of care involves a conversation with

- Patient and/ or patient representative
- Patient representative at request of patient
- Patient doesn't have capacity

Decision Making Capacity vs Competency

- **Competency**
 - A legal determination regarding a person's ability to make legally binding decisions in any realm.
 - Determined only by court
- **Capacity** means a person's ability
 - To understand the nature and consequences of proposed health care
 - including its significant benefits, risks, and alternatives, and
 - To make and communicate a health care decision

Presumption of Capacity

- A person is presumed to have the capacity to make a health care decision
 - to give or revoke an advance health care directive
 - to designate or disqualify a surrogate
- This presumption is a presumption affecting the burden of proof

Determination of Capacity and other Medical Conditions

- Unless otherwise specified in a written advance health care directive, a determination that
 - a person lacks or has recovered capacity,
 - or that another condition exists that affects
 - an individual's health care instruction or
 - the authority of an agent or surrogate,
- Shall be made by the primary physician

Evaluating Decision Making Capacity

- Does the patient have a sufficient awareness of the nature of the situation?
- Does the patient have a factual understanding of the issue?
- Does the patient have the ability to manipulate the information to reach a reasonable decision?
- Is the patient able to make their choice known?
- Is the choice reasonable given the patient's personal values and circumstances?
 - This is not the same as, Do you agree with the choice?

Avoid Personal Judgment

- View from patient's world view and values
- Explore fears, don't dismiss them
- Always ask why
- **Do not coerce or dictate**
 - coercion and dictation are never ethical
 - May Persuade and guide which is ethical
- Be honest about uncertainty
- Agree to disagree but do not abandon

A Health Care Decision is a Decision

- Made by a patient or the patient's agent, conservator, or surrogate,
- Regarding the patient's health care, including the following:
 - Selection and discharge of health care providers and institutions.
 - Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication.
 - Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

California Law

July 2000



California Law

July 2000

- In recognition of the dignity and privacy a person has a right to expect, the law recognizes
 - that an adult has the fundamental right to control the decisions relating to his or her own health care,
 - including the decision to have life sustaining treatment withheld or withdrawn.

California Law

July 2000

Modern medical technology has made possible the artificial prolongation of human life beyond natural limits.

- In the interest of protecting individual autonomy, this prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may
 - violate patient dignity and
 - cause unnecessary pain and suffering,
 - while providing nothing
 - » medically necessary or
 - » beneficial to the person.

California Law

July 2000

- In the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment.

California Law

July 2000

The legislature did not want the above to be construed to condone, authorize, or approve

- **mercy killing**
- **assisted suicide**
- **euthanasia**

This law was not intended to permit any affirmative or deliberate act or omission to end life

- other than withholding or withdrawing health care
- pursuant to an advance health care directive,
- by a surrogate, or as otherwise provided,
- so as to permit the natural process of dying.

Who Can Be a Decision Maker?

- The patient's agent
 - Durable power of attorney
 - verbal or written
- Conservator (guardian)
- Surrogate
- Skilled Nursing Facility IDT
 - If there is no other surrogate
 - Best to do in conjunction with Ombudsman

Surrogate Decision Making

In recognition of the problems as well as the benefits of a priority scheme, the law sets out a default list of adult statutory surrogates:

1. The spouse, unless legally separated
2. a domestic partner
3. children
4. parents
5. brothers and sisters
6. grandchildren
7. close friends

Selecting the Surrogate

The primary physician is required to select the Surrogate with the assistance of other health care providers or institutional committees in the order of priority set out in the statute.

Selecting the Surrogate

However, where there are multiple possible surrogates at the same priority level

- The primary physician has a duty to select the individual who reasonably appears after a good faith inquiry to be best qualified.
- The primary physician may select as the surrogate an individual
 - who is positioned lower in statutory list
 - if, in the primary physician's judgment
 - the individual is best qualified
 - to serve as the patient's surrogate

Selecting the Surrogate

These rules are directly related to

- the fundamental principal that the physician should attempt to find the best surrogate — the person who can make health care decisions according
 - to the patient’s known desires or
 - in the patient’s best interest.

Varying the Default Priority Rules

The procedure for varying the default priority rules is not arbitrary, but subject to a set of important statutory standards.

Varying the Default Priority Rules

In determining which listed person is best qualified to serve as the surrogate, the following factors must be considered:

- Whether the proposed surrogate appears to be best able to make decisions in accordance with the statutory standard and based on
 - patient's instructions, if known
 - if not known patient's best interest
 - taking into account personal values

Varying the Default Priority Rules

The degree of the person's regular contact with the patient before and during the patient's illness.

- Demonstrated care and concern for the patient
- Familiarity with the patient's personal values
- Availability to visit the patient

Limitations on who may act as agent or surrogate

None of the following persons may make health care decisions as an agent under a power of attorney for health care or a surrogate under this division:

- The supervising health care provider or an employee of the health care institution where the patient is receiving care.
- An operator or employee of a community care facility or residential care facility where the patient is receiving care.
- This prohibition does not apply to the following persons:
 - An employee who is related to the patient by blood, marriage, or adoption.
 - An employee who is employed by the same health care institution, community care facility, or residential care facility for the elderly as the patient has/ had been employed

POLST

- A recognized health care decision maker may execute the POLST form only
 - if the individual lacks capacity, or
 - the individual has designated that the decision maker's authority is effective, and would require a health care provider to explain the form

POLST

- An individual having capacity may revoke a POLST form

POLST

- A health care provider is expected to
 - treat an individual in accordance with a POLST form, except as specified
 - conduct an evaluation of the individual
 - issue a new order consistent with the most current information available about the individual's health status and goals of care

POLST

The legally recognized health care decision maker of an individual without capacity

- is required to consult with the individual's treating physician prior to making a request to modify that individual's POLST form

POLST

An individual with capacity may at any time request alternative treatment to that treatment that was ordered on the form

- if the orders in an individual's request regarding resuscitative measures directly conflict with his or her individual health care instruction
 - the most recent order or instruction is effective

Durable Power of Attorney for Health Care

No authority can give informed consent to a health care decision while principal has capacity

- Unless specifically spelled out in DPOA paperwork
- While principle has capacity to give a durable power of attorney he may
 - revoke the appointment of the attorney-in-fact orally or in writing;
 - revoke the agent's authority by notifying the physician orally or in writing
 - a subsequent durable power of attorney revokes prior one
- Divorce revokes any designation of former spouse
- Is enforceable if executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or in substantial compliance with the laws of California
- If completed in SNF needs to be witnessed by Ombudsman

Two Complexing Situations

- Where the patient has variable capacity
- Where the treatment is felt to be futile or non-beneficial

Variable Capacity

- 79 year old with recurrent UTI's and becomes confused with UTI.

Non-beneficial Treatment

82 year old with severe dysphagia who was alert and oriented, but had impaired judgment and insight who expressed desire to be a full code but did not want a feeding tube

Other Points of Discussion

- Consent to hospice
- My way cards

Resources

- <http://clrc.ca.gov/pub/Printed-Reports/Pub208.pdf>
- © 2007 American Academy of Hospice and Palliative Medicine
- AAHPM Medical Director Review Course MODULE A
- <http://statelaws.findlaw.com/california-law/california-durable-power-of-attorney-laws.html>
- <http://www.capolst.org/>
- <http://caringadvocates.org/MyWayCards/>