School of Health and Human Sciences

One is the Loneliest Number: Surrogate Medical Decision Making During Covid-19

Amber Comer, PhD, JD
Medical Decision Making

• A patient’s ability to make medical decisions is fundamental to the ethical principle of respect for autonomy and is a key component of informed consent to medical treatment.

• Surrogate medical decision makers act on behalf of the patient to make medical decisions when the patient is incapacitated.
Capacity versus Competency

**Competency:** *Legal* determination which “refers to the mental ability and cognitive capabilities required to execute a legally recognized act rationally.”

**Capacity:** *Medical* determination which refers to the patient’s ability to understand, appreciate, and manipulate information and form rational decisions.
Medical Decision Making for Older Adults

- 47.4% of hospitalized older adults in Indiana lack capacity and thus, require a surrogate decision maker
Identifying Surrogate Medical Decision Makers

Surrogate medical decision makers are identified via:

1. Court Order:
   - Guardianship

2. Appointment by the patient through a legal document such as:
   - Health Care Power of Attorney;
   - Health Care Representative Form;
   - *Physician Order for Scope of Treatment (POST); or

3. State Health Care Consent Law
Indiana Health Care Consent Statute

Indiana Code §16-36-1-5

Provides that any of the following may act as a surrogate decision maker, listed in order of priority:

1. Spouse;
2. Adult Child;
3. Parent;
4. Adult Sibling;
5. Grandparent;
6. Adult Grandchild;
7. The nearest other adult relative in the next degree of kinship;
8. Friend;
9. Religious superior if the individual is a member of a religious order.
What Constitutes a “Friend”

An adult, who:

• Has maintained regular contact with the individual; and

• Is familiar with the individual’s activities, health, and religious or moral beliefs.
The Legal Standard for Making Surrogate Medical Decisions

Indiana Code §16-36-1-5

An individual authorized to consent for another under this section shall act in good faith and in the **best interest** of the individual incapable of consenting.
CDC Has Information For Older Adults at Higher Risk

8 out of 10 COVID-19 deaths reported in the U.S. have been in adults 65 years old and older. Visit CDC.gov/coronavirus for steps to reduce your risk of getting sick.
Virtual Intensive Care Units (vICU)

- Visitation bans in hospitals due to COVID-19 have resulted in the use of virtual technology to facilitate remote visitation with patients.

- Two recently published studies found:
  - “Use of vICU for remote family visitations evoked happiness, joy, gratitude and relief and a sense of closure for those who lost loved ones.”
  - Virtual visitation “bolstered the mental and emotional status” of patients.
Assessing Suffering and Poor Prognosis

• It is extremely hard for surrogate medical decision makers to assess suffering and accept the patient’s poor prognosis when they are not able to experience the hospital setting.
Developing Relationships Essential for Shared Medical Decision Making is Challenging

1. Provider & Patient
2. Provider & Surrogate
3. Surrogate & Patient
The Role of Advanced Care Planning

• Assist surrogates in making medical decisions and providers in making recommendations.

• Types of advanced directives:
  • Living will
  • Out of hospital DNR
  • Life Prolonging Procedures Declaration
  • Physicians Orders for Scope of Treatment (POST)
In Indiana, are physicians legally able to follow a patient’s advanced directive over the objection of a surrogate medical decision maker?

It Depends . . .
Surrogate Wishes versus the Patient’s Advanced Directive

• Generally, advanced directives are ethically binding, but not legally binding as surrogate medical decision makers can override the preferences stated in an advanced directive.

• Whether and to what extend an advanced directive may be overridden by a surrogate is different between states and is codified in State Health Care Consent Statutes.

• The Indiana Life Prolonging Procedures Declaration should be followed, even over the objection of the surrogate.

• Only one state, Texas, has a law which provides legal protection for physicians who do not wish to abide by a patient’s advanced directive or the direct wishes of the patient or the patient’s surrogate medical decision maker.
Legal Implications of Visitation Policies

• A disability rights group sued the State of Connecticut for failing to ensure that persons with disabilities who are hospitalized receive reasonable accommodations.

• Specifically, the complaint alleges that the state executive order which mandated “non-visitor” policies in hospitals and other facilities due to the pandemic were resulting in patients being denied:
  • Access to medical treatment
  • Effective communication
  • The ability to make decisions
  • The ability to provide consent
Visitation Recommendations

• The surrogate medical decision maker should be allowed visitation, albeit with limitations:
  • The surrogate medical decision maker should be vaccinated or have a negative rapid COVID-19 test.
  • The surrogate medical decision maker should wear appropriate PPE.
• Continue implementation of vICUs.
“We have to be the surrogate family during COVID”
- Dr. Elizabeth Prsic, Palliative Care, New York

“Behind each closed door is a patient: breathless, exhausted, often confused, perhaps scared, always alone. Behind each patient is a family, also confused and scared, and unable to visit their loved one … If we can’t hold the hand of a dying person in their last hours on this planet, we might as well all pack up and go home.”

- Dr. Ben Moor, Anesthesiologist, MA