HEALTH CARE DECISION FOR INCAPACITATED UNREPRESENTED PATIENTS

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Document Owner	Chief Medical Informatics Officer	***Executive Responsible***	Chief Medical Officer

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PURPOSE

This policy is designed to provide uniformity and consistency across AHS acute and post- acute system on the process for making ethically sound medical decisions for incapacitated unrepresented patients.

POLICY

AHS will use an interdisciplinary team (IDT) with diverse perspectives to make ethical and effective medical decisions for incapacitated unrepresented patients.

BACKGROUND

Despite their incapacity, unrepresented patients are entitled to ethical and effective medical decisions made on their behalf and in keeping with their best interests, taking into consideration patients' personal histories, values, and beliefs to the extent that these are known. Use of an interdisciplinary team to make medical decisions is consistent with community standards of care.

Unrepresented means that despite efforts to locate an appropriate surrogate decision maker no one has been identified who knows the patient and is willing and able to make medical treatment decisions on his or her behalf. This document does not address the criteria for determining and appointing an appropriate decision maker when one or more are available and willing to serve. And finally, this procedure is not meant to be applied in emergency medical situations including those in which an altered state will likely clear within a few hours.

Decisions made without clear knowledge of an incapacitated unrepresented patient's specific treatment preferences must be in the patient's best interest, Decisions about treatment should be based on sound medical advice and should be made without influence of material conflicts of interest. These decisions must be made with a focus on the patient's interests, beliefs and values, and not the interests, beliefs or values of providers, the institutions, or other affected parties. In this regard, appropriate health care decisions include both the provision of needed medical treatment, and the withholding or withdrawing of treatment that is medically ineffective or contrary to generally-accepted health care standards.[2]

This policy applies to most medical decisions for which informed consent is usually required. This procedure is meant to support and supplement AHS's underlying consent policy.
Use of this policy does not preclude any party from seeking judicial intervention. Appropriate judicial remedies may include a timely court order authorizing the provision, withdrawing, or withholding of treatment or appointment of a conservator; however, courts are not necessarily the proper forum in which to make health care decisions.[3]

PROCEDURE

Conditions for Invoking Policy

This policy may be used when all of the following conditions are met:

1. The patient has been determined by the primary physician (with assistance from appropriate consulting physicians if necessary) to lack capacity to make health care decisions. Capacity means a patient's ability to understand the nature and consequences of proposed health care, including its significant benefits, risks and alternatives, and to make and communicate a health care decision. Conditions for which psychiatric or psychological treatment may be required do not, in and of themselves, constitute a lack of capacity to make health care decisions.

2. No agent, conservator, or guardian has been designated to act on behalf of the patient.

3. There is no individual health care directive or instruction in the patient's medical record or other available sources that would eliminate the need for a surrogate decision maker.

4. No surrogate decision maker can be located who is reasonably available[4] and who is willing and able to serve. Efforts to locate a surrogate should be diligent and may include contacting the facility from which the patient was referred, and contacting public health or social service agencies known to have provided treatment for the patient. See Attachment I for steps to pursue in conducting a due diligent search for potential surrogate decision makers.

Requirement of Notification When Invoking Policy

When the above conditions are met, the incapacitated unrepresented patient must be notified that:

1. He or she has been determined incapacitated;

2. It has been determined that he or she lacks a surrogate decision maker;

3. Medical decisions will be made by the IDT in accordance with this policy; and

4. He or she has the opportunity to seek judicial review of the above determinations.

Reliance on Interdisciplinary Team to Make Decisions Under This Policy

When use of this policy is appropriate (as outlined above), medical decisions will be made by an ad-hoc interdisciplinary team whose members shall include, but not be limited to, individuals directly involved with care of the patient.

Interdisciplinary Team Composition

It is recommended that the interdisciplinary team include an attending physician, nurse familiar with the patient, social worker familiar with the patient, chair and/or member(s) of the ethics committee, non-medical (community) member of the ethics committee or other appropriate committee and, if available and appropriate, consulting clinicians, resident physician(s), Advance Practice Providers, and spiritual care staff.[5]

Interdisciplinary Team Responsibilities

In order to determine the appropriate medical treatment for the patient, the interdisciplinary team should:

1. Review and confirm that a determination of incapacity has been made.

2. Review and confirm that the searches done prior to such conclusions have been diligently performed. The expected procedures can be found in Attachment I.

3. Review the diagnosis and prognosis of the patient as well as the treatment options and their associated risks, benefits, and alternatives.

4. Determine appropriate goals of care by weighing the following considerations:
   a. Patient's previously-expressed wishes, if any and to the extent known
   b. Relief of suffering and pain
   c. Preservation or improvement function
   d. Recovery of cognitive functions
   e. Quality and extent of life sustained
   f. Degree of intrusiveness, risk or discomfort of treatment
   g. Cultural or religious beliefs, to the extent known

5. Establish a care plan based upon the patient's diagnosis and prognosis and the determination of appropriate goals of care. The care plan should determine the appropriate level of care, including categories or types of procedures and treatments and code status, when appropriate.

Scope of Interdisciplinary Team Decision Making Authority

Under the terms of this policy, the interdisciplinary team may make the same treatment decisions, and will have the same limitations, as does an agent appointed pursuant to a power of attorney for health care specified under current law[6][7]. However, this policy shall not apply to decisions pertaining to autopsies, anatomical gifts, or disposition of remains.

The interdisciplinary team must assure itself that the medical decision is made based on sound medical advice, and is in the best interest and takes into account the patient's values, beliefs, and preferences to the extent known. In determining the best interest of the patient, it is not required that life support be continued in all circumstances, for example when treatment is otherwise non-beneficial or is medically ineffective or contrary to generally-accepted health care standards, when the patient is terminally ill and suffering, or when there is no reasonable expectation of the recovery of cognitive functions.

Except to the extent that such a factor is medically relevant, any medical treatment decision made pursuant to this policy shall not be biased based on the patient's age, sex, race, color, religion, ancestry, national origin, disability, marital status, sexual orientation (or any other category prohibited by law), the ability to pay for health care services, or avoidance of burden to family/others or to society.

Status of IDT Treatment Decisions

Agreement on Treatment

1. If all members of the interdisciplinary team agree to the appropriateness of providing the proposed treatment, it shall be provided.

2. If all members of the interdisciplinary team agree to the appropriateness of withholding or withdrawing treatment, it shall be withdrawn or withheld. Any implementation of a decision to withhold or withdraw life-sustaining medical treatment will be the responsibility of the primary treating physician.[8]

Disagreement on Treatment

1. If the members of the interdisciplinary team disagree about the care plan, the ethics resources expert(s) or other resource experts will meet with the team to explore their disagreement and facilitate resolution.

2. If an agreement is still not reached, current treatments will be continued and any other medically necessary treatments provided, until such a time that the issue is resolved through court intervention or the disagreement is otherwise resolved.[9] Court-imposed legal remedies should be sought only in extreme circumstances and as a last resort.[3]

In all cases, appropriate pain relief and other palliative care shall be continued.

Exceptional Circumstances

Legal counsel should be consulted if a decision to withhold or withdraw treatment is likely to result in the death of the patient and the situation arises in any of the following circumstances:

1. The patient's condition is the result of an injury that appears to have been inflicted by a criminal act.

2. The patient's condition was created or aggravated by a medical accident.

3. The patient is pregnant.

4. The patient is a patient with sole custody or responsibility for support of a minor child.

Prerequisites for Convening an IDT Meeting

1. Assessment of incapacity clearly documented by attending physician in progress notes.

2. Confirmation has been made that there is no advance health care directive, conservator, guardian or other available decision maker, and no health care instructions in the patient's medical record or other available sources.

3. Due diligent search has been performed and patient's unrepresented status confirmed.

4. Patient has been notified of incapacitated and unrepresented determination and right to seek judicial review.

5. Treatment question(s) for IDT to consider and the recommendation of the treating team have been clearly identified.

6. Identification of relevant clinical specialties has been made and their input sought.

7. Invite and ensure participation of the following at a minimum in the IDT meeting: an attending physician, nurse familiar with the patient, social worker familiar with the patient, chair and/or member(s) of the ethics committee, non-medical (community) member of the ethics committee or other appropriate committee and, if available and appropriate, consulting clinicians, resident physician(s), Advance Practice Providers, and spiritual care staff.

8. Invite and encourage participation of individuals identified in the due diligent search who may know or have information about the patient that might be valuable for the IDT even if they are not comfortable or willing to serve as surrogate decisions makers.

<u>Documentation</u>

Signed, dated and timed medical record progress notes will be written for the following:

1. The findings used to conclude that the patient lacks medical decision-making capacity.

2. The finding that there is no advance health care directive, no conservator, guardian or other available decision maker, and no health care instructions in the patient's medical record or other available sources.

3. The attempts made to locate surrogate decision makers and/or family members as part of the due diligent search and the results of those attempts.

4. Patient notification of incapacitated and unrepresented determination and right to seek judicial review.

5. Any treatment decisions the IDT has made specifically any plans to provide or withhold/withdraw proposed treatments and decisions regarding code status.

6. The basis for the IDT's recommendation and decision to treat the patient and/or the recommendation and decision to withhold or withdraw treatment.

7. Any information from the ethics committee or other consults, should it be convened.

ATTACHMENT I
Procedure for Conducting Due Diligent Search as part of AHS Health Decisions for Incapacitated Unrepresented Patients Policy

These cases are often complex and challenging. The ethics committee is always available to offer assistance, guidance, and advice.

The purpose of the due diligent search is to:

- Search for surrogate decision maker or members of patient's support network
- Gather evidence of patient's values, beliefs, preferences, and any other relevant data

Procedure for social workers conducting the due diligent search:

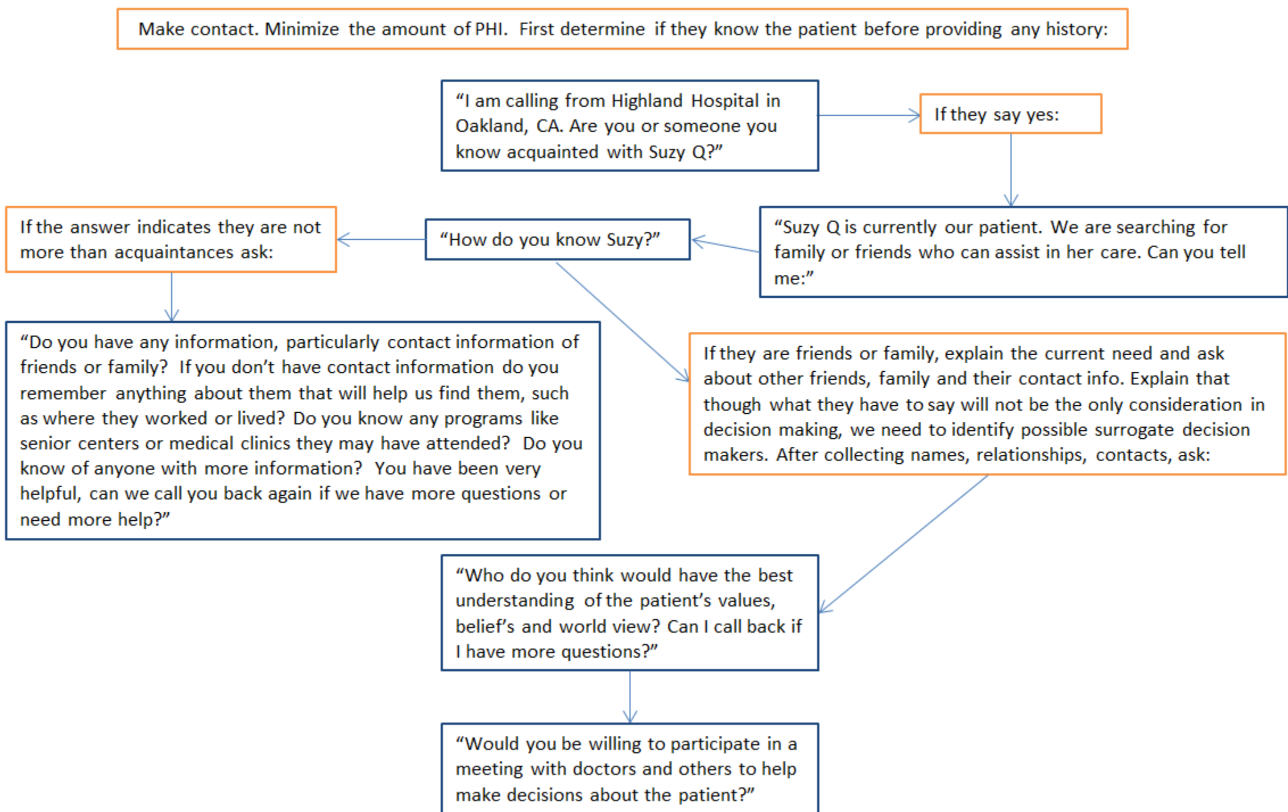
1. The social worker will conduct a chart review to look for:
    a. any prior statements of wishes or documentation of treatment preferences
    b. any prior decisions made,
    c. any prior surrogate decision makers
    d. any prior advance directives.
    e. any record of the patient's PCP and other involved care providers
    f. any record of agencies the patient may have once been a client of, skilled nursing facility in which they lived, homeless shelter or other provider of services they may have frequented.
    g. In all instances the due diligent search seeks to identify potential surrogate decision makers and/or information about the patient's values, beliefs, preferences. To that end, when talking to potential surrogate decision makers or prior providers of care it is important to seek any information that might shed light on the patient's values, goals, beliefs, preferences, priorities, and world view that could inform our care.

2. In an effort to identify appropriate surrogate decision makers the social worker will also:
    a. With the assistance of a witness (document who this is) search throughout the patient's personal effects for any identifying information.
    b. Review phone numbers in the patient's cell phone and make contact
    c. Review the reports by Ambulance EMT, and other emergency personnel.
    d. Search address on the internet to locate any phone numbers connected with address of ambulance pick up location
    e. Post a message on the wall of the patient's room asking visitors to talk to the social work or nursing staff

3. If still unable to identify appropriate surrogate decision maker the social workers will.
    a. Seek assistance from local police to place a notice at the patient's last known residence or to visit the location where the patient was found or most recently lived
    b. Search internet for phone numbers connected to the patient's name
    c. Contact AHS Homeless teams, Urgent Care and K6 staff
    d. Contact the AHS's Private Investigator
    e. Contact the California Advance Health Care Directive Registry by faxing a letter of inquiry to 916-651-9805

4. If his or her identity is established but no advance directives or evidence of treatment preferences have been identified:
   a. Search the current and historical electronic health record for information regarding medical preferences
   b. Contact PCP and/or community providers if none found within AHS.

5. Once potential decision makers are identified consider using the following script to explain why you are speaking to them and how they can help a person in need. Ask for contact information for anyone they think may know the patient. Be sure to ask them what they know about the patient- anything from which we can glean information regarding the patient's values and beliefs can be helpful:



6. When the person who can serve as the surrogate decision maker is identified: Explain to them what a surrogate does, and does not do. For example the surrogate does not exercise their personal beliefs or that of the family. They exercise their best understanding of what the patient would have wanted for themselves. Ask if potential surrogate decision makers are willing to make health decisions on the patient's behalf. If not, do they know of anyone one else who might be suited for this role? If not are they willing to assist as an informant?

7. Even if no one we locate qualifies as an appropriate surrogate decision maker, by talking with them and/or members of the patient's support network we can still learn more about what is important to the patient, their values, goals, beliefs, preferences, priorities, and world view.

REFERENCES

[1] This policy is intended for use in general acute care hospitals. California Health and Safety Code Section 1418.8 set forth a statutory decision-making process for patients in a skilled nursing facility or intermediate care facility.

[2] California Probate Code Section 4735 states that: "A health care provider or health care institution may decline to comply with an individual health care instruction or health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution."

[3] California Probate Code Section 4650(c) states that: "In the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment."

[4] California Probate Code Section 4717 states that:

a. Notwithstanding any other provision of law, within 24 hours of the arrival in the emergency department of a general acute care hospital of a patient who is unconscious or otherwise incapable, of communication, the hospital shall make reasonable efforts to contact the patient's agent, surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decision on behalf of the patient. A hospital shall be deemed to have made reasonable efforts, and to have discharged its duty under this section, if it does all of the following:
    i. Examines personal effects, if any, accompanying the patient and any medical records regarding the patient in its possession and reviews any verbal or written report made by emergency medical technicians or the police, to identify the name of any agent, surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the of the patient.
    ii. Contacts or attempts to contact any agent, surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of to the patient as identified in paragraph (1).
    iii. Contacts the Secretary of State directly or indirectly, including by voice mail or facsimile, to inquire whether the patient has registered an advanced health care directive with the Advance Health Care Directive Registry, if the hospital finds evidence of the patient's Advance Health Care Directive Registry identification card either from the patient or the patient's family or authorized agent.

b. The hospital shall document in the patient's medical record all efforts made to contact any agent, surrogate, or family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient.

c. Application of this section shall be suspended during any period in which the hospital implements its disaster and mass casualty program, or its fire and internal disaster program.

California Probate Code Section 4736 states that:
A health care provider or health care institution that declines to comply with an individual health care instruction or health care decision shall do the following: (a) Promptly inform the patient, if possible, and any person then authorized to make health care decisions for the patient. (b) Unless the patient or person then authorized to make health care decisions for the patient refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision. (c) Provide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished. In all cases, appropriate pain relief and other palliative care shall be continued.

[5] Institutions should designate by policy the particular types and numbers of providers who may constitute the multi-disciplinary team, and should ensure that non-medical/community representatives are properly prepared to serve on the

[6] California Probate Code Section 4617 states that:

> **"Health care decision"** means a decision made by a patient or the patient's agent, conservator, or surrogate, regarding the patient's health care, including the following: (a) Selection and discharge of health care providers and institutions. (b) Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication. (c) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

California Probate Code Section 4683 states that: "Subject to any limitations in the power of attorney for health care: (a) An agent designated in the power of attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so."

[7] California Probate Code Section 4652 states that: "This division does not authorize consent to any of the following on behalf of a patient: (a) Commitment to or placement in a mental health treatment facility. (b) Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions Code). (c) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code). (d) Sterilization. (e) Abortion."

8 California Probate Code Section 4734 states that:

a. A health care provider may decline to comply with an individual health care instruction or health care decision for reasons of conscience.
b. A health care institution may decline to comply with an individual health care instruction or health care decision if the instruction or decision is contrary to a policy of the institution that is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health care decisions for the patient.

[9] California Probate Code Section 4736 states that:
A health care provider or health care institution that declines to comply with an individual health care instruction or health care decision shall do all of the following: (a) Promptly so inform the patient, if possible, and any person then authorized to make health care decisions for the patient. (b) Unless the patient or person then authorized to make health care decisions for the patient

refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision. (c) Provide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished. In all cases, appropriate pain relief and other palliative care shall be continued.

APPROVALS

		System	Alameda	AHS/Highland/John George/San Leandro
Department	**Date:**	N/A	04/2020	04/2020
Pharmacy and Therapeutics (P&T)	**Date:**	N/A	N/A	N/A
Clinical Practice Council (CPC)	**Date:**	07/2020	N/A	N/A
Medical Executive Committee (MEC)	**Date:**	N/A	07/2020	07/2020
Board of Trustees	**Date:**		N/A	N/A