

ETHICS ROUNDS

Substituted Judgment or Best Interests?

When a surrogate takes on the role of decision maker for an incapacitated patient, he or she accepts a great deal of responsibility. What should a physician do when he or she believes that a surrogate is not taking that responsibility seriously? What if the surrogate is not acting in the patient's best interests?

Consider the following scenario:

Mrs. M, a 70-year-old woman, is being treated in the ICU for advanced pulmonary TB. She's on a ventilator, is being tube fed, has a right chest tube, and is no longer able to participate in decisions about her care. Before her current illness, she appointed her son Andrew as her durable power of attorney for health care and he is now making treatment decisions on her behalf.

After doing some research on the Internet, Andrew wants his mother to receive alternative therapies. Specifically, he requests that she be given doses of castor oil through her NG tube. He also wants to be able to rub her back with a homemade ointment. Andrew and his mother never explicitly discussed her preferences about treatment should she become incapacitated, and Mrs. M seems not to have executed an advance directive or living will. It isn't clear how she would feel about the kind of alternative therapy her son proposes.

Mrs. M's physician objects to the treatment Andrew proposes. Administering castor oil through the NG tube could cause the patient gastrointestinal discomfort. In addition, it might degrade the tubing, necessitating its replacement. The physician does not believe that the intervention Andrew is requesting is in Mrs. M's best interest and believes that Andrew is not living up to his responsibilities as her surrogate.

How should decisions about Mrs. M's care be made? When a patient lacks decision-making capacity, his or her designated surrogate generally assumes the same authority and responsibilities as the patient in the informed consent process. A surrogate should first represent the known wishes of the patient, making decisions as the patient would have made them if competent. This "substituted judgment" approximates the patient's own participation in the decision-making process, and thus respects the patient's right of self-determination. VHA policy on informed consent defines substituted judgment as:

The standard to be used by surrogate decision makers who have specific knowledge of the patient's values and wishes pertaining to health care choices. This standard requires that the surrogate decide based on what the patient would have wanted if he or she were capable of expressing those preferences. That

decision may not necessarily coincide with what the surrogate and health care team otherwise would consider optimal for the patient. [Handbook 1004.1.03(l)]

When the patient's wishes are not known, however, the surrogate's decision must be based on the patient's "best interests." As defined in VHA policy, "The surrogate together with the health care team use this standard to determine the optimal outcomes for patients and the interventions most likely to produce them. In making that determination the surrogate must also take into account the patient's cultural, ethnic, and religious perspectives, if known." [Handbook 1004.1.03(a)]

When it cannot be known whether a surrogate's decisions reflect the preferences of his or her no-longer competent principal, the physician is not obligated to comply with the surrogate's requests if he or she feels that the requests are outside the range of reasonable options for the patient. The care team should gently remind the surrogate of his or her responsibilities, or educate the surrogate about those responsibilities if he or she is not aware of them. At the same time, a reasonable accommodation may be made if the requested treatment does not risk harm to the patient. For example, Mrs. M's physician might allow Andrew to put some ointment on his mother's back, provided it contains no harmful ingredients. This modest accommodation might serve to diffuse some of the conflict.

If Andrew rejects this suggestion for compromise and continues to insist that his mother receive alternative therapy the physician believes is not in her best interest, an ethics consultation is called for. VHA policy requires that if a practitioner "considers the surrogate to be clearly acting contrary to the patient's values and wishes or best interests, the practitioner must notify the Chief of Staff, or designee, and consult with the local ethics program and/or Regional Counsel." [Handbook 1004.1.08(b)(4)]