Advance Directives

Calais Regional Hospital

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Law on Right to Refuse Treatment is Far From Clear

- We see variety of societal tensions about death & dying reflected in the law on medical decision-making
- Right to refuse treatment is converse of informed consent to treatment – "negative consent"
- Constitutional protections of privacy & self-determination
- Patient autonomy v. governmental interest in preserving life
- Allocation of limited medical resources

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Nature of Right to Refuse Treatment Depends on Patient Status

- Competent patient: common law right of informed consent & constitutional protection
- Incompetent patient: rights exercised through surrogate decision-maker based on 1 of 3 standards
  - Subjective standard: based on evidence of patient's subjective wishes, such as an advance directive
  - Substituted-judgment standard: based on surrogate's belief about patient's wishes
  - Best-interest standard: based on patient's best interests

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Finding the Law in Maine

- Maine legislature's web site: http://janus.state.me.us
  - Bill status: L.D. #
  - Session laws: P.L. or Resolves Chapter
  - Statutes: 24 MRSA § 2851
- State agency rules online: http://www.maine.gov/sos/cec/rules/rules.html
- AMA's Code of Medical Ethics: http://www.ama-assn.org/apps/pf_new/pf_online

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History of Medical Ethics

- Oath of Hippocrates (5th century B.C.)
- Percival's Code of Medical Ethics (1803)
- AMA Code of Medical Ethics (1847)
  - Opinion 2.03, *Allocation of Limited Medical Resources*
  - Opinion 2.035, *Futile Care*
  - Opinion 2.037, *Medical Futility in End-of-Life Care*
  - Opinion 2.20, *Withholding or Withdrawing Life-Sustaining Medical Treatment*
  - Opinion 2.21, *Euthanasia*
  - Opinion 2.211, *Physician-Assisted Suicide*
  - Opinion 2.22, *Do-Not-Resuscitate Orders*
  - Opinion 2.225, *Optimal Use of Orders-Not-to Intervene & Advance Directives*

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Case Law Lacks Cohesion

- Quinlan (1976) & Saikewicz (1977): first & most important U.S. Supreme Court cases on constitutional right to refuse treatment
- Cruzan (1990): Missouri law said care could not be withdrawn from an incompetent patient without "clear & convincing" evidence of her wishes; U.S. Supreme Court upheld State's interest in preserving life, but
  - Court left open question whether state would have to abide by surrogate's decision
- Schiavo (1998-2005): Florida guardianship court found by "clear & convincing" evidence that Schiavo would want to stop life-prolonging measures; ultimately upheld despite extensive litigation, legislation, & executive action at both state & federal levels

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History of DNR Orders

- Dr. Mitchell Rabkin's article: Rabkin, et al., *Orders Not to Resuscitate*, 295 New Eng. J. Med. 364 (1976)
- Suggested they should be reserved for terminally ill & those whose death is imminent
- Competent patient: non-attending physician & ad hoc committee of physicians consult on case; if they agree with attending physician, seek informed consent to DNR order from patient
- Incompetent patient: seek consent of appropriate family member

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Federal Legislation

- *Patient Self-Determination Act of 1990*
  - Applies to hospitals, SNFs, home health agencies, & hospice programs
  - Requires written policies & procedures governing advance directives & the right to accept or refuse treatment
  - Addresses documentation of advance directives in the medical record, staff education, & community education
  - Sets timing requirements
- Companion regulations published
- JCAHO standards amended to meet

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Maine Legislative History on Medical Decision-Making

- Living Will (1989)
- Durable Health Care Power of Attorney (1991)
- Uniform Health Care Decisions Act (1995): 18-A MRSA § 5-801 *et seq.*

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Drafters' Notes on UHCDA

- Much state legislative activity since Cruzan
  - All states have legislation authorizing advance directives
  - Nearly all states authorize living will
  - Nearly all states authorize power of attorney for health care
  - Majority of states have legislation authorizing family members, & in some cases close friends, to make health care decisions for adults who lack capacity
- However, development of state legislation has happened in "fits & starts," resulting in rules that are often "fragmented, incomplete, & sometimes inconsistent"
- Conflicts among state laws are common
- In increasingly mobile society, need greater uniformity

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UHCDA Based on these Concepts

- Acknowledges right of competent individual to decide all aspects of own health care in all circumstances, including refusal or discontinuation of care, even if death results
- Comprehensive legislation that allows states to replace all legislation on the subject with 1 statute: designated agent, surrogate, or court
- Designed to simplify & facilitate making of advance directives: model forms; no witness or acknowledgement necessary for POA
- Seeks to ensure decisions will be governed by patient's own desires: basis will be instruction or in the "best interest of the individual but in light of the individual's personal values"
- Addresses compliance by health care providers
- Provides procedure for dispute resolution

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Surrogate Decision Makers

In absence of an agent named in an Advanced Healthcare Directive (or court-appointed guardian), physicians may turn to other surrogates to make health care decisions for patients who lack capacity, in this order:

1.Spouse (unless legally separated);
2. Someone with whom the patient share an emotional, physical and financial bond similar to a spouse;

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Surrogate Decision Makers cont.

3. Adult children;
4. Parents;
5. Adult brothers and sisters;
6. Adult grandchildren;
7. Adult nieces and nephews;
8. Adult aunts and uncles; and
9. Another adult relative of the patient, related by blood or adoption, who is familiar with the patient's personal values and is reasonably available for consultation.

18-A MRSA § 5-801 (n)

Surrogate Decision Makers cont.

If none of the individuals eligible to act as surrogate is reasonably available, an adult who has exhibited special concern for the patient, who is familiar with the patient's personal values and who is reasonably available may act as surrogate.

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Responsibly Available

"Responsibly available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health-care needs.

18-A MRSA § 5-801(n)

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Obligations of Health-Care Providers

18-A MRSA § 5-807

Obligations of Health-Care Providers

(See handout)

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Surrogates Limited Authority

NOTE

Surrogates more limited in authority than agents and guardians in situations involving non-terminal and non persistent vegetative state. In such a case, a surrogate may not deny surgery, procedures or other interventions that are lifesaving and medically necessary.

18-A MRSA § 5-805 (a)

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UHCDA Supersedes

- Model Health-Care Consent Act (1982)
- Uniform Rights of the Terminally Ill Act (1985)
- Uniform Rights of the Terminally Ill Act (1989)

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Related Laws

- L.D. 1763, *Resolve, Concerning the Authority of "Do-Not-Resuscitate" Directives* (Resolves 2005, Chapter 169; effective 4/7/06)

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Practical Ways to Facilitate Decision-Making

- Encourage completion of advance directive
- Emphasize family dialogue on treatment choices during care for terminal illnesses
- Encourage patients to discuss their wishes with family members, clergy, & attending physicians
- Document patient wishes
- Comply with obligations of health-care provider under § 5-807

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Questions?

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