

REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*

CEJA Report 3 - A-04

Subject: Selection of Health Care Decision-Making Surrogates
(Resolution 2, A-03)

Presented by: Michael S. Goldrich, MD, Chair

Referred to: Reference Committee on Amendments to Constitution and Bylaws
(Mary W. Geda, MD, Chair)

1 At the 2003 Annual Meeting, the California Delegation introduced Resolution 2, "Selection of
2 Health Care Decision-Making Surrogates," which called for the Council on Ethical and Judicial
3 Affairs (CEJA) to "review the California Medical Association's (CMA's) policy document
4 *Selection of Health Care Surrogates with the Assistance of Health Care Professionals*, and endorse
5 it as policy of the AMA and/or as an ethical opinion in the AMA Code of Medical Ethics." This
6 resolution was referred to the Board of Trustees, and assigned to the Council on Ethical and
7 Judicial Affairs for report back to the House of Delegates in June 2004.

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9 **CMA'S POLICY DOCUMENT: "SELECTION OF HEALTH CARE SURROGATES WITH THE
10 ASSISTANCE OF HEALTH CARE PROFESSIONALS"**

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12 The CMA policy describes the need for a uniform process for physicians to select surrogate
13 decision-makers for patients who lack decision-making capacity. Indeed, in the absence of such a
14 process, physicians are likely to encounter significant ethical and practical difficulties in
15 performing this responsibility.

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17 The four-part document includes a preamble, a section of definitions, and two sections of general
18 guidelines for the selection of a surrogate: by patients with decision-making capacity and for those
19 without. The guidelines recognize that physicians should honor the preferences – whether
20 documented wishes or delegation of decision making power to a health care proxy – that an
21 individual developed in advance of losing decision-making capacity. However, in circumstances
22 where it is the physician's responsibility to identify a surrogate, the document emphasizes the
23 importance of selecting an individual who knows the patient well and is capable of assuming the
24 role. Finally, the policy cautions that surrogates should be selected based on the outlined criteria,
25 not because their preferences are aligned with health care professionals' treatment
26 recommendations.

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28 The Council has closely reviewed the document and commends CMA for developing an excellent
29 road map for the implementation of the surrogate selection process in the state of California.

* Reports of the Council on Ethical and Judicial Affairs are assigned to the reference committee on Constitution and Bylaws. They may be adopted, not adopted, or referred. A report may not be amended, except to clarify the meaning of the report and only with the concurrence of the Council.

1 Beyond California, the policy document provides a useful model of how to systematize this
2 complicated process. As such, wide dissemination of the document is encouraged. However,
3 because the laws for identifying surrogates can be distinct from state to state, in terms of
4 terminology and of standards, adoption of any one state's document is not necessarily appropriate
5 as policy for other states or as a standard of the AMA.

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7 Moreover, the AMA already has several ethics policies that address surrogate decision-making.
8 CEJA believes these documents provide a helpful and important resource for physicians that
9 transcends differences among the states and specialties.

10 SURROGATE DECISION MAKING IN THE CODE OF MEDICAL ETHICS

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12
13 Two specific policies in the AMA's Code of Medical Ethics offer guidance to physicians regarding
14 surrogate decision making. Opinion E-2.20, "Withholding or Withdrawing Life-Sustaining
15 Medical Treatment" considers the issue in the context of end-of-life care, whereas Opinion E-
16 8.081, "Surrogate Decision Making" is broader in scope, addressing health care decisions at any
17 stage. In their discussion of surrogate decision makers, the two opinions accomplish some of the
18 same objectives: (i) they offer a process for determining who the decision-maker should be for an
19 individual who lacks decision-making capacity; (ii) they outline steps the designated decision-
20 maker should follow in making health care determinations on behalf of the patient; and (iii) they
21 identify resources for health care professionals and/or families in case of decision-making conflict.

22
23 It is worth noting that while the two opinions are less detailed than CMA's policy document, they
24 cover the same ethical issues and offer similar guidance. Like the CMA document, Opinions E-
25 2.20 and E-8.081 also emphasize:

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- 27 • The value in physicians encouraging patients to establish an advance directive.
- 28 • The importance of selecting, when necessary and as possible, a surrogate with whom the
- 29 patient is closely associated, who enjoys a good understanding of the patient's values.
- 30 • Guidelines for fostering an effective surrogate-physician relationship.
- 31 • The notion that physicians should regard surrogate decision-makers as an extension of their
- 32 patients, and therefore should generally respect the surrogates' informed decisions.
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34 OPINION E-8.081, "SURROGATE DECISION MAKING"

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36 The careful review of Opinion E-8.081, "Surrogate Decision Making" that was undertaken in
37 addressing Resolution 2 (A-03), has prompted CEJA to consider possible amendments to Opinion
38 E-8.081 (see Appendix). In particular, CEJA believes that Opinion E-8.081 should acknowledge
39 legal standards at the state level that may restrict surrogate decision-makers' authority. Through
40 additional minor changes, the Council could clarify further the scope of the Opinion.

41 CONCLUSION

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44 AMA policy already satisfactorily addresses issues of surrogate decision making. CEJA believes it
45 would be duplicative to adopt additional guidelines. Moreover, it would be inappropriate for
46 guidelines of our national Association to be modeled on any one state's laws. Still, CMA's
47 *Selection of Health Care Surrogates with the Assistance of Health Care Professionals* is an
48 excellent document that may serve as a helpful resource to some other states.

1 RECOMMENDATIONS

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3 The Council on Ethical and Judicial Affairs recommends that the following recommendations be
4 adopted in lieu of Resolution 2 (A-03) and that the remainder of this report be filed:

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6 1. That the American Medical Association reaffirm policy E-2.20, "Withholding or
7 Withdrawing Life-Sustaining Medical Treatment," which provides guidance to physicians
8 on the selection and role of surrogates making decisions regarding life-sustaining medical
9 treatment. (Reaffirm CEJA Policy)

10

11 2. That the Council on Ethical and Judicial Affairs' proposed amendments to Opinion E-
12 8.081, "Surrogate Decision Making," be filed at I-04. (Directive to Take Action)

Fiscal note: less than \$500.

APPENDIX

E-8.081, Surrogate Decision Making, *proposed amendment*

1 Competent adults may formulate, in advance, preferences regarding a course of treatment
2 in the event that injury or illness causes severe impairment or loss of decision-making
3 capacity. These preferences generally should be honored ~~followed~~ by the health care team
4 out of respect for patient autonomy. Patients may establish an advance directive by
5 documenting their treatment preferences and goals in a living will or by designating a
6 health care proxy (durable power of attorney for health care) to make health care decisions
7 on their behalf.

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9 In some instances, a patient with diminished or impaired decision-making capacity can
10 participate in various aspects of health care decision-making. The attending physician
11 should promote the autonomy of such individuals by involving them to a degree
12 commensurate with their capabilities.

13
14 ~~If an incompetent patient is to receive medical treatment lacks the capacity to make a~~
15 health care decision, a reasonable effort should be made to identify a prior written
16 expression of values such as a pertinent living will, or a health care proxy. the presence of
17 ~~an advance directive. When such a patient lacks a documented advance directive, or when~~
18 reasonable efforts have failed to uncover such relevant documentation, physicians should
19 consult ~~defer to state law to identify a surrogate decision maker.~~ Physicians should be
20 aware that under special circumstances (for example, reproductive decisions for individuals
21 who are incompetent), state laws may specify court intervention. In the absence of state
22 law specifying either appropriate surrogate decision makers or a process to identify them,
23 the patient's family, domestic partner, or close friend should become the surrogate decision
24 maker. ~~Family includes persons with whom the patient is closely associated such as close~~
25 ~~friends or unmarried living partners. In the case w~~When there is no family, domestic
26 partner, or close friend, but there are persons who have some relevant knowledge of the
27 ~~patient, such persons~~ should participate in the decision-making process. In all other
28 instances, a physician may wish to consult ~~utilize~~ an ethics committee to aid in identifying
29 a surrogate decision maker or to facilitate sound decision making.

30
31 When there is evidence of the patient's preferences and values, decisions concerning the
32 patient's care should be made by substituted judgment. This entails considering the
33 patient's advance directive (if any), the patient's views ~~values~~ about life and how it should
34 be lived, how the patient has constructed his or her identity or life story, and the patient's
35 attitudes towards sickness, suffering, and certain medical procedures.

36
37 ~~In some instances, a patient with diminished or impaired decision-making capacity can~~
38 ~~participate in various aspects of health care decision making. The attending physician~~
39 ~~should promote the autonomy of such individuals by involving them to a degree~~
40 ~~commensurate with their capabilities.~~

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42 If there is no reasonable basis on which to interpret how a patient would have decided, the
43 decision should be based on the best interests of the patient, or the outcome that would best
44 promote the patient's well-being. Factors that should be considered when weighing the

1 harms and benefits of various treatment options include the pain and suffering associated
2 with treatment, the degree of and potential for benefit, and any impairments that may result
3 from treatment. Any quality of life considerations should be measured as the worth to the
4 individual whose course of treatment is in question, and not as a measure of social worth.
5 One way to ensure that a decision using the best interest standard is not inappropriately
6 influenced by the surrogate's own values is to determine the course of treatment that most
7 reasonable persons would choose for themselves in similar circumstances.
8

9 Physicians should recognize the proxy or surrogate as an extension of the patient, entitled
10 to the same respect as the competent patient. Physicians should provide advice, guidance,
11 and support; explain that decisions should be based on substituted judgment when possible
12 and otherwise on the best interest principle; and offer relevant medical information as well
13 as medical opinions in a timely manner. In addition to the physician, other hospital staff or
14 ethics committees are often helpful to providing support for the decision makers.
15

16 In general, physicians should respect decisions that are made by the appropriately
17 designated surrogate and based on the standard basis of sound substituted judgment
18 reasoning or the best interest standard. In cases where there is a dispute among family
19 members, physicians should work to resolve the conflict through mediation. Physicians or
20 an ethics committee should try to uncover the reasons that underlie the disagreement and
21 present information that will facilitate decision making. When a physician believes that a
22 decision is clearly not what the patient would have decided, ~~or~~ could not be reasonably
23 judged to be within the patient's best interests, or primarily serves the interest of a
24 surrogate or a third party, the dispute should be referred to an ethics committee should be
25 consulted before requesting court intervention resorting to the courts.
26

27 Physicians should encourage their patients to document their treatment preferences or to
28 appoint a health care proxy with whom they can discuss their values regarding health care
29 and treatment in advance. Because documented advance directives are often not available
30 in emergency situations, physicians should emphasize to patients the importance of
31 discussing treatment preferences with individuals who are likely to act as their surrogates.
32 (I, III, VIII) Issued December 2001 based on the report "Surrogate Decision Making,"
33 adopted June 2001; updated December 2004.