

Considerations for Revising the Hospital's Policy and Procedure Regarding Decision Making for Unrepresented Patients

Hospitals that have adopted the CMA/CHA/Alliance model policy, "Health Care Decisions for Unrepresented Patients," may wish to revise their policy & procedure to address the deficiencies in state law identified in the recent Superior Court case, *California Advocates for Nursing Home Reform v. Chapman*. Hospitals may wish to consider the suggestions outlined below.

- 1. Your policy should require that the hospital or physician notify the patient that:
 - a. He or she has been determined incapacitated;
 - b. It has been determined that he or she lacks a surrogate decision maker;
 - c. Medical intervention has been prescribed; and
 - d. He or she has the opportunity to seek judicial review of the above determinations.

The hospital may wish to develop a notification form to give to the patient (see the sample form at the end of the revised CMA/CHA Alliance Model Policy). A copy of the form can be put in the medical record to document that notice was given. This form should include the name of the physician who determined that the patient lacks capacity to make health care decisions, confirmation that the information identified in a. through d. was provided, and the type of treatment that the physician has recommended. The form may also include the address of the county Superior Court and contact information for any resources that might assist the patient if he or she wishes to contest the determinations. Resources might include a local ombudsman, law school legal assistance clinic, Adult Protective Services, any assistance the local Superior Court offers, etc.

The notification should be given to the patient sufficiently in advance of treatment to allow the patient to contest the determinations, to the extent possible. If it is inadvisable to delay treatment, this fact should be documented. How far in advance of treatment a patient should be notified will depend upon what is reasonable given all the facts and circumstances. There is no one-size-fits-all answer to this question. (Remember that the law implies consent in emergency situations, and this notification process is thus not required in emergencies.)

If the patient does not speak English sufficiently well to understand the form, an interpreter should be used. If the patient has impaired vision, appropriate auxiliary aids should be used.

If a patient is comatose, in a persistent vegetative state, or otherwise so obviously unable to comprehend this information, these circumstances should be documented.

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- 2. Include a patient representative on the hospital's interdisciplinary team (IDT), when practicable.

Some patients may have a family member or friend who is unable or unwilling to take full responsibility for making health care decisions on behalf of the patient, but who is willing to serve as part of the IDT. If no such person exists, the hospital may consider including on the IDT an ombudsman, patient advocate, bioethicist, community member, or other person whose role is to protect the patients' interests.

If it is not practicable to include such a person on the IDT in a particular case, document the reasons therefore.

- 3. If the patient will be administered antipsychotic drugs, consider obtaining the review of an independent physician. There is no legal definition of "independent" – it is unclear whether the court meant that the second physician should be independent from the hospital, or from the prescribing physician, or both. Hospitals that choose to adopt a policy for independent review should make their best efforts to secure a physician that seems independent to a reasonable judge or jury.
- 4. Limit end of life decisions (such as withholding or withdrawing life-sustaining treatment, or ordering hospice care) to patients who are terminally ill.
- 5. The hospital's policy should clearly state that the patient's wishes will be taken into account when making health care decisions, to the extent those wishes are known.
- 6. Consider obtaining the review of an independent physician in difficult cases.