INFORMED CONSENT AND THE UNBEFRIENDED AND INCAPACITATED RESIDENT: Lessons from the Field and the Courts

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Overview

- Background of Informed Consent
- Determination of Capacity
- IDT Process for Informed Consent/Health and Safety Code Section 1418.8
- Challenges to Process
- Preparation

Informed Consent Basics

- Every competent adult has the right of self-determination over his or her body and property.
- Individuals who are unable to exercise this right, such as minors and incompetent adults, have the right to be represented by another person who will protect their interests and preserve their basic rights.
- When an individual is admitted to a health facility, a physician has both a legal and an ethical duty to obtain the patient’s consent, or the consent of the patient’s legal representative, to medical treatment.
Informed Consent Basics

- Patients have a right to receive all information that is material to their decision to accept or refuse any proposed treatment or procedure.
- A SNF is required to have policies and procedures that include a description of all patient’s rights and that states that the facility shall ensure these rights are not violated.
- The admission agreement may have a general consent provision. However, this provision must be limited to consent for emergency care and routine nursing care only.

Facility policies and procedures must describe how the facility will verify that informed consent was obtained or a treatment or procedure was refused pertaining to key treatments.

Note: The regulations require that the facility verify that informed consent was documented prior to initiating the treatment the first time, not each time a treatment is continued or re-applied.

Who May Give Consent

- Determination of who has legal authority to consent is based on:
  - Patient’s legal status (e.g., adult, emancipated minor, minor)
  - Patient’s physical and mental condition
- If the patient has capacity, then he/she has the right to consent.
- If the patient lacks capacity, then someone else must consent to the treatment on their behalf except in an emergency situation.
Definition of Capacity

“Capacity” means a person’s ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks and alternatives. (California Probate Code section 4609)

Who Determines Capacity?

- Capacity determination is the responsibility of the attending physician (and is specifically listed on most History & Physical forms)
- In complex cases, mental health professionals may need to be involved in determination
- Capacity is not all-or-nothing. Patients may have capacity for some decisions and not others.

Determining Capacity

- Issues for the physician to consider:
  - Can the patient respond knowingly and intelligently to questions about the proposed medical treatment?
  - Can the patient participate in the treatment decisions through a rational thought process?
  - Can the patient understand:
    - the nature and seriousness of the illness, disorder or defect;
    - the nature of the recommended treatment, degree and duration of benefits and risks;
    - and the nature, risks and benefits of any alternative treatment.
  - Does the patient voice consistent opinions about treatment?
Who May Consent?

Adults with Capacity
- Patient has right to consent or refuse to consent to medical treatment.
- Spouse does not have right to make health care decisions if patient has capacity unless the spouse is the patient’s conservator or agent pursuant to a power of attorney for health care.
- Adult may designate another adult to act as a surrogate decision maker by personally informing the physician.

Adults Under Conservatorship
- Adult may still be able to make health care decisions even if under a conservatorship.
  - Depends on whether the patient has been adjudicated to lack capacity to make health care decisions.
- If patient adjudicated to lack the capacity to make decisions, then the conservator has exclusive authority.
- Facility should obtain copy of conservatorship papers and place them in the medical record.

What Happens if Adult Lacks Capacity and Has No Conservator
- General Rule: If patient lacks capacity and no conservatorship and there is not a medical emergency, treatment should be withheld until either:
  - Patient regains capacity
  - Agent appointed pursuant to valid power of attorney for health care, or a surrogate is available and gives consent;
  - Court order issued;
  - Conservator appointed;
  - In special circumstances, patient’s closed available relative has consented;
    - California Supreme Court case indicated that if patient is incompetent, authority to consent is transferred to patient’s legal guardian or closest available relative
  - Should not rely if relative’s motives are questionable; there is a question as to whether the patient would have consented; or another close relative objects.
Selection of a Surrogate for Patient Without Capacity and an Appointed Surrogate

- Primary physician may identify surrogate to make health care decisions after good faith inquiry to select the best person to function in this capacity.
- Relevant factors to consider:
  - Familiar with patient’s personal values
  - Demonstrated care and concern for patient
  - Degree of regular contact with patient
  - Availability to visit patient
  - Ability to understand medical condition and treatment options
  - Ability to assume surrogate duties
  - Previous designation as a surrogate, whose authority has expired.

Use of the Interdisciplinary Team in the SNF Setting

- Health and Safety Code section 1418.8 allows the SNF’s interdisciplinary team to authorize medical treatment ordered by physician that requires informed consent if there is no:
  - Available family member willing to make health care decisions; and
  - Conservator of the person, and
  - Other person with legal authority to make health care decisions.

Interdisciplinary Team Process

- Attending physician determines lack of capacity.
- Attending physician determines that there is no person with legal authority to make health care decisions or no person who is willing to serve in a decision-making capacity (e.g., power of attorney, guardian, conservator or law).
- Except in an emergency, facility holds interdisciplinary team review of the medical intervention that includes:
  - Review of physician’s patient assessment;
  - Reason for proposed medical intervention;
  - Discussion of patient’s desires if known (interviews with patient, family members, friends, review of medical records);
  - Review of type of medical intervention;
  - Probable impact on patient’s condition with or without medical intervention;
  - Alternative medical intervention considered or utilized and reason for discontinuance or inappropriateness; and
  - Evaluation by interdisciplinary team of prescribed medical intervention at least quarterly and upon significant change in patient’s medical condition.
Interdisciplinary Team Process

- Interdisciplinary team must oversee care using team approach
  - Participants include attending physician, RN with patient responsibility, and other appropriate staff depending on patient’s needs
  - Must include a patient representative when practical (e.g., family member or friend who can’t take full responsibility for health care decisions; public guardian or ombudsman)
- All determinations and the reasons must be documented in the medical record.
- Not subject to administrative sanction if the physician or other health care provider believes in good faith that actions consistent with Health and Safety Code 1418.8, desires of patient if known, or the best interests of the patient.
- See CDPH Smart Tool (8/24/10)

Uses of IDT Process/Health and Safety Code Section 1418.8

- Anything that requires informed consent
- Specific Circumstances
  - Psychotherapeutic Medications (See CDPH Anti-Psychotic Tool)
  - End-of-Life Care
    - Hospice Referrals
    - Life-Sustaining Treatment/DNR orders
- Decisions made under 1418.8 should be revisited quarterly by IDT

Challenges to the IDT Process

- CANHR Litigation Against CDPH in Alameda Superior Court
- Attacks on IDT Process/Health and Safety Code Section 1418.8
  - Determination of Capacity
  - Use of Process for Psychotherapeutic Drugs and End-of-Life Care
Issues of Current Legal Challenge

- Parade of Horribles – CANHR’s Perspective
  - Changes in Capacity
  - Outcomes
- Impact of Rains v. Belshe
  - Issues
  - Holding
  - Dicta
- If 1418.8 is thrown out, a court order could be required to prescribe any psych medication!

The Responsible Use of the IDT Process/Health and Safety Code Section 1418.8

- Steinberg Declaration – On Behalf of CDPH
  - The invaluable nature of the IDT process/Health and Safety Code Section 1418.8
  - The importance of M.D. determinations and reassessments of capacity
  - IDT members serve as a check on M.D. determinations of capacity, and on treatment decisions themselves
  - The importance of having a resident advocate on the IDT or Ethics Committee

Psychotropic Medications and 1418.8

- The use of the IDT process for psychotherapeutic drugs is essential when the resident is suffering from severe psychiatric symptoms (e.g., severe depression, severe anxiety, psychotic episodes or self-injurious behavior) and their use is necessary
  - Not typically used as “chemical restraints”
  - Used to alleviate distress
  - There has been a concerted effort since 2012 to reduce the use of antipsychotic drugs
  - While used only when absolutely necessary and after exhausting non-drug options, antipsychotics are an accepted and common element of nursing home care
Palliative, Hospice, End-of-Life Care

- The use of the IDT provisions for end-of-life care is essential when the alternatives would produce unnecessary pain and harm
  - The ability to access the hospice benefit
  - The use of CPR vs. a DNR order given the typical absence of Advance Directives or POLSTs from this population
  - CPR is almost always medically ineffective (futile) in frail elderly nursing home residents
- Additional Protections

Are You Prepared? Taking the Necessary Steps

- Identify on admission if the patient has an advance directive, and if so, get a copy of it.
- Identify if the patient has capacity or lacks capacity to make health care decisions. Make sure it is clearly documented in the medical record and known to facility staff.
- Maintain open lines of communication with the patient and family members concerning consent issues.

Recommendations

- Address any and all consent issues with the attending physician.
- Draft policies and procedures to ensure compliance with laws/regulatory requirements
- Develop all necessary Informed Consent forms and maintain practices consistent with law.
- Consider having 2 physicians on the IDT when significant treatment decisions are being made
Recommendations

- Make sure that compliance with Interdisciplinary Team Meetings held pursuant to Health and Safety Code 1418.8 is well documented in the medical record.
  - Consider drafting a form to memorialize the meetings.
  - Include a resident advocate on IDT (ombudsman, family member, friend, etc.)
  - Recap all IDT treatment decisions quarterly

Recommendations

- Continually educate staff on policies and procedures regarding consent issues.
- Create and implement a process for monitoring compliance with consent issues.
- Consult legal counsel when necessary.
- Stay tuned as to the outcome of the current CANHR case.

QUESTIONS?
THANK YOU!