Current Legal and Ethical Issues in Physicians’ Decisions to Terminate Life-Sustaining Treatment (Futility)

Jennifer S. Bard, J.D., M.P.H.
Alvin R. Allison Professor of Law
Texas Tech University School of Law
Director, Health Law Program
Associate Professor of Law (adjunct) Texas Tech University School of Medicine

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Goals

1. Clarify definition of medical futility as withdrawal of care without patient’s consent in the context of a hospital in-patient.
2. Review ethical and legal issues in withdrawing care without patient’s consent.
3. Equip every member of this audience with the ability to understand the limits of his or her obligations to meet the demands of a patient (or their decision maker) for specific medical treatment and the risks they run in not meeting those demands.
Objectives—Why are we talking about this?

Lack of clear legal standards creates tension among medical staff and between families and medical staff.

Confusion about the place of refusing treatment in the ethical obligations of a healthcare provider.

Medical Decisions are for Medical Doctors

- There is almost never a legal obligation for any specific doctor to undertake a specific medical act—even a rescue.
- A process for withdrawing life sustaining care against a patient’s objection that provides an internal review panel (such as an ethics committee), sufficient notice, and opportunity for transfer is the likeliest to provide the most protection.
Issue Is Not Whether Further Care is Futile

Issue is Whether Further Care is Fruitless.
Futility of a Specific Intervention Versus Futility of any Intervention.

- Decision to withdraw life sustaining treatment is based on a medical opinion that further treatment or intervention will not achieve treatment goals even though a specific intervention may have a measurable positive result.

Issue arises when death is not imminent.
Separating the Ethical from the Legal

- Substantial difference between whether a physician should do something or whether a family member should request an intervention for a patient and whether the physician and hospital faces legal consequences for the act.
- If increase in lifespan (even by a minute) is an ultimate good, then no intervention with any chance of success if futile.

Are Doctors Heroes or Villains?
Do Doctors Bring Life and Death?

Conflict affects the whole medical team.
NO UNIVERSAL LEGAL OR MEDICAL DEFINITION OF FUTILITY

<table>
<thead>
<tr>
<th>medically ineffective health care</th>
<th>treatment which would not offer the patient any significant benefit. (comment to § 7(f) of the Uniform Health Care Decisions Act)</th>
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<tbody>
<tr>
<td>medical futility</td>
<td>“The [AMA]’s Code of Medical Ethics does not require physicians to ‘deliver care that, in their best professional judgment, will not have a reasonable chance of benefiting their patients’”</td>
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Nothing New About Tough Medical Decisions

- Definition of futility changes according to situation.
- Triage following a disaster could involve withholding treatment from a patient who would certainly receive it under ordinary circumstances.
- Under terms of triage, others have higher likelihood of survival therefore making treatment of those less likely to survive futile.
But Definitely New Issues in the Futility Debate

Lots of Support Around the Country for Better Access to Healthcare.
But Reforming Healthcare is Complicated

And Has Stirred up a Lot of Emotion Including Concerns About...
Death Panels!

This is Not a Joke

WHO IS CERTAIN THERE ARE NO DEATH PANELS?

Demographic groups

Source: Daily Kos Research 2009 poll
What is the Legal Overview?

Disclaimer—I am not an Attorney in California and This is Not Legal Advice
Letting Patients Make Decisions for Themselves was an Achievement of the Civil Rights Movement

Law Developed to Guarantee Individual Patient Right to Refuse Treatment
But there is no Corresponding Constitutional Right to Receive Treatment

Doctor’s don’t have to treat anyone but they are not allowed to discriminate against groups protected by U.S. or California law. A license to practice medicine or nursing does not bring with it a requirement to treat anyone in need.

Is Refusal to Treat a Matter of Conscience?
What About EMTALA?

Hospitals do have a legal requirement under the Federal Emergency Medical Treatment and Active Labor Act ("EMTALA") not to turn away any patient until she is stabilized. This is narrowly construed in the context of "patient dumping" or closing emergency rooms and probably would not prevent a hospital from refusing life sustaining treatment to a patient who they had already admitted, stabilized and evaluated.

http://www.rcrc.org/issues/MedMisc_Transportation.html

Cost: The Elephant in the Living Room
Who is Paying for This?

• Insurance companies routinely make “coverage” decisions based on likelihood the treatment will be beneficial.

Death Panels!
What Will Happen If I don’t do What the Patient Wants?

Always helpful to know the consequences before acting.

If the patient demands an intervention and the doctor decides not to do it the following possible results are:

1. A pre-emptive law suit asking a court to order the intervention.
2. A law suit for medical negligence or wrongful death after the patient’s death (or after the harm caused by not acting has occurred)
3. A criminal action
4. Money damages for violating an advanced directive

The California Approach

- California Uniform Health Care Decision Act ("UHCDA") went into effect on July 1, 2000.
- Provides a comprehensive legislative scheme for managing end-of-life care which allows patients to refuse treatment but also allows hospitals and doctors to decide when specific treatments (or any treatment) is no longer warranted.
The California Act

The UHCDA allows physicians to refuse to provide a treatment when:
1. It violates their conscience (a “conscience clause) or
2. When they believe treatment would be “medically ineffective.”

BUT

The California Act does not provide the same immunity as Texas because it does not provide any procedural structure.

What the California Law Requires

✓ Promptly inform the patient
✓ Make all reasonable efforts to assist in transfer of the patient to a provider willing to comply with the instruction
✓ Provide continuing care until transfer accomplished OR until it appears transfer cannot be accomplished
✓ Continue appropriate pain relief and other palliative care
California Law is Short on Specifics

• Reasonable interpretation that an individual physician can make the decision unilaterally.
• Equally reasonable for a hospital to develop its own policy for making these decisions.
• Nothing in California Law requires employer hospitals to follow an individual physician’s decision to withdraw treatment.

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<tr>
<th>TERMS</th>
<th>CALIFORNIA</th>
<th>TEXAS</th>
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<tr>
<td>health care decision;</td>
<td>decision made by patient or his agent regarding the patient’s health</td>
<td>consent, refusal to consent, or withdrawal of</td>
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<tr>
<td>treatment decision</td>
<td>care, including: (a) Selection and discharge of health care providers and</td>
<td>consent to health care, treatment, service, or a</td>
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<td>institutions. (b) Approval or disapproval of diagnostic tests, surgical</td>
<td>procedure to maintain, diagnose, or treat an</td>
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<td>procedures, and programs of medication. (c) Directions to provide,</td>
<td>individual's physical or mental condition,</td>
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<td>withhold, or withdraw artificial nutrition and hydration and all other</td>
<td>including such a decision on behalf of a minor.</td>
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<td>forms of health care, including cardiopulmonary resuscitation. (PC § 4617)</td>
<td>(H&amp;SC § 166.002 (7))</td>
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<td>health care instruction</td>
<td>patient’s written or oral direction concerning a health care decision for</td>
<td></td>
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<td></td>
<td>the patient (PC § 4623)</td>
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“Malpractice Liability” Depends on Finding that Care was Below Professional Standards

- A medical malpractice case is really a “family feud” since there can be no case without a disagreement among licensed physicians.
- To the extent that critics of the medical malpractice system blame anyone but the individual physicians willing to testify they misunderstand the system.

Suggestions for the Future
The Texas Solution

§ 166.046. Procedure if Not Effectuating a Directive or Treatment Decision
(a) If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee. The attending physician may not be a member of that committee. The patient shall be given life-sustaining treatment during the review.
DEFINITIONS OF LIFE SUSTAINING TREATMENT

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<td>life sustaining treatment</td>
<td>treatment that, based on reasonable medical judgment, sustains life of a patient and without which patient will die. INCLUDES both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. NOT INCLUDE the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain. (H&amp;SC § 166.002 (10)).</td>
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Hospitals Have Won Every Law Suit Including Children

First time court anywhere in the United States has ever allowed a hospital to remove a child from life-sustaining treatment against the objection of his parent.

Sun Hudson had a fatal form of genetic dwarfism called thanatophoric (death bearing) dysplasia which meant that his bones were fusing together in a way incompatible with life.

- http://www.foxnews.com/story/0,2933,151386,00.html
Texas Law Provides Doctors and Hospitals Immunity From Suit

If a physician in Texas follows the notice and meeting requirements of the TADA, he or she is immune from any disciplinary action or civil or criminal liability. Tex. Health & Safety Code § 166.046(g)

http://www.txpec.org/whatsnew/texas.asp

The Texas Solution Works Because it Provides a Process

• Although the legitimacy of the Texas Act was challenged by a number of patients, it was upheld by the Texas Supreme Court and efforts to repeal it in the 2007 legislative session failed.
• It cannot be reconsidered until the legislature reconvenes in 2011.
An Unlikely Ally: The Medical Right!

A growing movement intended to protect doctors who refuse to provide medical care in contrast to their moral and religious beliefs may, unintentionally, be helpful in disputes over involuntary care withdrawal even those these groups oppose this practice.

http://www.rcrc.org/issues/MedRt_Christian_Medical_Assn.cfm

Hidden Reality

- How often are patients sent home to die?
- Discharged from the hospital with absolutely no access to a necessary life saving intervention.
- (where are the numbers on people who cannot afford organ transplants)?
Medical Decisions are for Medical Doctors

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- A process that provides an internal review panel (such as an ethics committee), sufficient notice, and opportunity for transfer is the likeliest to provide the most protection.

Thank you for Inviting Me!

- Please feel free to contact me at Jennifer.Bard@ttu.edu if you would like further information about this presentation.