

# Selection of Health Care Surrogates With the Assistance of Health Care Professionals – Sample Policy

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## Preamble

This policy guides California medical professionals through a procedure for selecting a surrogate decision maker when patients lose decision-making capacity and lack a written advance directive for health care or a court-appointed conservator. This document illustrates best practices and clarifies the process commonly and currently used by health care professionals.

It is the role of physicians and other health care professionals to recommend that patients consider in advance who might make medical decisions for them if they become too sick to make such decisions themselves. The California legislature has created a formal legal process to assist in this task, the Advance Health Care Directive. When patients without such a directive lose capacity for making decisions, health care professionals turn to the patient's relatives or friends for guidance. This common process usually works to the satisfaction of all concerned. Often, a family member steps forward with the support of others to take on the responsibility of becoming the surrogate health care decision maker. The interaction with health care staff and this individual is amicable, patient-centered decision making is emphasized, and family integrity is maintained.

Occasionally, the process of surrogate selection breaks down. Family members may disagree over who among them would be best able to make medical decisions on the patient's behalf. Sometimes the person closest to the patient is unable or unwilling to take on this responsibility. In such circumstances, health care professionals try to identify someone else who knows the patient's values, can speak for the patient, and can assist in making health care decisions.

The California Medical Association, the California Hospital Association and the California Coalition for Compassionate Care have considered the ethical, medical, and legal issues in this process. We believe that patients, physicians and health care institutions benefit when a uniform process is agreed upon by which such designations will be made. We have written these procedures in the form of a policy.

We recommend that physicians, clinics, long-term health care facilities, medical centers, hospitals and other health care professionals adopt this policy or a similar written procedure. With adoption of these procedures, we hope to improve patient-centered decision making by choosing a surrogate who knows the patient best and is best able to serve as the patient's surrogate. This policy details procedures for this task and can be used to educate the patient's loved ones about the process used by physicians in selecting a surrogate. This policy reminds health care professionals that whether a potential surrogate agrees or disagrees with the health care professional's treatment recommendations is not a criterion for the selection of a surrogate.

## The Selection of a Surrogate by Patients With Decision-Making Capacity

Under ideal circumstances, a patient completes a written Advance Health Care Directive (AHCD) that names an agent for health care decision making. The patient discusses this directive with a health care professional and provides a copy for the medical record. For patients who have not

completed an AHCD, the physician may recommend that these patients consider who they would like to assist in making health care decisions on their behalf if they become unable to make such decisions themselves. If a patient expresses a clear and consistent choice, the physician must document the identity of this individual in the medical record.

When an oral designation of a surrogate decision maker is made by a patient, this designation is effective only 1) during the course of the patient's treatment or illness, 2) during the patient's hospitalization, or 3) for 60 days, whichever period is shorter. If desired, the patient may choose to make the designation for an even shorter period of time. If the patient has appointed an agent in a written AHCD prior to the oral designation, the more recent orally appointed surrogate's authority supersedes that of the agent during the period of hospitalization during which the oral designation is made.

### **The Selection of a Surrogate for Patients Without Decision-Making Capacity Who Lack an Appointed Surrogate**

If the patient has not appointed a surrogate or agent through a valid written or oral directive and if there is no court appointed conservator for health care decision making; or if the designated surrogate, agent or conservator is not reasonably available, the primary physician may identify an individual (surrogate) to make health care decisions on behalf of the patient. This surrogate shall be the individual who appears, after a good faith inquiry, to be best able to function in this capacity. In identifying a surrogate, input from any or all of the following may be used as appropriate:

- a. Family and friends of the patient
- b. Other health care professionals
- c. Institutional committees
- d. Social workers
- e. Chaplains

In determining the individual best able to serve as the surrogate, all relevant factors may be considered, among them:

- a. Familiarity with the patient's personal values
- b. Demonstrated care and concern for the patient
- c. Degree of regular contact with the patient before and during the patient's illness
- d. Availability to visit the patient
- e. Availability to engage in meaningful contact with health care professionals for the purpose of fully participating in the health care decision making process
- f. Ability to understand the medical condition and treatment options as explained by physicians or other health care professionals
- g. Ability to assume the duties of a surrogate detailed below
- h. Previous designation as a surrogate, whose authority has expired

**NOTE:** Agreement by a potential surrogate with the treatment recommendations of the physician or other health care professionals should not be a criterion used in the selection of a surrogate.

### **Authority of the Surrogate**

A surrogate may make health care decisions on behalf of a patient if the patient has no available, previously appointed conservator or designated agent with authority to make such decisions, and the primary physician determines and documents that the patient lacks capacity for making health care decisions. The surrogate may not make decisions that are limited by statute.

### **Duties of the Physician and Other Health Care Professionals**

- a. The primary physician, in conjunction with other health care professionals, shall make reasonable efforts to contact potential surrogates before selecting the surrogate.
- b. The primary physician shall document in the patient's health care record the determination that the patient lacks decision-making capacity.
- c. The primary physician shall document the name of the surrogate who best meets the above criteria in an easily seen location in the patient's health care record.
- d. The physician will communicate with and educate the surrogate about matters relevant to the patient's medical condition. The primary physician may request that a surrogate or proposed surrogate provide information to assist in making health care decisions. The primary physician may ask that the surrogate provide information to relatives and associates of the patient concerning the selection of the surrogate. The physician may ask the surrogate to communicate with relatives and associates of the patient concerning health care decisions for the patient.
- e. The supervising health care professional shall inform the patient, if possible, of the identity of the recognized surrogate and the decisions the surrogate authorizes.

### **Duties of the Surrogate**

- a. The surrogate shall make health care decisions and advocate on behalf of the patient as necessary, in accordance with the patient's values, individual health care instructions, if any, and other wishes to the extent known to the surrogate so that the patient's values, health care instructions, and known wishes remain the basis for the decisions with regard to restorative, palliative and other interventions. Otherwise, the surrogate shall make decisions in accordance with the surrogate's determination of the patient's best interest. In determining the patient's best interest, the surrogate shall consider the patient's personal values to the extent known to the surrogate.
- b. The surrogate shall provide information about the patient's known values and beliefs to health care professionals to assist in providing health care and in making health care decisions. The surrogate may be asked to assist in obtaining information about the patient's known values and beliefs from the patient's friends and family. The surrogate may be asked to assist in communications with relatives and associates of the patient as they are necessary for good medical care as judged by the physicians, and as the patient would have allowed.

## Definitions

- a. **“Capacity”** means a patient’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, that ability to understand its significant benefits, risks and alternatives.
- b. **“Health care”** means any care, treatment, service, or procedure to maintain, diagnose or otherwise affect a patient’s physical or mental condition.
- c. **“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:
  - Selection and discharge of health care professionals and institutions
  - Approval or disapproval of diagnostic tests, surgical procedures and programs of medication
  - Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation
- d. **“Health care professional”** means an individual licensed, certified or otherwise authorized or permitted by the law of this state to provide health care in the ordinary course of business or practice of a profession.
- e. **“Primary physician”** means a physician designated by a patient or the patient’s agent, conservator or surrogate, to have primary responsibility for the patient’s health care or, in the absence of a designation or if the designated physician is not reasonably available or declines to act as primary physician, a physician who undertakes the responsibility.
- f. **“Supervising health care professional”** means the primary physician or, if there is no primary physician or the primary physician is not reasonably available, the health care professional who has undertaken primary responsibility for a patient’s health care.
- g. **“Surrogate”** for purposes of this policy means the person who makes health care decisions on behalf of the patient.