

"CLEAR AND CONVINCING EVIDENCE"

EDUCATIONAL GUIDE

Purpose

The purpose of this document is to define the "clear and convincing evidence" standard of New York State and provide practitioners with information that will assist in making decisions appropriately when the standard needs to be invoked. This standard of proof for determining the wishes of individuals is applicable only when the patient is incapacitated to make health care decisions, has not appointed a health care agent, and the decision involves the withholding or withdrawing of life-sustaining treatment.

Background

New York State has a strict standard of "clear and convincing evidence" that must be met if an incapacitated patient's wishes regarding the withholding or withdrawing of life-sustaining treatment are to be honored. In this context life-sustaining treatment means that the refusal or withdrawal of the treatment would likely result in the patient's imminent death (e.g., dialysis, respirator, artificial nutrition and hydration). Although neither New York State law nor court decisions offer a precise definition of "clear and convincing evidence," a review of the incapacitated patient's wishes provides information that can serve as guidance. Because it is a strict standard of the state it is imperative that clinicians follow it. Not to do so puts practitioners and the institution in great jeopardy.

In 1990 the US Supreme Court affirmed the right of competent patients to refuse life-sustaining treatment and upheld the right of the state to require "clear and convincing evidence" when a patient lacks decisional capacity (Cruzan).

New York State courts have permitted the removal of life-sustaining treatment for incapacitated patients who had given "clear and convincing evidence" regarding their wishes (Elbaum, Gannon, Hallahan, Delio, Saunders, Eichner). Likewise, the courts have refused to authorize the removal of life-sustaining treatment in the absence of "clear and convincing evidence" (Wickel, O'Connor, O'Brien, Storar).

Who Will Make These Decisions?

In most cases the medical center has the authority to decide whether or not an incapacitated patient's expressed wishes meet the standard of "clear and convincing evidence."

New York State regulations state that "Nothing herein shall be construed to require that the facility must or may not seek a court determination that any individual advance directive has been expressed in a "clear and convincing manner:" (400.21 (iii) (3), 12/31/91).

In 1993 the New York State Court of Appeals in the Elbaum case provided additional guidance. The court reaffirmed the right of a provider to refuse to discontinue treatment when there is "uncertainty on the matter" until "the issue is legally determined." The court then added that "in many, perhaps most cases, providers will appropriately consider the family's evidence on the matter conclusive and honor requests to terminate

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treatment of a hopelessly ill patient." Thus the evidence presented by families should be carefully weighed. It also cautions that "judicial resolution of the question may be required if the family members are divided or uncertain in their understanding of the patient's wishes."

Guidelines

Recalling that the standard of "clear and convincing" evidence applies only to an incapacitated patient who has not appointed an agent under the Health Care Proxy Law, the following guidelines are offered:

1. The most reliable statement of "clear and convincing evidence" is that which is written by the patient in his/her own hand in which specific directives are given and the circumstances in which they are to be followed are detailed. A Living Will is an example of a written statement that would satisfy the "clear and convincing evidence" when these two conditions are met:
 - the circumstances are substantially similar to those described by the patient;
 - the treatments in question are substantially similar to those described by the patient.

Unless there is a concrete reason to question that the content is a true expression of the patient's wishes, it should be assumed that it is such an expression and is to be honored.

2. When written directives have not been provided, oral directives must be carefully evaluated.
 - Did the individual express his/her wishes in a clear and unambiguous manner?
 - In what circumstances were these statements made?
 - Were these statements made over a sustained period of time? To many different people?
 - Is the current situation similar to situations described by the individual?
 - Is there any conflicting evidence about the patient's wishes?

Review Process

- Physicians should seek a second independent opinion from a physician appointed by the Medical Director to confirm the patient's incapacity.
- The attached checklist is to be completed to determine whether the "clear and convincing evidence" standard has been met.
- A review of the conformance of the evidence of the patient's wishes with the "clear and convincing evidence" standard by the Ethics Committee is to be sought whenever ambiguity is evident.
- A review of the conformance of the evidence of the patient's wishes with the "clear and convincing evidence" standard may be obtained by consultation with the Risk Manager and/or the Ethics Committee.