LEGAL AND ETHICAL DILEMMAS IN HEALTHCARE DECISION MAKING

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THE MANY FACES OF THE CASE MANAGER

- CAREGIVER
- MANAGER
- TEACHER
- ADVOCATE
- GUARDIAN
- PERSON
SETTING THE STAGE

- THE MALPRACTICE “CRISIS”
  - The phenomenal rise in malpractice claims and cases creates a special need for awareness and sensitivity for such action.
    - IOM Report
    - Patient (Client) Safety & Disclosure of unanticipated outcomes

- EVOLUTION OF STANDARDS OF CARE
  - Advances in education, training and professional recognition have created uncertain boundaries of standards in practice. New responsibility brings with it new potentials for liability.
    - Professional Turf Battles
SETTING THE STAGE (CONT’D)

THE MEDIA AND CONFIDENTIALITY ISSUES

- Adverse media, consumer manipulation, HIPAA, and publication of “confidential” issues affect the public’s attitude toward health care and its practices. Confidentiality versus need-to-know remains a continuing dilemma.

ALLOCATI ON OF SCARCE RESOURCES

- Growing limitations and/or misuse of available funds, personnel, equipment and donor sources must be considered in standards of client/patient care.
SETTING THE STAGE (CONT’D)

- ADVANCES IN TECHNOLOGY
  - New trends, practices and developments in the health field have created social, ethical and legal dilemmas.

- EVOLVING ROLE OF THE CASE MANAGER
  - Balancing economics, demographics, professional capabilities, client and family needs with own ideas and ideals.
THEORIES OF ETHICS

- UTILITARIANISM
  - AN ACTION IS RIGHT IF IT LEADS TO THE GREATEST POSSIBLE GOOD

- DEONTOLOGY
  - MORAL PRINCIPLES MUST BE FOLLOWED REGARDLESS OF THE CONSEQUENCES
PRINCIPLES OF ETHICAL PRACTICE

- AUTONOMY
- BENEFICENCE
- NON-MALEFICENCE
- JUSTICE
- FIDELITY
THE UMBRELLA OF ETHICAL CONSIDERATION

- PERSONAL ETHICS vs.
- PROFESSIONAL ETHICS vs.
- ORGANIZATIONAL ETHICS
TRUTHTELLING AND THE USE OF SITUATIONAL ETHICS

- The Creation of a Perceptual Morality in a Specific Instance
  - Considerations
    - Economic Loss or Gain
    - The “De Minimis” Event
    - The “Fait Accompli”
    - The Vindication Mentality
    - The Higher Good Argument
  - Misrepresentation
    - The Question of Responsibility
    - “Puffing” the Truth
QUI NESCIT
DISSI MULARE NESCIT
VI VERE
PROFESSIONALISM IN HEALTH CARE AND DEFINING WHAT IS PROPER CONDUCT

- QUESTIONS OF MORAL TURPITUDE
- DISTINGUISHING PERSONAL FROM PROFESSIONAL CONDUCT
- AVOIDING THE APPEARANCE OF IMPROPRIETY
FAIRNESS IN JUDGMENT AND PRACTICE

- DISCRIMINATION
  - INVIDIOUS
  - BENIGN
  - FAVORITISM

- CONFIDENTIALITY & PRIVILEGE
  - INDIVIDUAL TRUST VS. DANGER TO OTHERS OR THE "NEED TO KNOW"

- CONSENT
INFORMED CONSENT

THAT CONSENT OBTAINED AFTER THE PATIENT HAS BEEN GIVEN SUFFICIENT INFORMATION SO THAT HE/ SHE UNDERSTANDS SUBSTANTIALLY THE NATURE OF THE PROCEDURE OR PROGRAM TO BE PERFORMED/ USED, THE RISKS AND CONSEQUENCES ASSOCIATED WITH IT, BENEFITS TO BE EXPECTED, AND ALTERNATIVE THERAPIES/ PROGRAMS. THE PATIENT ALSO HAS THE RIGHT TO ASK QUESTIONS, AND TO REFUSE.

INFORMED CONSENT IS A CONTINUING PROCESS
BALANCING TEST

- SERIOUSNESS OF THE RISK
- FREQUENCY OF THE RISK
TWO “SCHOOLS” OF INFORMED CONSENT

- INFORMATION GIVEN IS THE SAME AS, OR AS MUCH AS, ORDINARILY PROVIDED BY OTHER COMPETENT PHYSICIANS IN THE COMMUNITY.

- INFORMATION GIVEN IS SUFFICIENT TO ENABLE PATIENT TO MAKE AN INTELLIGENT DECISION.
EXCEPTIONS TO THE NEED FOR CONSENT

- IMPLIED CONSENT
- PRIOR OR CONSENT
- WAIVER
- EMERGENCY
- THERAPEUTIC PRIVILEGE
- EXTENSION DOCTRINE
- LEGAL ORDER
CONSENT AND MINORS

- Generally need consent of legal guardian

- Exceptions
  - Emancipation
  - Public policy considerations
  - "Mature minor"
CONSENT AND INCOMPETENT ADULTS

- Generally need consent of guardian ad litem
- Insanity vs incompetency
  - What is incompetent?
    - The “Ulysses” Consent
    - Substituted Judgment
CONSENT AND THE NEW TECHNOLOGIES

- GENETIC MANIPULATION
- "OWNERSHIP" OF BODY TISSUE
- CRYOGENICS
- POST MORTEM REPRODUCTION
REFUSAL TO CONSENT FOR CARE

- COMPELLING STATE INTERESTS
- RELIGION VS. HEALTH CARE
- TERMINAL CARE ISSUES
THE CYCLE OF LIFE AND DEATH
THE WEDGES OF CONFUSION
NASCENTES MORIMUR, FINISQUE AB ORIGINE PENDET
TRADITIONAL COMPELLING STATE INTERESTS

- PRESERVATION OF LIFE
- PROTECTION OF DEPENDENT THIRD PARTIES
- PREVENTION OF SUICIDE
- MAINTENANCE OF ETHICAL INTEGRITY OF THE MEDICAL PROFESSION

Superintendent of Belchertown State School v. Saikewicz, 370 NE 2d 417 (1977)
THE QUINLAN DECISION

355 A. 2d 647 (1976)

- RECOGNITION OF RIGHT OF PRIVACY AGAINST BODILY INTRUSION
- UTILIZED AN “ORDINARY VS. EXTRAORDINARY” LIFE SUPPORT STANDARD
- ALLOWED FOR GUARDIAN DECISIONMAKING WITH INCOMPETENT PATIENT
- CLARIFIED COMPELLING STATE INTERESTS STANDARDS
NUTRITION AND HYDRATION

“MEDICAL NUTRITION AND HYDRATION MAY NOT PROVIDE NET BENEFITS TO PATIENTS. MEDICAL PROCEDURES TO PROVIDE NUTRITION AND HYDRATION ARE MORE SIMILAR TO OTHER MEDICAL PROCEDURES THAN TO TYPICAL HUMAN WAYS OF PROVIDING NUTRITION AND HYDRATION. THEIR BENEFITS AND BURDENS OUGHT TO BE EVALUATED IN THE SAME MANNER AS ANY OTHER MEDICAL PROCEDURE.”

THE *BOUVIA CASE*

225 Cal. Rptr. 297 (1986)

- NON-TERMINAL PATIENT HAS RIGHT OF PRIVACY, TO INCLUDE A RIGHT TO DIE

- INTENT IS NOT TO DIE, BUT TO DISCONTINUE ARTIFICIALLY PROVISED MEANS TO LIFE IF THAT MEANS IS OVERLY BURDENSOME
THE INTENT TO DIE

- SUICIDE IS NOT INVOLVED WHERE THE PATIENT HAS NO EXPRESS INTENT TO DIE, BUT RATHER DOES NOT WISH TO CONTINUE LIVING UNDER THE ONEROUS AND PAINFUL CONDITIONS IMPOSED BY INVASIVE MEDICAL TREATMENT BEING RELIED UPON TO KEEP THE PATIENT ALIVE.

THE CRUZAN DECISION
497 U.S. 261 (1990)

- THERE IS A FOURTEENTH AMENDMENT LIBERTY INTEREST FOR COMPETENT PERSONS HAVING A PROTECTED RIGHT TO REFUSE LIFE-SAVING NUTRITION AND HYDRATION

- INCOMPETENT PERSONS MAY NOT HAVE THAT SAME RIGHT DUE TO LACK OF CLEAR INFORMED CONSENT

- STATES MAY SET GUIDELINES GOVERNING THRESHOLD OF EVIDENCE TO PERMIT SURROGATE END OF LIFE DECISIONS
LEGAL RESPONSE TO END OF LIFE DECISIONS

- PATIENT SELF-DETERMINATION ACT
  - EDUCATIONAL MANDATE
- ADVANCE DIRECTIVES
  - LIVING WILLS
  - DURABLE POWERS OF ATTORNEY FOR HEALTH CARE (HEALTH CARE PROXY)
- FAMILY SURROGACY STATUTES
EVOLVING ISSUES

- FUTILITY
  - ALLOCATION OF SCARCE RESOURCES
  - ECONOMICS
  - BEST INTERESTS OF PATIENT/SOCIETY
  - TECHNOLOGICAL ADVANCES AND RAMIFICATIONS
  - WHOSE BEST INTERESTS?
    - THE TERRI SCHIAVO CASE
Virginia Code § 54.1-2990

A. Nothing in this article shall be construed to require a physician to prescribe or render medical treatment to a patient that the physician determines to be medically or ethically inappropriate. However, in such a case, if the physician's determination is contrary to the terms of an advance directive of a qualified patient or the treatment decision of a person designated to make the decision under this article or a Durable Do Not Resuscitate Order, the physician shall make a reasonable effort to inform the patient or the patient's designated decision-maker of such determination and the reasons for the determination. If the conflict remains unresolved, the physician shall make a reasonable effort to transfer the patient to another physician who is willing to comply with the terms of the advance directive. The physician shall provide the patient or his authorized decision-maker a reasonable time of not less than fourteen days to effect such transfer. During this period, the physician shall continue to provide any life-sustaining care to the patient which is reasonably available to such physician, as requested by the patient or his designated decision-maker.
EVOLVING ISSUES

- REPRODUCTIVE ISSUES
- EUTHANASIA
  - PASSIVE VS. ACTIVE
  - PHYSICIAN ASSISTED SUICIDE
    - WASHINGTON V. GLUCKSBERG
      - 117 S.Ct. 2258 (1997)
    - VACCIO V. QUI LL
      - 117 S.Ct. 2293 (1997)
    - THE OREGON DEATH WITH DIGNITY ACT
      - Or. Rev. Stat. 127.800-.897
KEYS TO ETHICAL PRACTICE

- COMMITMENT
- CONSISTENCY
- COMMUNICATION
- DOCUMENTATION
- HUMANITY
- INTEGRITY