Hospital and Nursing Home Ethics Committees Face Significant New Responsibilities

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On June 1, 2010, the Family Health Care Decisions Act (the “FHCDA” or the “Act”) became effective in New York State.1 Proposed by the New York State Task Force on Life and the Law in 1992, the Act effects sweeping changes to New York State’s laws on treatment decisions for patients in hospitals and nursing homes.2 Specifically, the FHCDA establishes a new Article 29-CC of the Public Health Law that covers treatment decisions, including decisions to forgo life-sustaining measures, for adults who lack the capacity to decide for themselves and have not signed an advance directive. The Act also covers decisions to forgo life-sustaining treatment for children.

The FHCDA is the first New York State law to mandate that hospitals and nursing homes establish or participate in an ethics committee (“Ethics Committee”), with a significant role in resolving patient care disputes, providing ethics advice, and authorizing decisions by family members or other surrogates to withdraw or withhold life-sustaining treatment in certain sensitive cases. Notably, health care facilities, Ethics Committee members, consultants, and participants are protected from civil and criminal liability for actions taken reasonably and in good faith pursuant to the Act.3 This memorandum provides a brief description of the FHCDA decision-making process and standards, and then focuses on the role of Ethics Committees under the FHCDA—the duties of Ethics Committees, requirements for membership, and committee procedures.

I. Decision-Making Under the Family Health Care Decisions Act

The FHCDA established a new legal framework for treatment decisions for incapacitated adult patients, replacing “clear and convincing evidence” of an adult's wishes about treatment as the sole basis for decisions to forgo life-sustaining treatment for patients who have lost decision-making capacity and have not appointed a health care agent. For these patients, the FHCDA authorizes

family members and others close to the patient to decide about treatment, including life-sustaining measures, in accordance with standards and procedures in the Act.

The Act specifies the following priority list of individuals who can decide about treatment for patients determined to lack decision-making capacity: (i) a guardian authorized to make health care decisions pursuant to Article 81 of the Mental Hygiene Law; (ii) the spouse, if not legally separated from the patient, or the domestic partner; (iii) a son or daughter 18 years of age or older; (iv) a parent; (v) a brother or sister 18 years of age or older; or (vi) a close friend. An individual from the highest priority class on the list who is reasonably available, willing, and competent to decide will be authorized as a “surrogate” for treatment decisions.

Surrogates must decide about treatment in accordance with the patient’s wishes, including religious and moral beliefs, to the extent they are reasonably known, or, if they are not known, in accordance with the patient’s best interests. In addition to meeting these standards, surrogates are authorized to consent to withdraw or withhold life-sustaining measures if: (i) treatment is an extraordinary burden and the patient is terminally ill or permanently unconscious; or (ii) the patient has an incurable or irreversible condition and the treatment would entail such pain, suffering, or other burden that it would reasonably be deemed inhumane or excessively burdensome. As discussed in more detail below, decisions by surrogates to forgo life-sustaining treatment in certain cases require review and approval by an Ethics Committee.

The FHCDA also covers decisions to withdraw or withhold life-sustaining treatment for children. The FHCDA authorizes parents of minor children to forgo life-sustaining measures in accordance with requirements in the Act, resolving the uncertainty that has long marked parental authority for such decisions under New York State case law. The Act also establishes that if a minor is emancipated and has decision-making capacity, the minor can consent to forgo life-sustaining treatment.

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4 N.Y. Pub. Health Law § 2994-d(1). Recognizing the continuing importance of New York’s health care proxy law, and the preference given to individuals appointed by adults to decide about treatment for them, the FHCDA specifies that, if an adult has executed a health care proxy, the person appointed as agent takes priority over those authorized by the FHCDA to make decisions. The health care agent does not appear on the FHCDA surrogate list; decisions by a health care agent are governed by New York’s health care proxy law. See N.Y. Pub. Health Law, Art. 29-C (McKinney 1990 & Supp. 2011).

5 For decision-making standards under the Act, see N.Y. Pub. Health Law § 2994-d(4)-(5).


treatment, if the attending physician and the Ethics Committee determine that the decision satisfies
the standards in the Act, and the Ethics Committee approves the decision.8

II. Ethics Committees

The FHCDA requires all hospitals and nursing homes to establish an Ethics Committee or
participate in an Ethics Committee that serves more than one facility.9 The Act assigns significant
responsibilities to Ethics Committees, and imposes requirements for membership, notice to patients
and surrogates, procedures for meetings, and confidentiality.

A. Role and Responsibilities

The Act specifies that Ethics Committees will: (i) consider and respond to any health care matter or
request for assistance in resolving a dispute presented by a “Person Connected with the Case,”
such as the patient, surrogate, or involved health care professional;10 and (ii) review certain
decisions to forgo life-sustaining treatment by surrogates and mature minors. In cases where the
Ethics Committee responds to requests for assistance or dispute resolution, an Ethics Committee
can provide advice about the ethical aspects of proposed health care, make a recommendation, or
seek to resolve a dispute. Ethics Committees have significant latitude to determine how best to
carry out this responsibility; for example, depending on the nature of the issue or dispute, an Ethics
Committee could recommend an ethics or social work consultation.

Ethics Committees have the most substantial responsibility in cases where their decisions are
binding. This responsibility arises for decisions to forgo life-sustaining treatment in the following
cases: (i) in a hospital, for decisions to forgo artificial nutrition and hydration for a patient who is not
terminally ill or permanently unconscious, if a physician disagrees with the surrogate’s decision;
(ii) in a long-term care facility, if a surrogate consents to withdraw or withhold life-sustaining
treatment for a patient who is not terminally ill or permanently unconscious, except that Ethics
Committee review and approval is not required for decisions to withhold cardiopulmonary
resuscitation for such a patient; and (iii) in a hospital or long-term care facility, if a mature minor
consents to forgo life-sustaining treatment.

8 N.Y. Pub. Health Law § 2994-e(3). The Act defines an emancipated minor as an individual who is the parent of a child or is
sixteen years of age or older and is living independently from his or her parents or guardian. N.Y. Pub. Health Law § 2994-
a(8).

9 See N.Y. Pub. Health Law § 2994-m for provisions that govern Ethics Committee procedures, membership and
responsibilities.

10 “Person Connected with the Case” is defined in the Act to include the patient, any member of the surrogate list, an attending
physician, any other health or social service practitioner directly involved in the patient’s care, any duly authorized state
agency, and the facility or regional director for a patient transferred from a mental hygiene or correctional facility. N.Y. Pub.
Health Law § 2994-a(26).
In cases involving adults, the FHCDLA charges Ethics Committees to review the decision to forgo life-sustaining treatment by a family member or other surrogate, and determine if the decision meets the decision-making standards under the Act. A court may override the Ethics Committee’s determination in these cases; otherwise the surrogate is bound by the decision. The best interests standard in the FHCDLA leaves ample room for judgment, calling for a decision that takes into account factors such as: (i) consideration of the dignity of each person; (ii) the possibility and extent of preserving the patient’s life; (iii) the preservation, improvement or restoration of the patient’s health or functioning; and (iv) the relief of suffering. However, Ethics Committees should recognize that they are not authorized to serve as the surrogate, but as a check on a surrogate decision that is not consistent with the patient-centered standards in the Act.

Ethics Committees must apply the decision-making standards in the Act in carrying out their responsibilities. They should seek to do so in a timely fashion to avoid financial penalties imposed by the FHCDLA for failure to honor a surrogate’s decision. Specifically, the FHCDLA provides that facilities and physicians are not entitled to compensation for treatment, services, or procedures refused by a surrogate, when the surrogate’s decision is consistent with the standards in the Act.\footnote{11} The Act sets forth exceptions, including a provision establishing that the penalty would not apply while an Ethics Committee is considering a case, provided that the case "has been promptly referred to and considered by" the Ethics Committee.\footnote{12}

\section*{B. Ethics Committee Membership}

Ethics Committee membership must be interdisciplinary, and must include at least five members who have demonstrated an interest in or commitment to patient’s rights or to the medical, public health, or social needs of those who are ill. The members may include health care professionals, clergy, and others employed by or affiliated with the hospital or nursing home, as well as members of the community. At least three Ethics Committee members must be health or social service practitioners, at least one of whom must be a physician, and one must be a registered nurse. At least one Ethics Committee member must be a person without any governance, contractual, or employment relationship with the hospital or nursing home. A Person Connected with the Case may not participate as an Ethics Committee member in considering that case. Additional requirements for Ethics Committee membership apply in long-term care facilities.

\footnote{11}{N.Y. Pub. Health Law § 2994-s.}
\footnote{12}{N.Y. Pub. Health Law § 2994-a(1)(b).}
C. Ethics Committee Procedures

Ethics Committees must adopt a written policy governing committee functions, composition, and procedures that satisfies FHCDA requirements. In addition, as with other institutional committees, Ethics Committees should consider adopting bylaws that set forth a process to appoint the members, appoint or choose a chairperson, provide notice of meetings, establish a quorum for the meetings, and address other procedural matters.

Ethics Committees must respond promptly, as required by the circumstances, to: (i) any request for assistance in resolving a dispute by a Person Connected with the Case, or (ii) a request for consideration of a surrogate decision to withdraw or withhold life-sustaining treatment in the cases identified above.13 The Ethics Committee must also promptly give notice to the patient (if there is any indication of the patient’s ability to comprehend the information), the surrogate, other persons on the surrogate list directly involved in the decision or dispute regarding the patient’s care, the attending physician, a designated representative of the facility’s administration, and any other person the Ethics Committee deems appropriate of the following:

a) any pending consideration of a case concerning the patient, and for patients and persons on the surrogate list, information about the Ethics Committee’s procedures, composition, and function; and

b) the Ethics Committee’s response to the case, including a written statement of the reasons for approving or disapproving a surrogate’s decision to withdraw or withhold life-sustaining treatment for a patient who is not terminally ill or permanently unconscious, or for a decision by a mature minor to forgo life-sustaining treatment.14

The Ethics Committee must give Persons Connected with the Case an opportunity to present their views to the Ethics Committee, and the option of being accompanied by an advisor when participating in an Ethics Committee meeting.

Significantly, the Ethics Committee’s response to each case for which its decisions are binding must be in writing and included in the patient’s medical record. While the FHCDA provides that Ethics Committee proceedings and records are generally confidential and not subject to disclosure, the New York State Department of Health may review the written decisions of Ethics Committees as well as records of the proceedings in cases where the decision is binding.15 Ethics Committees

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13 See discussion, p. 3.
should therefore consider carefully the form that their written binding decisions will take and how they will be communicated to family members and other surrogates. Ethics Committees should also develop clear policies and procedures regarding minutes of the meetings and other Ethics Committee records.

III. Conclusion

The FHCDA grants substantial authority to Ethics Committees as a way to avoid costly litigation and establish a decision-making process within facilities, including for sensitive decisions to forgo life-sustaining treatment. Along with this responsibility, the Act provides protection from liability and from charges of professional misconduct for health care facilities and for Ethics Committee members, participants, and consultants for actions taken reasonably and in good faith pursuant to the Act.

Given the significant new responsibilities accorded Ethics Committees, especially for cases when their decisions are binding, hospitals and nursing homes should assure that Ethics Committee members have the expertise and training they need to fulfill their obligations. At a minimum, Ethics Committee members should understand the ethical principles that underlie the FHCDA, the standards in the Act that the Committee must apply, and the obligations and procedures mandated by the Act for Ethics Committees. Health systems should also consider how they can best support this new role for Ethics Committees within affiliated facilities, especially for institutions that do not have a strong history of ethics consultation or meetings.

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If you have any questions about Ethics Committees or other aspects of the FHCDA, please contact:

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