



*Promoting Wellness and Recovery*

John R. Kasich, *Governor*  
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# **Court Ordered Medication Processes**

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# Decision Making in Medical Care

- Self-direction is a valued attribute in American society
- Traditionally medicine was paternalistic
  - What the doctor says goes
  - You need to do what the doctor says
- Patient-directed care has become increasingly valued
  - Patient choice  $\geq$  doctor choice
  - Doctor seen more as partner, advisor, or consultant

# Medical Decision Making

- Competent patients have a right to make *informed* treatment decisions for themselves which is free of coercion
- They may provide consent for:
  - Psychotherapy
  - Participation in research
  - Medication
- Informed consent shifts the decision making balance from the doctor, to a shared process between the doctor and patient

# Schloendorff v. Society of New York Hospital (1914)

*“Every human being of adult years and sound mind has the right to determine what shall be done with his own body”*

# Salgo v. Leland Stanford etc. Bd. Trustees, 154 Cal.App.2d 560 (1957)

*For genuine “informed” consent, patients must be given facts necessary to form the basis of an intelligent consent*

# Informed Consent (Legal Definition)

*The name for a fundamental principle of law that a physician has a duty to reveal what a reasonably prudent physician in the medical community employing reasonable care would reveal to a patient as to whatever reasonably foreseeable risks of harm might result from a proposed course of treatment. This disclosure must be afforded so that a patient—exercising ordinary care for his or her own welfare and confronted with a choice of undergoing the proposed treatment, alternative treatment, or none at all—can intelligently exercise judgment by reasonably balancing the probable risks against the probable benefits.*

# Informed Consent (Medical Definition)

*“An ongoing dialogue between physician and patient throughout the course of treatment...presenting the information in a discussion-like format, attending to the patient’s level of sophistication and intelligence, and tailoring to the patient’s needs”*

*Stanley, 1988*

**Not signing a consent form!**



# 3 Components of Informed Consent

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- Information
- Voluntariness
- Competency

# 3 Components of Informed Consent

## Information

- Nature of illness
- Treatment proposed
  - Risks and benefits
- Alternative treatments
  - Risks and benefits
- Likely outcome/risks with no treatment

# 3 Components of Informed Consent

## Voluntariness

- In the process of informing, the physician may persuade
- Subtle difference between “persuasion” and “coercion”

# 3 Components of Informed Consent

## Competency (Capacity)

- Adults are presumed competent unless adjudicated otherwise
- Minors lack competency, unless adjudicated as emancipated

# 3 Decisional Capacity (Roth et al., 1977)

- Criteria for assessment
  - Patient actually evidences a choice
  - Evidence a choice that clinician feels will lead to a reasonable outcome
  - Applies rational reasoning to the decision making process
  - Has ability to understand the information disclosed
  - Actually understands the information

# Exceptions to Informed Consent

- Incompetency
  - Not fixed, and should not exclude the patient from decision process
- Emergencies
  - Imminent danger to self or others
  - Continues until the emergency is over
- Patient waiver (Advanced directive, DPA)
- Therapeutic privilege

# 3 Guardianship Issues

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- What if Guardian consents and Patient refuses?

# Right to Treatment

“If the right to treatment were to be recognized, our substantive constitutional law would then include the concepts that if a person is involuntarily institutionalized in a mental institution because he is sufficiently ill to require institutionalization for care and treatment, he needs, and is entitled to, adequate medical treatment.....”

-Morton Birnbaum, 1960



# Right to Refuse Treatment

- Applied differently in different states, and even in different jurisdictions within states
- Rights driven model
  - Competent patients have the right to refuse treatment, *except in an emergency*
  - Only treatment refusals of incompetent patients may be overridden

# Rights-Driven Model

- For incompetent patients, decision rests with the court (including court-appointed guardian), not the clinician
- Weighing competing interests
  - Family pressures
  - Desire to discharge patients
  - “Maintaining order” in a facility

# Considerations in Decision-Making for Incompetent Patients

## Considerations:

- “Best interest” of the patient
- Substituted judgment—What would the patient have wanted if competent?
  - Stated preferences
  - Experience of response to treatment, or side effects
  - Family preference
  - Prognosis without treatment
  - Religious considerations
  - What if the patient never was competent?

# Outcomes with Persistent Treatment Refusal

- Increased duration of illness/length of stay
- Disruption to treatment setting
- Diminution of treatment experience of other patients (does it violate *their* rights?)
- Increased risk of physical interventions (seclusion/restraint)

# So the Patient is Refusing Treatment – now what?

- Work with the patient before you go to court!
  - Can strengthen therapeutic relationship with the patient
  - Place the refusal in the larger context of the patient's illness
  - Elicit the reasons for refusal and try to deal with them
  - Using the whole treatment team artfully can help

# Reasons for Refusal

- Side effects
  - Real or fabricated
  - Not all side effects can be detectable by the clinician (akathisia, dry mouth)
  - Patient may be reticent to discuss unless asked
  - May seem trivial to the provider....but not to the patient
- Control issue
- May attach delusional meaning to the medication
  - Thought control, “poison”, etc.
- Discussion alone may resolve issues

# Approaches to Refusal

- Consider context of refusal
  - Shortly after admission: empathy, time, space
  - Later in treatment:
    - Does improvement in symptoms mean less time with staff?
    - Fear of stability and discharge?
- Negotiate
  - Can patient be persuaded?
  - Can accommodations be made to elicit compliance?
- If the patient isn't dangerous, should discharge be considered? (BE CAREFUL WITH THIS!)
- Legal approaches

# Probate Court Jurisdiction

- Ohio Revised Code Section 2101.24  
Jurisdiction of probate court:
- (A) (1) Except as otherwise provided by law, the probate court has exclusive jurisdiction:
- (u) To hear and determine actions involving informed consent for medication of persons hospitalized pursuant to section 5122.141 or 5122.15 of the Revised Code;

# **Steele v. Hamilton Cty. Community** **Mental Health Bd.,** **90 Ohio St.3d 176 (2000)**

A court may issue an order permitting the administration of antipsychotic medication against a patient's wishes without a finding that the patient is dangerous when the court finds by clear and convincing evidence that the patient lacks the capacity to give or withhold informed consent regarding treatment, the medication is in the patient's best interest, and no less intrusive treatment will be as effective in treating the mental illness.

# Legal Approaches to Treatment Refusal

- If you decide to take with approach, let the patient know (Discuss this with your team first—who should tell the patient and how)
- Let them know that you are doing this out of concern for them, and why
- Let them know about the process and what might be said (Clients' rights advocate has a role)

# Assessment of Capacity

- Before going to court, clinicians need to formally assess the capacity of a patient
- Very few patients have a global lack of capacity, specifically need to assess their capacity to provide consent for treatment
- Does the patient have the ability and knowledge to competently exercise a decision?

# Components of Capacity

## Questions to ask:

- Does the patient have the ability to appreciate the nature of their problems?
- *Do they appreciate the nature of their problems?*
- Do they understand the proposed treatment?
- Do they have the ability to manipulate information to make a decision?
- Do they have the ability to express a sustained choice?

A standardized capacity assessment tool is very helpful

## CAPACITY ASSESSMENT INSTRUMENT

Hospital/Unit	Time Assessment Began	Time Assessment Completed
Proposed Medication (type, dose, route)	Diagnosis of Patient	
	Axis I:	
	Axis II:	
	Axis III:	

Describe the patient's understanding of the informed consent process.

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Abilities, Functioning, Status		Severe	Moderate	Minor to None	Insuff. Data	Abilities, Functioning, Status		Severe	Moderate	Minor to None	Insuff. Data
1	Vision and Hearing					7	Form of Thought				
2	State of Consciousness					8	Content of Thought				
3	Attention					9	Emotion				
4	Comprehension					10	Behavior				
5	Recent Memory					11	Reception of Information				
6	Perception					12	Appreciation of Condition				

Reason(s) patient is refusing the proposed medication (use patient's own words when appropriate).

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Understanding: Describe the patient's understanding of the purpose, benefit, and risks of the proposed medications and alternative treatments.

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Rational Use of Information: Describe the patient's ability to use the treatment information in a rational manner and ability to make reasoned decisions regarding taking proposed medication.

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Does this patient have an advance directive regarding medication?

Yes  No If yes, please describe any terms affecting the current situation.

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Are there any other prior indications of the patient's wishes with regard to medication?

Yes  No If yes, please describe.

\_\_\_\_\_

Is there any evidence of recognized religious belief regarding treatment by spiritual means through prayer alone?

Yes  No If yes, please describe.

\_\_\_\_\_

Have treatment alternatives, including no treatment, been discussed with the patient?

Yes  No If yes, please describe.

\_\_\_\_\_

Has this patient taken this medication before?

Yes  No If yes, when? \_\_\_\_\_

If yes, any significant side effects/untoward reactions?

Yes  No Describe \_\_\_\_\_

\_\_\_\_\_

If yes, was the medication effective?

Yes  No Describe \_\_\_\_\_

\_\_\_\_\_

Findings and Rationale

Has Capacity  Lacks Capacity

Explain the rationale of your decision/making process by describing the functional relationship between the information from above and your conclusion. If your conclusion is that the patient lacks capacity due to an observed mental disability, explain how it interferes with the patient's ability to provide informed consent.

Signature of Physician

Date

# Court-ordered Involuntary Meds

- Patient has capacity
  - You cannot proceed with Court-ordered involuntary medication process
- Patient lacks capacity
  - File affidavit in court of jurisdiction
  - Patient has right to second opinion, counsel, ability to present witnesses, etc.
  - Why and when do this instead of pursuing guardianship?
  - What if the patient is voluntary and refusing meds?

# Findings of the Court

- Studies find that >90% of the time, the court overturns the patient's refusal of treatment

# Implementing Court-ordered Involuntary Medication

- After the court issues its decision
  - Let the patient know about this, and what it means (THIS SHOULD BE IN A THERPEUTIC CONTEXT)
  - Work with the treatment team about who, how when and where the patient should be informed
  - Many will accept the decision and the meds at that point
  - Try to at least get assent from the patient
  - Still try to give them as much choice in their treatment as possible (choice of meds within a class, oral meds vs. injection, etc.)

# Final Suggestions

- With a strong and collaborative therapeutic approach, most instances of initial patient refusal of treatment can be resolved without court involvement
- It is advisable to have a formal written policy and capacity assessment tool for court-ordered involuntary medication

# Contact Information

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# Questions???

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