

EMBRACING OUR DYING

California
Catholic Bishops'
Project



*Theological,
Medical, Legal,
Bioethical,
Political & Pastoral
Perspectives*

Prepared by the California Catholic Conference

The Law and Healthcare Decision Making

David C. Blake, PhD, JD

Vice President, Mission & Ethics/Human Resources

Organizational Responsibility Officer

Saint John's Health Center, Santa Monica

I. LAW AND MORALITY:

The apparent differences.

The less apparent connections.

II. INFORMED CONSENT:

The patient's right =

to be informed of all risks and potential benefits of recommended treatment AND alternatives.

The required information =

whatever a *reasonable person* would consider material to his or her decision. NOT what the physician thinks the patient needs to know!

The physician's duty =

Only physicians have the legal duty of informed consent. NOT nurses, NOT allied health professionals, NOT hospitals.

"Consent Forms" = In most instances, these forms only document the conversation between patients and physicians. NO conversation, NO informed consent!

The incompetent patient = The physician's duty of informed consent is owed to the patient's surrogate decision maker. The surrogate has the patient's right!

III. THE RIGHT TO REFUSE MEDICAL TREATMENT:

The right to refuse = In California, patients have a right to refuse any and all medical treatments *regardless* of their condition and *regardless* of the consequences of the refusal of (forgoing) treatment.

Medical treatment = Medical treatment includes any and all treatments and therapies which would require a licensed physician's written order, administration, or supervision, including nutrition and hydration.

The incompetent patient = In California, the patient's surrogate decision maker has authority to order the forgoing of medical treatment, unless forgoing treatment goes against the patient's known wishes or best interest.

IV. SURROGATE DECISION MAKERS:

Legally appointed surrogates = Conservators of the person (with medical decision making authority), guardians ad litem, and agents appointed through a Advance Health Care Directive (AHCD agent).

Legally recognized surrogates = Spouses, immediate family members, relatives, significant others, close friends.

V. ADVANCE DIRECTIVES (AD):

In general = Any oral or written indication of a patient's treatment preferences communicated in advance of the need for the treatment in question. E.g.,

The California Bishops' Project: Embracing our Dying

Prepared by the California Catholic Conference • 1119 K Street, 2nd Floor • Sacramento, CA 95814
(916) 443-4851, FAX (916) 443-5629, www.cacatholic.org

Do Not Resuscitate (DNR) Orders, Advance Health Care Directive.

Legally authorized AD: Creates *immunity* for healthcare providers from any professional disciplinary action, criminal prosecutions, or civil litigation arising from any good faith effort to comply with the AD. E.g., Advance Health Care Directive (Probate Code §§ 4701).

Legally unauthorized AD: Creates *no immunity* for health care providers; though it may be considered a credible indication of the patient's preferences. E.g., stationary store "living will," or statements handwritten by patient and kept with personal papers.

VI. UNRESOLVED ISSUES: WHERE ARE THE BOUNDARIES?

Over-treatment of Dying Patients: Also called "futile treatment." Providing aggressive, often highly invasive, medical interventions for patients in the finale stages of living, and in a manner that interferes with a dignified, "socially-meaningful" death.

The Social/Psychological Dynamics: A patient struggling with the mortality of human life, within the context of a family who cannot "let go," within the context of a death-defying society. Add to this a medical profession trained only to intervene in one way, and to equate death with failure.

The ambiguity of law: No clear right to "demand treatment," and no clear privilege to deny treatment.

The ambiguity of the ERDs: *The Ethical and Religious Directives for Catholic Healthcare Services* (1995). "Ordinary" and "extraordinary" treatment covered, but not "futile treatment."

The California Bishops' Project: Embracing our Dying

Prepared by the California Catholic Conference • 1119 K Street, 2nd Floor • Sacramento, CA 95814
(916) 443-4851, FAX (916) 443-5629, www.cacatholic.org