A patient who lacks capacity and who has no surrogate is extremely vulnerable and presents complex ethical challenges to his physician. Who should make treatment decisions? Which criteria should guide those decisions? What if no laws or professional policies apply? A legal expert provides ethical guidance based on five key observations.

The AMA Code of Medical Ethics provides additional guidance on caring for unrepresented patients, such as opinion 2.1.2, “Decisions for Adult Patients Who Lack Capacity,” to involve patients in health care decisions commensurate with their decision-making capacity, and opinion 5.2, “Advance Directives,” to support continuity of care for patients when they transition across care settings, physicians or health care teams.

Following are highlights from an article in AMA Journal of Ethics® (@JournalofEthics) by Thaddeus Mason Pope, professor of law and director of the Health Law Institute at the Mitchell Hamline School of Law in Saint Paul, Minnesota, noting the top-level considerations for physicians and risks associated with each.

“Decision-making for such unrepresented patients is a common challenge in the United States,” Pope wrote. “Nevertheless, few laws or professional organization policy statements address either who should make treatment decisions for unrepresented patients or according to which criteria treatment decisions should be made.”

He recommends five things to keep in mind:

**Unrepresented patients are extremely vulnerable.** “They not only are unable to advocate for themselves but also lack trusted and reliable friends or family to advocate for them,” Pope wrote. “As such, clinicians and institutions should carefully evaluate treatment decisions made on their behalf.”

He notes three significant treatment risks: overtreatment, undertreatment and delayed treatment. “In short, available evidence suggests that, in the absence of a surrogate, there is a risk that
incapacitated patients will receive treatment inconsistent with their preferences or best interests. Being aware of these risks should help clinicians be more vigilant in guarding against them,” he wrote.

The patient might, in fact, not be incapacitated. “As long as the patient can understand the significant benefits, risks and alternatives and can make and communicate a decision about proposed health care, there is no need for a surrogate,” Pope wrote. “Unfortunately, clinicians might too quickly (and erroneously) conclude that a patient lacks capacity.”

He offers three tips to help mitigate these errors:

- Presume all patients have capacity.
- Recognize that capacity depends on the complexity of the decision at hand.
- Appreciate that decision-making capacity may fluctuate over time, even within a day.

Patients who seem unrepresented also might not be. “Patients who appear to be unrepresented are often not,” Pope wrote, adding that there are three tips for determining whether a patient has or needs a surrogate.

First, ascertain whether the patient has an advance directive or a physician order for life-sustaining treatment that could guide decisions. Second, if necessary, ask social workers to help locate available surrogates. Third, take a broad and flexible view of who could be a surrogate. Many state laws specify a limited list of surrogate categories, so if nobody on this list is available, consider talking to people who know and care about the patient.

Relevant state laws are highly variable. Only a dozen or so states specify decision-making processes for unrepresented patients, and even those processes are highly variable. Because of this vulnerability, institutions should “manage decision making through a fair process even when state law authorizes procedures with less oversight. Typically, more oversight is warranted as the invasiveness or burden of the treatment increases,” Pope wrote.

Use guardianship and conservatorship only as a last resort. Guardianship is generally considered “neither a preferred nor an adequate solution,” Pope noted, explaining how the disadvantages can significantly outweigh the advantages.

The July issue of the journal features numerous perspectives on the ethics of representing unrepresented patients and gives you an opportunity to earn CME credit.