

Medical Futility: Recent Legal Developments

Thaddeus Mason Pope, J.D., Ph.D.
Widener University Health Law Institute
HCA webinar • November 7, 2011

1

Define “medical futility
dispute”

Identify causal factors

Intramural resolution

2

Intractable cases

Typical pathway

Recent court cases

3

Surrogate
replacement

Limits of surrogate
replacement

4

What is a
medical
futility
dispute?

5



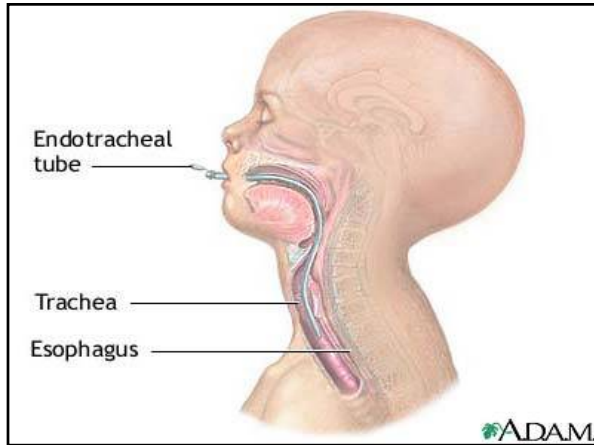
January 2008

Ruben Betancourt

73yo male

Surgery - thymus
gland tumor

7



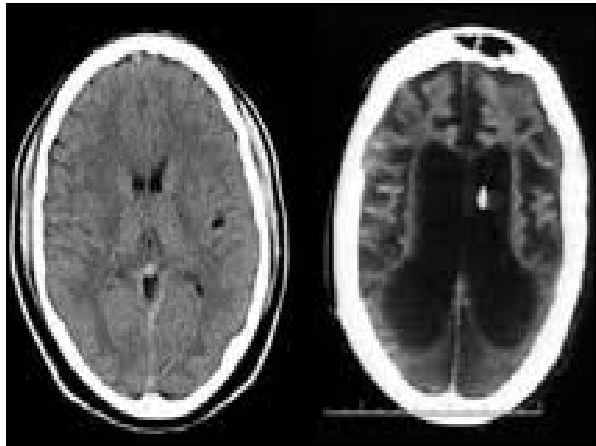
January - July 2008

Other facilities

July 2008

Readmitted to Trinitas

9



COPD
ESRD
Hypertensive
cardiovascular
disease

11

Stage 4 decubitus ulcers
Osteo- myelitis
Diabetes
Parchment- like skin

12

“It all seems to be **ineffective**.
It’s not getting us anywhere.”

“We’re allowing the man to
lay in bed and really
deteriorate.”

13

Proposed Tx plan

DNAR

Stop dialysis

14

Surrogate

Daughter

Jacqueline

15

Late 2008

Multiple family
conferences

Surrogate will
not consent

16

	D: Palliative	D: Curative
P/S: Palliative	1	2
P/S: Curative	3	4

Question and Responses ^a	Public, % (n=1006)	Professionals, % (n=774)
Do patients have the right to demand care that doctors think will not help?		
Yes	72.4	44.3
No	20.2	44.8

Question and Responses ^a	Public, % (n=1006)	Professionals, % (n=774)
If doctors believe there is no hope of recovery, which would you prefer?		
Life-sustaining treatments should be stopped and should focus on comfort	72.8	92.6
All efforts should continue indefinitely	20.6	2.5

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	D: Palliative	D: Curative
P/S: Palliative	1	2
P/S: Curative	3	4

Causal Factors

22

- 1. Surrogate demand
 - 2. Provider resist
- 23

Why surrogates **demand** non-beneficial treatment?

24

Misunderstand Prognosis

25



Iatrogenic

Inadequate communication

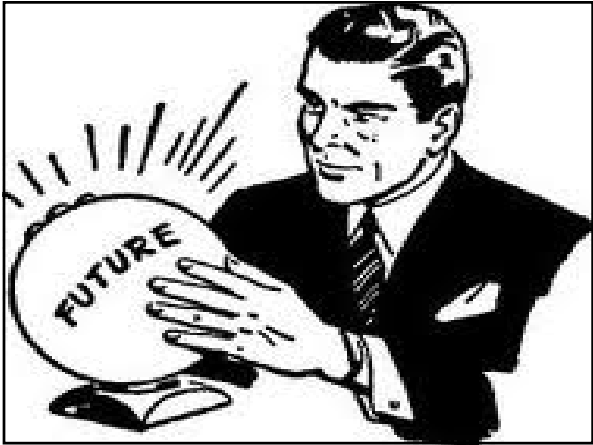
Uncoordinated, conflicting

Undue pressure

27

Mistrust

28



USA TODAY Home News Travel Money Sports Life Tech

News » **Health & Behavior** Fitness & Nutrition Your Health: Kim Painter Swine Flu M

More 'empowered' patients question doctors' orders

Updated 11h 9m ago | Comments 68 | Recommend 4 | E-mail | Save | Print | Reprints & Permissions | **RSS**



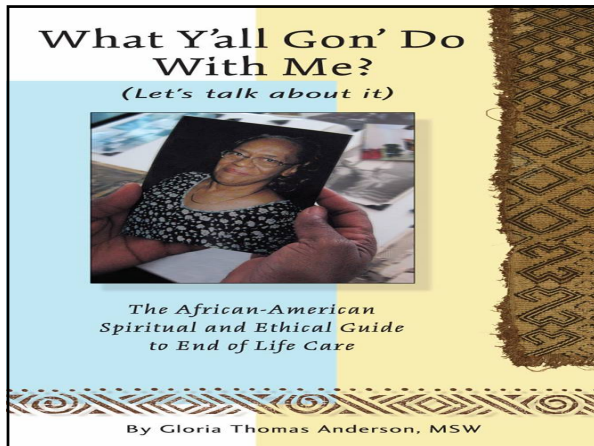
By Mary Brophy Marcus, USA TODAY

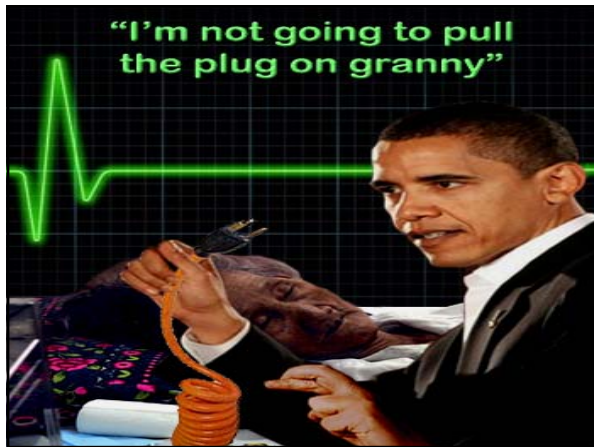
In the past, most patients placed their entire trust in the hands of their physician. Your doc said you needed a certain medical test, you got it.

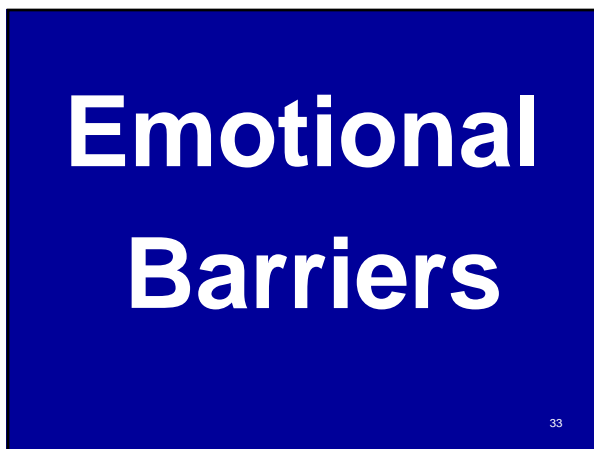
Not so much anymore.

Jeff Chappell of Montgomery, Ala., recalls a visit a couple of years ago to a Charlotte emergency room, near where the family

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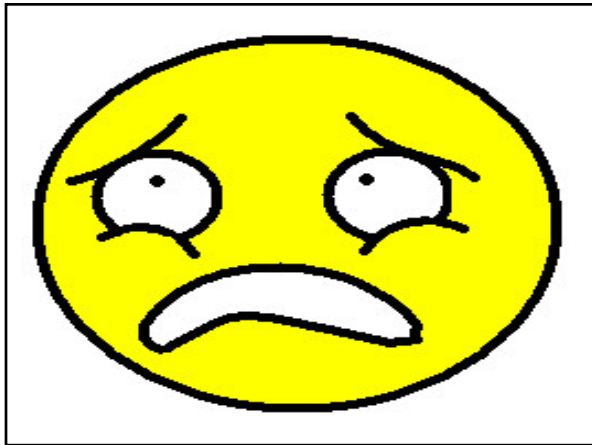






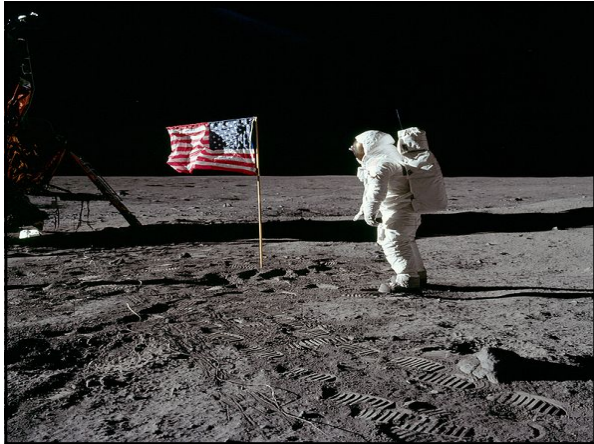
Psychological Barriers

37

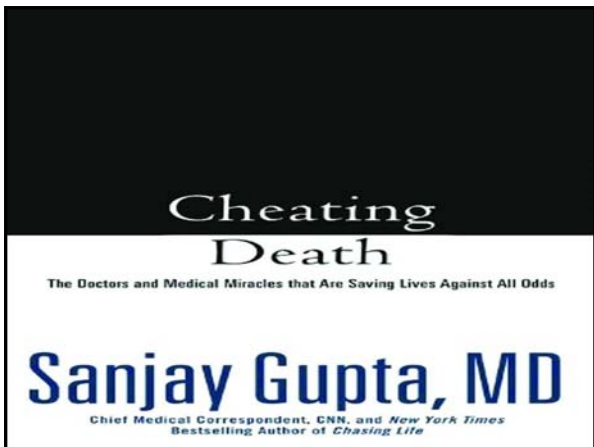




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Question and Responses ^a	Public, % (n=1006)	Professionals, % (n=774)
If the doctors treating your family member said futility had been reached, would you believe that divine intervention by God could save your family member?		
Yes	57.4	19.5
No	35.5	61.1

“religious grounds were more likely to request continued life support in the face of a very poor prognosis”

Zier et al., 2009 *Chest* 136(1):110-117

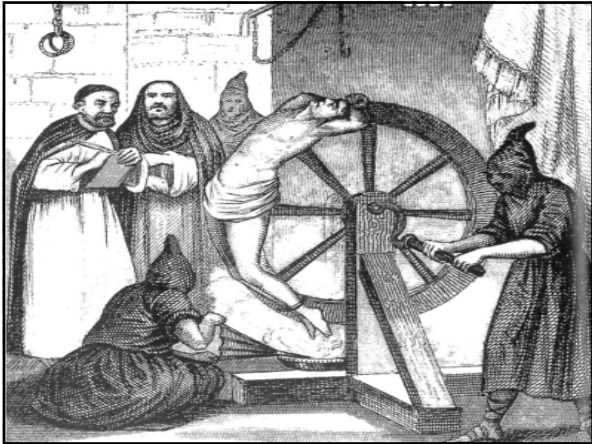


**Why
providers
resist**

50

**Avoid
patient
suffering**

51



“This is the
Massachusetts
General Hospital,
not **Auschwitz.**”

53

“I do not see much
difference between
what we are doing
. . . and . . . **atrocities**
. . . in **Bosnia.**”

54

Moral distress

55



Intensive and Critical Care Nursing 12(2017) 456–462

ELSEVIER

ORIGINAL ARTICLE

ICCN

www.elsevierhealth.com/journal/

The relationship between moral distress and perception of futile care in the critical care unit*

Melinda J. Mobley^a, Mohamed Y. Rady^{a,*}, Joseph L. Verheijde^b, Bhavesh Patel^a, Joel S. Larson^a

1. Follow the family's wishes for the patient's care when I do not agree with them but do so because hospital administration fears a lawsuit	41 (93)	29 (66)
2. Follow the family's wishes to continue life support even though it is not in the best interest of the patient	42 (95)	39 (89)
3. Carry out a physician's order for unnecessary tests and treatment	43 (98)	32 (73)
5. Initiate extensive life-saving actions when I think it only prolongs death	44 (100)	38 (86)

→ Adverse impact on patient care

57

Integrity of profession

58



Stewardship

60



**Distrust
surrogate**

62



66% accurate

50% = pure chance

64

Moorman & Carr
2010

62%

Barrio-Catelejo et al.
2009

63%

Shalowitz et al.
2006

58%

65

Even lower

when most needed
intermediate zones

66

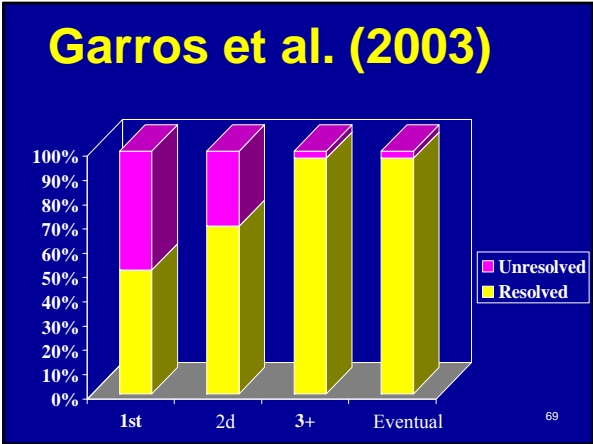
Typical dispute resolution pathway

67

Prendergast (1998)

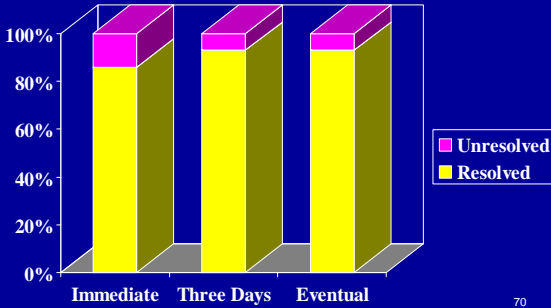
57% agree immediately
90% agree within 5 days
96% agree after more meetings

68



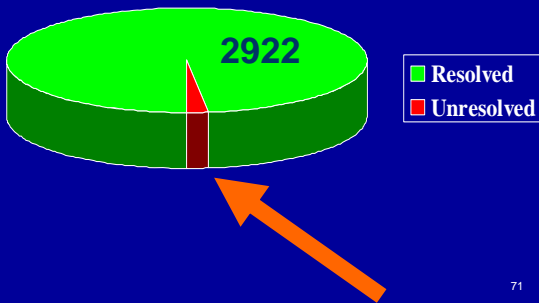
69

Fine & Mayo (2003)

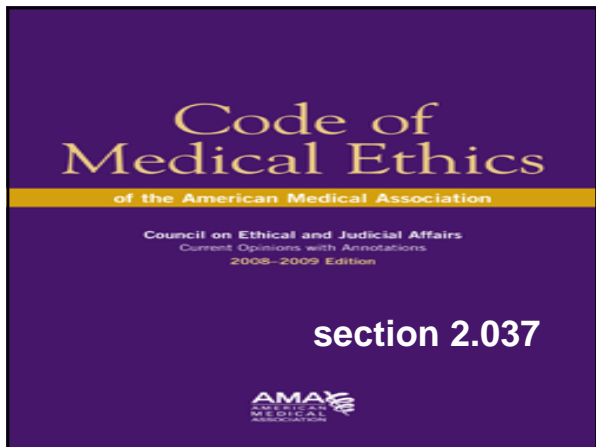


70

Hooser (2006)



71



1. Earnest attempts . . .

deliberate . . .

negotiate . .

2. **Joint** decision-making

. . . maximum extent . .

73

3. Attempts . . .

negotiate . . .

reach resolution . . .

4. Involvement . . .

ethics committee . . .

74

Consensus

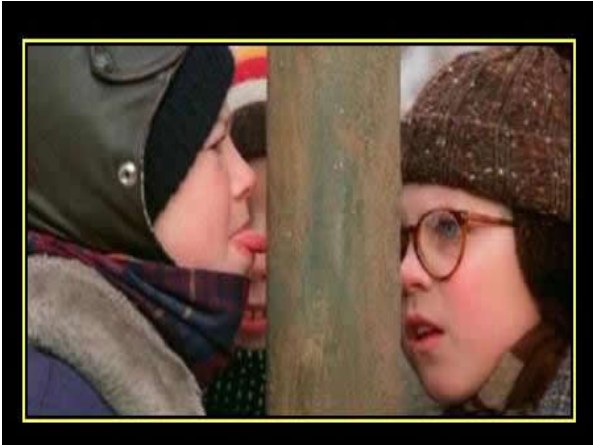
Intractable

75

Intractable cases

Typical resolution

76



“Remove the ___, and I will **sue you.**”

78

Perceptions of “futile care” among caregivers in intensive care units

Robert Sibbald MSc, James Downar MD, Laura Hawryluck MD MSc

CMAJ 2007;177(10):1201-8

“Why they follow the . . .
SDMs instead of doing
what they feel is
appropriate, almost all cited
a **lack of legal support.**”

79

**Bad
law**

80





Legal Risk

83

- ## Civil liability
- Battery
 - Medical malpractice
 - Informed consent
 - State HCDA
 - EMTALA
- 84

Licensure discipline

Criminal liability

e.g. homicide

85

Providers have **won almost every single** damages case for unilateral w/h, w/d

86

Providers typically lose only **IIED** claims

Secretive

Insensitive

Outrageous

87

Risk > 0

88

Process = punishment

Even prevailing parties
pay **transaction costs**

Time

Emotional energy

89

Liability averse

Litigation averse

90

Easier to cave-in

Patient will die soon

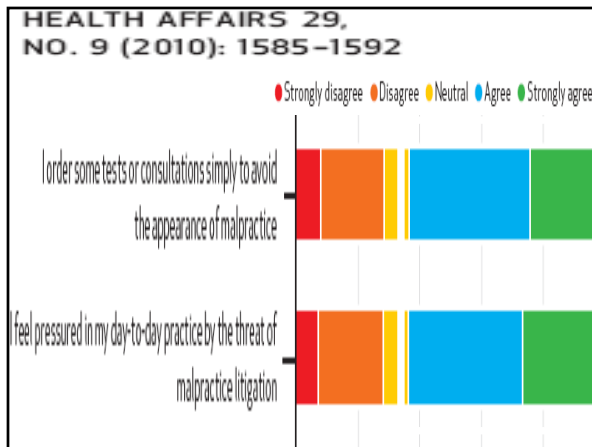
Provider will round off

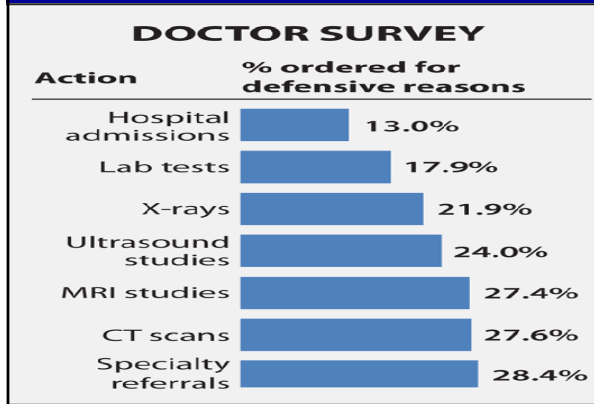
Nurses bear brunt

91

Defensive Medicine

92





J Am Geriatr Soc 58:533-538, 2010.

Factor	Extremely or Very Important	Most Important of All Factors Listed
Patient's prognosis	98.5	12.0
What was best for the patient overall	98.1	33.2
Respecting the patient as a person	96.6	5.4
Patient's pain and suffering	94.6	12.5
What the patient would have wanted you to do	81.8	29.4
Providing the standard of care	81.5	2.2
Respecting the wishes of the family or surrogate(s)	80.9	3.3
Following the law	68.6	1.1
The burden on the family	44.8	0
Religious beliefs of the patient	35.3	0
Religious beliefs of the family or surrogate(s)	28.6	0
Cost to society of caring for the patient	14.2	0
Physician's religious beliefs	10.7	0
Concerns about paying for	9.3	0
Concern that the surrogate(s) might sue	8.4	1.1

Cost to society
 Quality & safety
 of patient

96

Medical push for right to object

97

Resolution 505-08	TITLE: LEGAL SUPPORT FOR NONBENEFICIAL TREATMENT DECISIONS
Author: H Hugh Vincent, MD; William Andereck, MD	
Introduced by: District 8 Delegation	
Endorsed by: District 8 Delegation	Reference Committee
	October 4-6, 2008
<i>This resolution constitutes a proposal for consideration by the California Medical Association House of Delegates and does not represent official CMA policy.</i>	
<p>WHEREAS, it is still common for physicians who feel non-beneficial or futile treatments are being provided or considered to feel threatened by legal action by the patient's family or other surrogates, and thus continue to provide such care against their best medical judgment; and</p>	

WASHINGTON STATE MEDICAL ASSOCIATION HOUSE OF DELEGATES	
	Resolution: C-5 (A-09)
Subject:	Legal Protection for Physicians When Treatment is Considered Futile
Introduced by:	King County Medical Society Delegation
Referred to:	Reference Committee C
WASHINGTON STATE MEDICAL ASSOCIATION HOUSE OF DELEGATES	
	Resolution: A-2 (A-10)
Subject:	WSMA Opinion on Medical Futility in End-of-Life Care
Introduced by:	Shane Macatlay, MD, Delegate WSMA Board of Trustees
Referred to:	Reference Committee A

RESOLUTION 1 - 2004

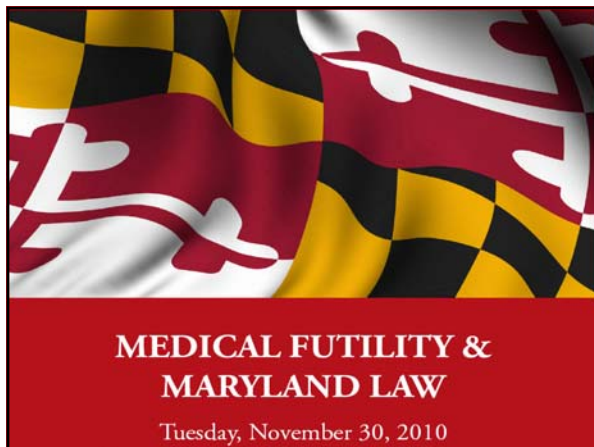
[\(read about the action taken on this resolution\)](#)

Subject: Futility of Care

Introduced by: Michael Katzoff, MD and the Medical Society of Milwaukee County

RESOLVED, That the Wisconsin Medical Society, concurrent with a recommendation of the American Medical Association, Medical Futility in End-of-Life Care policy E-2.037, supports the passage of state legislation which establishes a legally sanctioned extra-judicial process for resolving disputes regarding futile care, modeled after the Texas Advanced Directives Act of 1999.





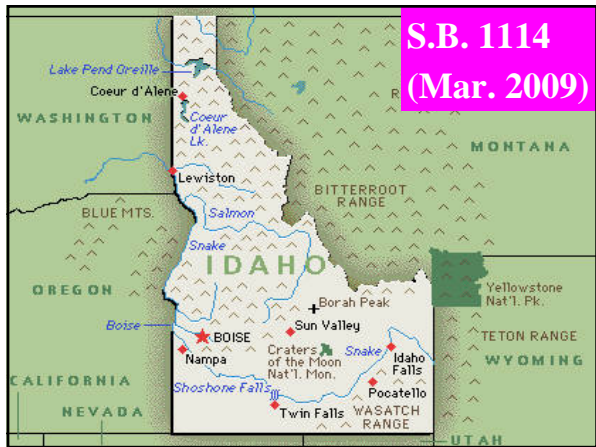
Medical Futility

Medicine Law & Ethics


Thursday, October 21, 2010
7:30 am - 12:45 pm
Education & Resource Center (ERC)
Hartford Hospital, Heublien Hall



103



S.B. 1114
(Mar. 2009)



TRINITAS
Regional Medical Center

[Click here for more information](#)

Late 2008

Try to transfer
No facility willing

106

January 2009

Unilateral DNAR
Remove dialysis port

107

January 2009

Jacqueline files
Court issues TRO

108

Courts almost always grant **temporary** injunctions to preserve the **status quo**

109

But litigation is **slow**

Patients often **die** before adjudication of the merits

110

February 2009

Evidentiary hearings

Medical experts

Family members

111

March 2009

Permanent
injunction

112

April 2010

NJHA	GNYHA
MSNJ	CHPNJ
NJP	

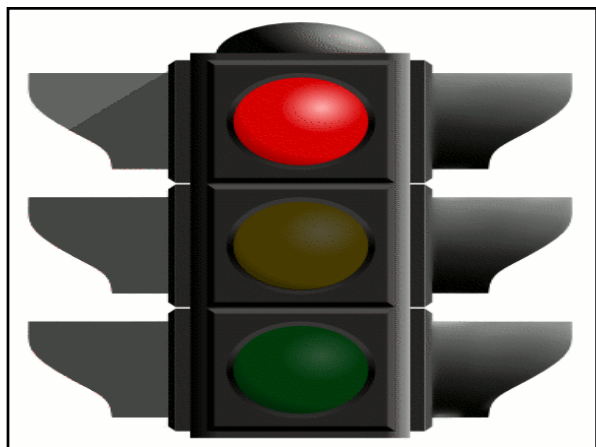
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August 2010

Appeal dismissed

114

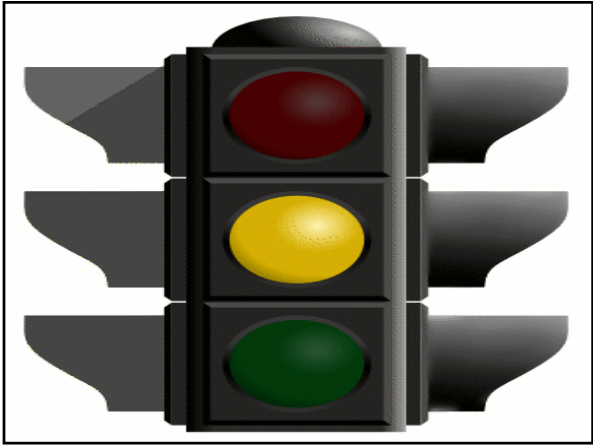


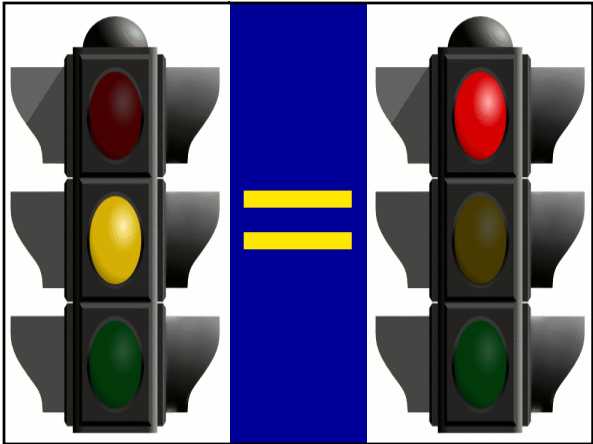




Treat 'til transfer

118





Surrogate Selection

121






85-year-old
Irreversible dementia
End-stage kidney failure
Chronic respiratory failure

124

Recurrent pneumonia
and infections
Dependent on ventilator
Dependent on CANH

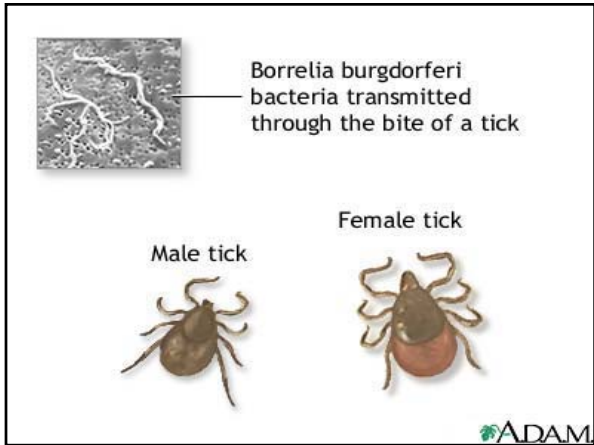
125



Nephrologist
Dialysis will
not improve or
lengthen life
Unethical and
painful

126





1993 advance directive

Appoints Lana

Appears **silent**

as to Al's wishes

129

Act in accord

Prior instructions

Preferences + wishes

Best interests

130

Making Medical Decisions for Someone Else: A How-To Guide



The American Bar Association
Commission on Law and Aging



EMANUEL
MEDICAL CENTER
Technology to Heal. Compassion for Life.

Guide For Healthcare Agents & Surrogate Decision-Makers

Making decisions for patients who can't
speak for themselves

Try to transfer

But AI **already** at
10 other hospitals

80 ambulance
transports

133



“substantial harm”

“inappropriate”

“unnecessary”

“harmful”

“painful”

135

1993 advance directive

“allowed to die and **not** be kept alive by artificial medical means or heroic measures”

136

1994 advance directive

Appointed **son** (by earlier marriage) to be agent

137

Feb. 2011



A	ALTERNATE
D	DECISION
M	MAKERS
I	INC.

Surrogate	Advance directive
A	B

139

Surrogate	Best interests
A	B

140



Mass. General
v.
Carol Carvitt

141

Court to surrogate:


“Your **own personal** issues are impacting your decisions”

“**Refocus** your assessment”


142

Not just an option, an obligation

143





USC University Hospital



More than a hospital. An academic medical center.

USC University Hospital has established its place as one of the nation's preeminent academic medical centers. Part of Tenet California, and located just minutes from downtown Los Angeles, USCH is a private, 411-bed research and teaching hospital staffed by the faculty of the renowned Keck School of Medicine of the University of Southern California.



Pascentia McDonald

74yo

Aug. 14, 2002

Surgery
thoraco-abdominal
aneurysm

145

Advance directive

1. Bobby Miles is agent
2. Cynthia Cardoza is alternate agent
3. "Do **Not** prolong life if incurable condition"

146

Aug. 14-30

Post-op infections

Aug. 30

Sepsis

Non-cognitive

147

Sept. 1-16

Bobby

Continue LSMT
3 more surgeries

Cynthia

Disagrees

148

Sept. 17

Cynthia

Threatens to sue

USC stops

Pascentia dies

149

Probate Code 4740
immunizes providers
who “in **good faith**
comply with . . . decision
made by one whom they
believe authorized . . .”

150



“Operation of the immunity here is **not** so certain.”

151

“Compliance with an agent’s decision that is **at odds** with the patient’s own expressed decision, in her AHCD, would probably **not** qualify as in good faith.”

152

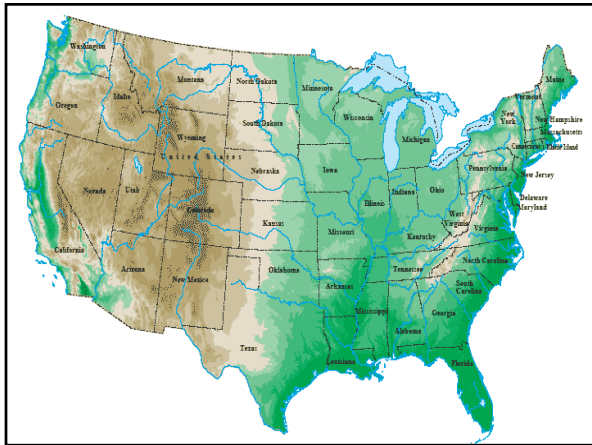
The agent (Bobby) was **not authorized** to depart from AD.

USC should have known that.

153

“This case does not provide the appropriate **platform . . .**”

154



Limits of surrogate replacement

156

Without evidence
of patient wishes,
providers cannot
show deviation

157



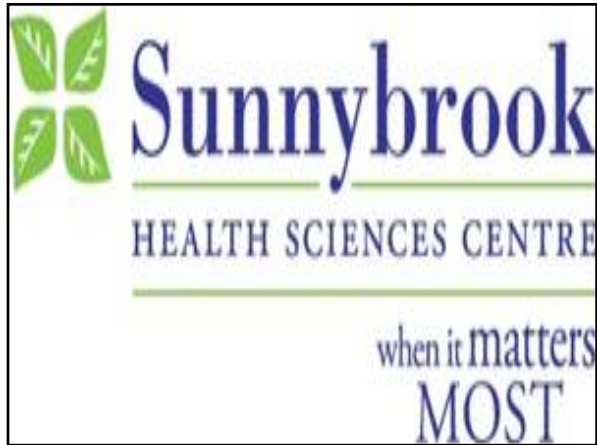
Surrogates are
often **faithful** to
patient wishes

159



Consent and Capacity Board

160





162

October 2010

Surgery to remove
benign tumour in head

Bacterial meningitis
and ventriculitis

163

Severe brain damage

ICU – vent + CANH

PVS

164

“No realistic hope
recovery”

“No medical benefit”

“May cause harm”

165



Many conferences
Wife
Physician from Iran
Does **not** consent
Tried to transfer

167



withdrawal of
LST violates a
tenet of the Shia
Muslim faith

169



Plan unilateral
withdraw

Wife moves to
enjoin

171

Docs argue they do not
need consent

Not “treatment”

No benefit

Outside standard care

172
















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