


INCAPACITATIONS, UNBEFRIENDED RESIDENTS: An Update on Health and Safety Code 1418.8

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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


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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.



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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.

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Informed Consent Basics



- 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.

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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)

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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.

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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?

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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.

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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.



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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



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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 kin).
- 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/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;

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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)

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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

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Related Patients Rights Provision

- Cal. Code Regs, Title 22, section 72527
 - (c) If a patient lacks the ability to understand these rights and the nature and consequences of proposed treatment, the patient's representative shall have the rights specified in this section to the extent the right may devolve to another, unless the representative's authority is otherwise limited. The patient's incapacity shall be determined by a court in accordance with state law or by the patient's physician's unless the physician's determination is disputed by the patient or patient's representative.

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Challenges to the IDT Process

- CANHR Litigation Against CDPH
- Attacks on IDT Process/Health and Safety Code Section 1418.8
 - Notice to Resident?
 - Determination of Capacity –MD or Court/Tribunal?
 - Determination of Intention – IDT or Court/Tribunal?
 - Use of Resident Advocates
 - Use of Process for Psychotherapeutic Drugs and End-of-Life Care (Hospice and Comfort Care)

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Superior Court Judgment

- MD determines capacity
- IDT determines intervention
- Resident must receive notice
- No anti-psychotic drugs can be administered under Section 1418.8
- Withdrawal or removal of life-sustaining treatment prohibited but hospice and comfort care okay

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Appeals

- DPH appeals judgment
- CANHR Cross-appeals
- CAHF files amicus supporting DPH
- CMA/CHR/CMA file amicus supporting DPH
- AARP files amicus supporting CANHR

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Appeals

- Disability Rights California files amicus supporting CANHR
- ACLU files amicus supporting CANHR
- California Ombudsman Association files amicus supporting CANHR

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Issues To be Resolved

- Notice requirements
- Capacity decisions
- Intervention decisions
- Resident Advocate Roles
- Scope of Interventions Covered

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Current Realities

- Judgment stayed – not in effect/nothing changed
- Decision likely in 2018
- Could go to California Superior Court in 2019
- Legislation to fix?

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Practicalities

- Be cautious
 - Admissions
 - Compliance
- Pay Attention

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Another Wrinkle: AB 937 (Eggman)

- Passed CA Assembly 2017, now in suspense
- Would essentially “lock in” a person’s health care decision if they subsequently lose capacity
 - Unless they have a DPOAHC
- Potential for great harm if it passes
 - Even a spouse would not be able to change code status
- A good reason why POLST should not be done on every nursing home resident!

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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.
- Make a good-faith, due-diligence, concerted effort to find a decision-maker who is willing to speak for the resident.
- 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.

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Recommendations

- Address any and all consent issues with the attending physician and/or medical director; obtain mental health consultation when needed.
- Draft policies and procedures to ensure compliance with laws/regulatory requirements
- Develop all necessary Informed Consent forms and maintain practices consistent with law.
- When a resident has early dementia but still has capacity, consider executing a POLST even if resident not otherwise POLST-appropriate (in the last year of life, etc.)

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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 proceedings of the meeting
 - Include a resident advocate on IDT (ombudsman, family member, friend, etc.)
 - Recap all IDT treatment decisions quarterly
 - Consider having two MDs present when significant treatment decisions being discussed

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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.

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QUESTIONS?



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THANK YOU!



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