NAVIGATING THE FEAR OF LITIGATION

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Legal Ramifications of End Of Life Decisions
We Live in a Society Permeated by Litigation

- Advanced directives have not yet become the norm;
- Hospitals have standard forms.
Succession of Responsibility

• Who has the final say;
• May not be the closest “next of kin”.
Substituted Judgment vs. Best Interest of the Patient

• These are NOT the same thing.
Substituted Judgment

- How the patient would decide if he or she were able;
- The decision maker puts themselves in the patient’s “shoes”
Best Interest

• Decision makers use their own values to make their best decision on behalf of the patient.
Implementing End of Life Decisions

• THE 4 “C’s”
  • Communication
  • Consent
  • Charting
  • Consistency
Communication

- Patients who lack the capacity to make decisions have the same rights as those who have the capacity to make decisions.

- May refuse unwanted medical treatment even if this may result in their death;

- 14th Amendment;

- Cruzan vs Director of Missouri Department of Health;

- Cruzan Family wanted to only remove their daughter’s food and water rather than more advanced artificial life support
An individual has a constitutional right to refuse treatment.

This extends to patients who do not have life threatening illnesses.
Distinctions that make a difference

- The treatment option being suggested must not be considered homicide or suicide;

- There is a difference between intentionally causing or hastening a patient’s death versus allowing a patient to die as a result of withdrawing life sustaining treatment.
Withdrawing and Withholding Treatment is Justifiable

- Court have upheld the validity of DNR;
- There is no limitation on the type of treatment that may be withheld or withdrawn;
- Recently courts have rejected the distinction between ordinary and extraordinary treatment;
- Ventilator withdrawal which may directly result in death is permissible;
- Parenteral nutrition and hydration may be withheld or withdrawn.
Information Physicians MUST Provide

• Complete and accurate information about the patient’s situation;

• Complete and accurate description of all choices of treatment (including non-treatment);

• Description of all reasonable methodologies of care;

• Consequences of reasonable methodologies of care.
Informed Consent

- The patient has the ultimate ability to decide how he/she will be treated;
Defeating Informed Consent Allegations and Arguments

• Patients and/or decision makers may not have been fully informed of the risks and benefits of therapy at the time it was begun and this complicates the decision to withhold or terminate treatment or therapy;

• Patients and/or decision makers may not have been told that the treatment would be withdrawn if the treatment was no longer deemed effective;

• Patients and/or decision makers may not have been advised of the burdens of continued treatment (both physically, mentally, emotionally and financially.)
The Decision Maker Must be Told of the Consequences Regarding Continuation and/or Discontinuation of Treatment

- This discussion must be as accurate, complete and pertinent as a discussion of the risks and benefits of intervention.

- Consent must be given voluntarily and free of coercion.
The Criteria for Judging the Propriety of the Information Given to the Patient or Decision Maker

- What any good professional would do;
- What any reasonable person would want;
- What this specific patient has expressed he or she would want under these circumstances.
Charting: All Decisions Relative to Treatment Options Must Be Clearly and Consistently Charted.

- **This includes:**
  - Who the decision maker is;
  - If it is not an “obvious” choice state why this person is the decision maker;
  - A complete description of the treatment alternatives provided to the decision maker;
  - A description that the decision maker is able to appreciate the impact of the condition and the consequences of the various options;
  - Charting of the decision maker’s ability to evaluate the options and make a decision.
Consistency: Once a Determination has been made, that Determination has to be Followed in a Consistent Manner

• If there are changes in circumstances that effect the original decision this must be communicated to the decision maker for any change or alteration they may wish to make.
The Appearance of inconsistency in End of Life Decisions will be Subject to Close Scrutiny

- The standard that is most often utilized to determine the reasonableness of end of life decisions is the “preponderance of evidence” standard.

- This is not beyond a shadow of the doubt;

- This is more probable than not.
Clear, concise, timely advanced directives continue to be the best and most effective device in assisting healthcare providers in making decisions relative to end of life care and treatment.
When an Advance Directive or Living Will is NOT Available

- The Following Steps Should be Applied:
  - The physician should clearly, concisely and competently advise the family/decision maker of the prognosis;
  - A determination should be made on how an end of life treatment decision is going to be made before the actual decisions are made;
  - Identification of the individual who has the “final say”;
  - Discuss all choices and the ramifications both positive and negative;
  - Do not hesitate to utilize second and even third opinions when necessary.
End of Life Decisions are Often Painful and Fraught With High Emotions. Following a Clear and Consistent Protocol will ease the Potential for Post-Decisions Ramifications if the Four “C’s” are followed:

Communication  Consent
Charting  Consistency