Medical Futility: Recent Legal Developments

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HCA webinar ● May 14, 2012
Law is a last resort

Typical dispute resolution pathway

Consensus Intractable
Prendergast (1998)

57% agree immediately
90% agree within 5 days
96% agree after more meetings

Garros et al. (2003)

1. Earnest attempts . . .
   deliberate . . .
   negotiate . . .

2. Joint decision-making . . . maximum extent . . .

Hooser (2006)

Code of Medical Ethics
of the American Medical Association

section 2.037

Council on Ethical and Judicial Affairs
Current Opinions, with Annotations
2006-2009 Edition

Resolved

Unresolved
3. Attempts . . .
   *negotiate* . . .
   reach resolution . . .

4. Involvement . . .
   *ethics committee* . . .

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Coordinated communication

Mandatory time-triggered ethics consults

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**5%**

**BUT**

Big & growing population
Hassan Rasouli

Surrogate Replacement
1. Follow directions
2. Exercise substituted judgment
3. Best interests

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<thead>
<tr>
<th>Surrogate</th>
<th>Advance directive</th>
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<td>A</td>
<td>B</td>
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Minnesota 2011
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2005

Barbara Howe
“Your own personal issues are impacting your decisions”

“Refocus your assessment”
Not just an **option** but sometimes a **duty**
“A . . . provider . . . may decline to comply . . . medically inappropriate health care or . . . contrary to generally accepted health care standards . . .”

“Remove the __, and I will sue you.”
“Why they follow the . . . SDMs instead of doing what they feel is appropriate, . . . a lack of legal support.”
Provider push for right to refuse
You may stop LSMT for **any reason**
- with immunity
- if your HEC agrees

*Tex. H&S 166.046*
WASHINGTON STATE MEDICAL ASSOCIATION
HOUSE OF DELEGATES
Resolution: C-9
(A-90)
Subject: Legal Protection for Physicians When Treatment is Considered Inutile
Introduced by: King County Medical Society Delegation
Referred to: Reference Committee C

WASHINGTON STATE MEDICAL ASSOCIATION
HOUSE OF DELEGATES
Resolution: A-2
(A-19)
Subject: WSMA Opinion on Medical Futility in End-of-Life Care
Introduced by: Shane Macaulay, MD, Delegate
WSMA Board of Trustees
Referred to: Reference Committee A

RESOLUTION 1 - 2004
(read about the action taken on this resolution)
Subject: Futility of Care

Introduced by: Michael Katzoff, MD and the Medical Society of Milwaukee County
RESOLVED, That the Wisconsin Medical Society, concurrent with a recommendation of the American Medical Association, Medical Futility in End-of-Life Care policy E-2.037, supports the passage of state legislation which establishes a legally sanctioned extra-judicial process for resolving disputes regarding futile care, modeled after the Texas Advanced Directives Act of 1999.

Medical Futility
Medicine Law & Ethics
Thursday, October 21, 2010
7:30 am - 12:45 pm
Education & Resource Center (ERC)
Hartford Hospital, Heublien Hall

HARTFORD HOSPITAL
“If a surrogate directs the provision of [LST] . . . provider that does not wish to provide . . . shall nonetheless comply . . . pending either the transfer . . . or judicial review”


Discrimination in Denial of Life-Preserving Treatment Act
April 5, 2012
Signed by Governor

July 1, 2012
Effective

“Health care . . . may not be withdrawn or denied if its provision is directed by . . . patient . . ., by . . . directive . . ., or by . . . surrogate”

“Futile care” exception
“... terminal condition... death is imminent within hours or at most a few days whether or not... treatment is provided...”

OR

“denial... will not result in or hasten the patient's death.”

S.B. 1695

Nondiscrimination in Treatment Act
March 14, 2012
Passes Senate

April 3, 2012
Passes House PH Comm

May 14, 2012
House reconvenes

“A health care provider shall not deny . . . life preserving health care . . . directed by the patient or [surrogate] . . . on the basis of . . .”

“view that treats extending the life of an elderly, disabled, or terminally ill individual as of lower value”
“disagreement with how the patient [or surrogate] values the tradeoff between extending the length of the patient’s life and the risk of disability”

“this subsection does not . . . allow a . . . provider . . . to decline to comply with . . . requests a [DNR] order be made ineffective”
Prohibited

“withholding or withdrawing . . . life-sustaining treatment . . . unless . . . advance directive . . . guardianship or other court order . . .”
“or such action is taken in accordance with the facility's standard protocol as applicable to its general patient population.”

Conscience clauses

Traditional limitations

Treat until transfer

Treat until transfer appears impossible
February 7, 2012
Referred to House
Judiciary Comm

“A healthcare provider has the right not to participate . . . in a healthcare service that violates his or her conscience.”

“No healthcare provider shall be civilly, criminally, or administratively liable for declining to participate . . .”
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