New Tools Developed for End-of-Life Issues

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PHILADELPHIA — Two new ways of dealing with end-of-life issues—default surrogates and physician-ordered life-sustaining treatment orders—are becoming more common in hospitals, according to several legal experts.

So far, 37 states have passed default surrogate regulations, aimed at naming a person who can act on behalf of an incapacitated hospital patient who does not have an advance directive, said Nina Kohn of Syracuse (N.Y.) University's College of Law. The vast majority of Americans—especially minorities, those with lower education levels, and younger patients—do not have an advance directive, noted Ms. Kohn, who spoke at a meeting of the American Society of Law, Medicine, and Ethics.

The states that have passed the default surrogate statutes "create a priority list saying if there is not an appointed surrogate, first the spouse does it, then the parent, then an adult sibling, and so on," she explained. "The common justification is the idea that the statutes help protect wishes of the incapacitated person."

But does that really work? Ms. Kohn and her associate Jeremy Blumenthal, also of Syracuse University, have been studying whether the laws result in the selection of the surrogates that incapacitated patients would have selected for themselves, and whether those surrogates made the decisions that those patients would have made.

They found that Americans tend to favor close family members as surrogates, which is consistent with most of the state laws. On the other hand, said Ms. Kohn, "The priority lists don't account for a number of factors predictive of surrogate selection, such as surrogate gender. Women are disproportionately selected as surrogates." In addition, the statutes "don't do a good job of accounting for nontraditional family structures such as same-sex couples, or [situations] where people have more inclusive or more intergenerational notions of families." This is particularly true of African Americans, who are less likely than are members of other racial groups to select a spouse or adult child as a surrogate, according to studies, she said.

As to whether the surrogates are deciding things the same way the patients would have, "we can't know for sure … because the patient is incapacitated," she said. "But I think we can confidently say that there's real reason to be skeptical about the congruence levels being obtained."

The literature on the subject shows that surrogates are very bad at predicting patient wishes; in addition, surrogates are not always willing to do what they know the patients would want them to do, Ms. Kohn continued.

Ms. Kohn had two suggestions for improving decision making by surrogates: First, move away from selecting surrogates based on familial relations and toward surrogates whose values are more consistent with those of the patient. And second, provide surrogates with information to better inform their decisions—for example, what a typical patient would do in a particular situation.

Another emerging tool for hospital-based end-of-life care is the physician orders for life-sustaining treatment (POLST) form, said Robert Schwartz, J.D., professor of law at the University of New Mexico, Albuquerque. These orders also go by other names: medical orders on life-sustaining treatment, medical orders on scope of treatment, or physician orders on scope of treatment.

"This is the next step from the advance directive," he explained. 'These are physician orders that go in the patient's chart and provide information about the kind of patient care that should be provided."

Usually, a POLST form addresses resuscitation issues, the extent of appropriate medical intervention, use of antibiotics, provision of nutrition and hydration, desired place of treatment, and the identity of the authorized health care provider, Mr. Schwartz said. The forms all have a place for the physician's signature, and many have a place for the patient's or surrogate decision maker's signature.

He has some reservations about the concept. "My problem with all these documents is that it seems like it's a step backwards [because] doctors are deciding these things in the hospital [rather than] patients having the authority to make these decisions. On the other hand, if patients make these decisions and they're never honored, we haven't achieved a whole lot." ■