MOLST
MEDICAL ORDERS FOR LIFE-SUSTAINING TREATMENT
A POLST Paradigm Program

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ECHO® MOLST: Honoring Preferences at End-of-life

Ethics and the Law: What's the Latest? Who's Accountable for What?

COVID-19: Why it Matters

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The speaker has no significant financial conflicts of interest to disclose.

Learning Objectives

- Define the ethical framework for making end-of-life decisions
- Recognize the ethical framework is the basis for NY Public Health Law (NYPHL)
- Describe the impact of recent changes in NYSPHL
- Review Governor Cuomo's Executive Order No. 202.10: Addressing Changes to Healthcare Laws & Regulations March 23, 2020

Hierarchy of Medical Decision-Making

- Patient's Current Wishes
  - If the patient has decisional capacity, this **ALWAYS** takes precedence.
- Substituted judgment
  - Done by the surrogate decision-maker only when the patient is not fully capable of making decisions
  - Based on the patient's prior values and wishes
  - **Making decisions as the patient would**
  - Advance directive is used as a *guide*
  - Patient input is used when possible even if the patient is not fully capable of making the decision
  - Health care agent or surrogate (FHCDA or §SCPA 1750-b)

Hierarchy of Medical Decision-Making

- Best interest
  - Done by the health care agent or surrogate (FHCDA or §SCPA 1750-b) when the patient lacks decisional capacity and evidence does not exist for substituted judgment
  - Balancing benefits and burdens
  - Input from caregivers is important, but must focus on the patient – not the caregiver's best interest
  - Using values and beliefs, when there is no surrogate and no knowledge of patient values, beliefs, goals or prior wishes with respect to end-of-life care

Practical Strategies: Clarifying Best Interest When Patients Lack Capacity

- Meet with the patient, health care agent/surrogate and key caregivers
- Allow each person to tell their story
- Integrate cognitive assessment (capacity determination)
- Be honest and direct about the diagnosis
- Respond to emotions elicited
- Identify areas of agreement and disagreement

Practical Strategies: Clarifying Best Interest When Patients Lack Capacity

- Best Interest
  - To be respected and understood as people
  - To have their goals and values honored including personhood, spirituality, dignity
  - To lessen suffering and enhance quality of life
- Useful guide for physicians, NPs & PAs when the patient lacks capacity and does not have a health care agent or surrogate

Challenges: Patient *with* Capacity

- Choose right HCA, complete a health care proxy, if none exists, and the patient has capacity to do so
- Be sure copy of HCP and contact phone # is in medical record.
- Encourage patient's family to do the same
- Develop & discuss goals for care with the patient, family and loved ones
- Clarify medical decisions are patient-centered and remain so if the patient loses capacity

Challenges: Patients *without* Capacity

- Empower the designated health care agent
- If there is no health care proxy and the patient retains decisional capacity to choose a health care agent, complete a health care proxy
- If lacks capacity, identify the FHCDA Surrogate
- Always engage families in the process
- Always consider the patient's/resident's goals
- Provide both choice and guidance
- Consider quality of life and personhood for patients who cannot speak for themselves

MOLST Instructions and Checklists

Ethical Framework/Legal Requirements

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- Checklist #1 - Adult patients with medical decision-making capacity (any setting)
- Checklist #2 - Adult patients without medical decision-making capacity who have a health care proxy (any setting)
- Checklist #3 - Adult hospital or nursing home patients without medical decision-making capacity who do not have a health care proxy, and decision-maker is a Public Health Law Surrogate (surrogate selected from the surrogate list)
- Checklist #4 - Adult hospital or nursing home patients without medical decision-making capacity who do not have a health care proxy or a Public Health Law Surrogate
- Checklist #5 - Adult patients without medical decision-making capacity who do not have a health care proxy, and the MOLST form is being completed in the community.
- Checklist for Minor Patients - (any setting)
- Checklist for Developmentally Disabled who lack capacity – (any setting) **must** travel with the patient's MOLST

http://www.nyhealth.gov/professionals/patients/patient_rights/molst/

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Family Health Care Decisions Act (FHCDA)

- Part of Laws of 2010, Chapter 8, effective June 1, 2010
- FHCDA is Public Health Law (PHL) Article 29-CC.
- PHL Article 29-CC is applicable in general hospitals and residential health care facilities (nursing homes).
- Laws of 2010, Chapter 8 also repealed PHL § 2977 (Nonhospital orders not to resuscitate) and created a new PHL Article 29-CCC (Nonhospital Orders Not to Resuscitate). MOLST is the only alternate form approved by the Commissioner of Health, under 29-CCC, per successful legislated community pilot (2005-2008).

Decisions by Adults with Capacity under FHCDA

- No “therapeutic exception” anymore
- Even if the patient lacks capacity, there is no surrogate decision-making where the patient has already made a decision about the health care prior to losing capacity:
  - in writing or orally
  - with respect to a decision to withdraw or withhold life-sustaining treatment, such oral consent must be during hospitalization in the presence of two witnesses eighteen years of age or older, at least one of whom is a health or social services practitioner affiliated with the hospital

FHCDA Clinical Standards: When an Incapacitated Patient Has A Surrogate

1. Treatment would pose an extraordinary burden to the patient, as determined by attending physician, NP/PA* and independent concurrence of another physician, NP/PA and:
   - Patient has an illness or injury which can be expected to result in death in less than 6 months whether or not treatment is provided, **or**
   - Patient is permanently unconscious
2. Clinical condition is irreversible or incurable, and provision of treatment would involve such pain and suffering that it is deemed inhumane or extraordinarily burdensome

*As of June 17, 2020

Jonathan Karmel, Esq., NYSDOH, EMS Briefing, May 2010; revised 3/25/20

FHCDA Clinical Standards: When an Incapacitated Patient Has No Surrogate

- Physicians are asked to serve as surrogates and make decisions on behalf of the incapacitated patient
- Clinical standard: imminently dying (not defined and variably interpreted) prior to 2015
- Revised NYSDOH Checklist #4 posted 2/2019

What's New:
2015 Amendment to FHCDA

- A patient who lacks capacity and who does not have a health care agent or surrogate may be enrolled in hospice with a plan of care that includes orders regarding the provision or withdrawal/withholding of life-sustaining treatment (MOLST)
  - only if two physicians and an Ethic Review Committee agree that the patient meets certain criteria and the staff directly caring for the patient are consulted
- These are the same criteria that would apply to a decision by a surrogate under Checklist 3
- For incapacitated patients with no surrogate, who are not hospice-eligible, the clinical standard remains "imminently dying" that is not defined in FHCDA

Who Determines Capacity

- Under NYSPHL, a patient is presumed to have capacity until determined the patient lacks capacity
- Concurrent determination required
- **Prior to May 28, 2018**, only a physician could determine the patient's capacity to make decisions to withhold and/or withdraw life-sustaining treatment with or without the MOLST
- Special expertise required:
  - Persons with DD/ID
  - Persons with Mental Illness

Can an NP Participate in the MOLST Process and Sign MOLST?

This table is accurate as of February 3, 2019.

	Can NP Sign the MOLST (subject to the usual constraints on an NP)	
Decision by Patient (directly or by advance directive)	**Yes**	• Falls within NP's scope of practice. • No statutory limitation • NP can write the order
Decision by health care agent	**Yes**	• The health care proxy law, in requires the "health care provider" to honor decisions by agent. "Health care provider" would include a NP. • NP can write the order
Decision by FHCDA surrogate	**Yes, as of May 28, 2018**	• Currently, the FHCDA specifies that the attending physician must implement the surrogate's decision. PHL 2994-F. • The definition of attending physician (effective May 28) will include nurse practitioner. • So as of May 28 an NP can write the order
Decision by an § SCPA 1750-b surrogate (decisions for patients with intellectual disabilities)	**No**	• SCPA 1750-b.4(d) provides that it is the "attending physician" who must write the order. • The 2017 NP bill did not amend this.

Adapted from tables created by Robert N. Swidler, V.P. Legal Services, St. Peter's Health Partners, Albany NY

Can an PA Participate in the MOLST Process and Sign MOLST?

This table is accurate as of June 17, 2020. Pending Executive Order may impact this table.

	Can PA Sign the MOLST (subject to the usual constraints on an NP)	
Decision by Patient (directly or by advance directive)	**Yes**	• Falls within PA's scope of practice. • No statutory limitation • NP can write the order
Decision by health care agent	**Yes**	• The health care proxy law, in requires the "health care provider" to honor decisions by agent. "Health care provider" would include a PA. • PA can write the order
Decision by FHCDA surrogate	**Yes, as of May 28, 2018**	• Currently, the FHCDA specifies that the attending physician must implement the surrogate's decision. PHL 2994-F. • The definition of attending physician (effective June 17, 2020) will include nurse practitioner. • So as of June 17, 2020 a PA can write the order
Decision by an § SCPA 1750-b surrogate (decisions for patients with intellectual disabilities)	**No**	• SCPA 1750-b.4(d) provides that it is the "attending physician" who must write the order. • The 2019 PA bill did not amend this.

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Key Points

- Ethical principles and NYSPHL affirm end-of-life decisions to withhold &/or withdraw MUST be consistent with the patient's personal values, beliefs and goals for care
- MOLST represents "clear and convincing" evidence of patient preferences
- Authority of NPs & PAs is expanded under PHL
- For hospice-eligible, incapacitated patients with no surrogate, an amendment to FHCDA allows physicians, NPs & PAs as of 6/17/20
  - To provide hospice care
  - To complete a MOLST with the clinical standards and other requirements that align with MOLST DOH Checklist #3
- For incapacitated patients with no surrogate who are *not* hospice-eligible, clinical standard remains "imminently dying"

References

- Bomba, P.A., & Karmel, J.B. (2015). Medical, ethical and legal obligations to honor individual preferences near the end of life. *NYSBA Health Law Journal*, 20(2), 28-33.
- COVID-19 Guidance on MOLST/eMOLST
- MOLST.org
  - Ethics & Law
  - Ethical and Legal Requirements
  - Authority of a Health Care Agent & Surrogate
  - Authority of Nurse Practitioners & Current NYS Law
  - Authority of Physician Assistants as of June 17, 2020