Health Care for the Elderly and Legal Issues

David English

University of Missouri

Chair, ABA Commission on Law and Aging

Scope

- The assigned topic, Health Care for the Elderly and Legal Issues, is vast.
- I will focus on a subset, the issues of planning for incapacity and the making of end-of-life decisions for patients who lack capacity.

Informed Consent-Foundation Principle

- Healthcare provider can be held liable for treating without informed consent.
- Informed consent requires disclosure of risks and alternatives and a voluntary decision by a patient having capacity.
- Requirement that consent be obtained to treat implies there is right to refuse treatment.
- But if patient lacks capacity, patient cannot give informed consent. Such consent can only be given by a substitute, generally referred to as a “surrogate.”
- Permissible surrogates include court-appointed guardians and agents acting under health care powers of attorney. Certain close family members also authorized to act for incapacitated relative in many but not all US states.

Famous Right-To-Die Cases [1]

- Quinlan (NJ 1976)-first big case. Involved young adult in persistent vegetative state. Issue was whether guardian could withdraw respirator. Court said yes, applying doctrine of substituted judgment, under which guardian is to make decision patient would have made if competent.
- Saikewicz (Massachusetts 1977)-involved profoundly retarded patient and whether respirator could be removed. Articulated countervailing factors to decision to withdraw treatment: (1) preservation of life; (2) protection of innocent third parties; (3) prevention of suicide; (4) maintenance of ethical integrity of medical profession. In later cases, (1) and (3) have carried much more weight than (2) and (4).

Famous Right-To-Die Cases [2]

- Conroy (NJ 1985)-involved elderly adult and whether feeding tube could be removed. Court articulated 3-level standard for making decisions, with express wishes being preferred, followed by substituted judgment, with best interest last.
- O'Connor (NY 1988)-involved elderly adult and whether feeding tube could be removed. Held that withdrawal allowed only if there is clear and convincing evidence of patient's expressed wishes.

Famous Right-To-Die Cases [3]

- Cruzan (Mo 1988)-perhaps the biggest case. Involved young adult in persistent vegetative state. Missouri Supreme Court, following O'Connor, held that artificial nutrition and hydration could be withdrawn only if clear and convincing evidence of patient's express wishes. US Supreme Court held that Missouri test was constitutional.

Cruzan-The Aftermath

- Supreme Court decision led to a huge mostly negative reaction among the public.
- On a more positive note, more than 30 states enacted health care power of attorney statutes within a couple years following the case.

Advance Directive Fundamentals

- An instruction directive is a written direction as to care that will be provided in the future.
- A proxy directive is an advance direction as to who will make the decision.
- A proxy directive and instruction directive may be combined. In that case, the substitute (the “proxy”) will make the decision as directed in the instruction directive.

DNR Orders

- Order written by doctor directing that Cardiopulmonary Resuscitation (CPR) not be attempted.
- Rules are fairly well-established in hospital setting, less well-established in out-of-hospital setting such as treatment by emergency personnel.

Patient Self-Determination Act

- Enacted by 1990 Omnibus Budget Reconciliation Act (OBRA)
- Requires that all Medicare and Medicaid-certified facilities [basically all hospitals and nursing homes]:
  - Have written policies on advance directives
  - Not discriminate against patients who have or don't have advance directives
  - Record advance directives as part of the medical record
  - Provide patient with written information on advance directives upon admission to the facility.

Limitations of Advance Directives

- ADs were a great idea but:
  - Most Americans don’t do them although precise percentage is unknown
  - Standard form doesn’t provide much guidance
  - People change their minds
  - Agent under health-care power of attorney often not provided effective guidance
  - Health-care providers are unaware of AD or can’t find in medical record
  - Or the AD in medical record isn’t consulted.

More Limitations

- Cookbook directions aren’t particularly helpful
- Piece of paper doesn’t change fact that dying is complicated
- AD is tool to encourage discussion, not a substitute for discussion
- AD can’t control health-care providers.

What ADs Can Do

- Can be important tool to encourage process of advance care planning.
- Can help to encourage discussions with agent and family.
- Can empower and give direction to patient’s actual voice and can be made part of patient’s care plan.

Emphasize Communication Process

- Emphasize process, not merely document preparation.
- Understand patient’s goals, values and fears.
- Emphasize importance of naming agent.
- Stress importance of periodic review.

Post-Signing

- Encourage patient and, in appropriate cases, the agent to speak to physician.
- Make AD accessible. An invisible AD=no AD.
- Consider wallet card.
- Consider cell phone app.
- Provide framework for periodic review.

Periodic Review

- Review AD when any of 5 D's occur:
  - Reach new decade
  - Experience death of family or friend
  - Divorce
  - Receive a new diagnosis
  - Experience a significant decline.

POLST

- For patients who are terminally ill, a technique known as Physician Orders for Life-Sustaining Treatment (POLST) has proved promising.
- POLST legally implemented in a variety of ways, such as state statute, government regulations, or medical/hospital association protocols
- POLST Recognizes that advance directives, particularly instruction directives, are often clinically irrelevant
- POLST is 3-step process:
  - Discussion between patient/agent or other surrogate and physician re end-of-life treatment options;
  - Wishes incorporated into physician's orders on POLST form cover sheet to medical record
  - POLST form travels with patient.