Legal Risks & Ethical Imperatives
Palliative Care or Futile Care

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Legal and Ethical Issues relating to Palliative Care are Changing

Historically legal and ethical issues related to patients and families requesting withdrawal of life support

- Cases of Karen Ann Quinlen and Nancy Cruzan
- Reinforced laws relating to self-determination and the right to refuse life-sustaining care
- Strengthened principles of informed consent
- Diminished paternalism in medicine
- Provided the foundations for PC
New Legal and Ethical Issues

- Patient/families who demand medically non-beneficial or futile care.
- Fewer ethical norms and little settled case law regarding medically futile care
- Antidiscrimination in Treatment Act, an attempt to codify one ethical approach
How to Respond to the New Legal and Ethical Challenges

Active Ethics Committee is a Critical Component of a Hospital Palliative Care Program

- Every Ethics Committee should have a member trained in Palliative Care
- Benefits of an Ethics Committees consultation:
  - Hear from everyone who has knowledge of the case
  - Bring in experts that know of options that have not been considered by the treatment team.
  - A recommendation from a multi-disciplinary ethics committee provide legal protection and a stronger defense for a course of action
How to Respond to the New Legal and Ethical Challenges, continued

Every Healthcare organization should have a Dispute Resolution Policy with steps for appealing disagreements over the plan of care:

- Based on legal due process principles of fairness to all stakeholders.
- Progressive appeals process may include the following:
  - Request for a second opinion
  - Request an Ethics Committee consultation
  - Appeal to a review panel for a fair hearing
    - Review panel consists of objective members of the institution's ethics committee
    - Reasonable Notice of hearing (no less than 48 hours)
    - Providers and patient/family or representatives may present the facts
  - Opportunities to terminate patient/physician relationship and seek care elsewhere
  - Injunctive relief always available to patient/family
  - Palliative Care is always offered
Definitions of Medical Futility

- The patient has a prognosis of imminent death;
- Evidence that suggested therapy cannot achieve its physiologic goal;
- Evidence that suggested therapy will not or cannot achieve the patient’s or family’s stated goals;
- Evidence that suggested therapy will not or cannot extend the patient’s life span; and
- Evidence that the harm to a patient caused by the treatment outweighs the proportionate benefits.
Does Nondiscrimination in Treatment Act preclude Futility Policies?

- Geriatricians tell us that the standard of care for elderly patients is differently than for young patients.
- Physicians still have the duty of beneficence and non-maleficence regardless of the Act.
- Creating a policy to direct the conduct of the organization and its Ethics Committee is even more critical.
- Documentation is the key.
  - Don’t use stand alone statements such as “the patient is not a candidate for XYZ procedure” or “procedure is not appropriate due to the patient’s age”.
  - Innumerate medical reasons why the patient is not a candidate or why the procedure is not appropriate.
The Nondiscrimination in Treatment Act is an unfunded mandate

Drafters of the NDTA anticipated the patient or family would pay for the expense of demanded care.

• Patients/families rarely have the resource’s to pay for these expenses.
• Insurance companies will not pay for “unnecessary care”
• Hospitals usually absorb the costs
Is it Unethical to Discuss Cost of Care with Patients?

Old School:
- Physicians never discussed cost with patients for many reasons
  - Focus on cure and avoid worries about finances
  - No need for the discussion as Health insurance covered almost all cost
  - Most physicians have no knowledge of the cost of healthcare
- Today:
  - Many patients are uninsured or underinsured
  - Growing knowledge and concern about the personal cost of healthcare
  - IT updates and innovations make cost data more available
  - Growing transparency of costs increases cost-based competition.
Discussion of Cost is a Necessary Element of Informed Consent

- Knowledge of cost causes people to be better shoppers for and more responsible users of healthcare.
- People want to know the impact of the costs of healthcare on their personal finances.
  - Hospitals aggressively collect on hospital bills.
- Many patients want to be responsible users of healthcare costs beyond their own personal finances.
- Every hospital has had the “Million Dollar Patient” who demands everything but cannot pay.
Are We Justified in Withdrawing Futile Care Due to the Cost Burdon on the Organization?

Social Justice: Hospitals are responsible to be good stewards of resources, but avoid discussions of cost due to:

- Fear of bad publicity when patient care decisions are made based on making or loosing money
- Hospitals believe they will never win the PR battle
- HIPAA contributes to the hospital’s PR disadvantage
- Hospitals would rather cost shift than deny medically futile care
Why do Law Makers Impose Increasing Restrictions on the Practice of Medicine?

- Cost cutting efforts.
  - Creative means used by physicians to insure costs of care are covered are in fact insurance fraud.
  - Physicians need to fully understand the contracts they sign with payors.
- Loss of trust that Healthcare will act in a patient’s best interest.
  - New practice arrangements undermine the patient/physician relationship.
  - Results in more litigation.
  - Results in more restrictive laws and regulations which in turn further undermine trust.
- Cultural and religious efforts to influence the Practice of Medicine.
Current Models of Payment undermine Palliative Care...“Follow the Money”

- Hospitals and physicians are paid by the volume of services provided
- Aggressive, curative care pays more than Palliative Care
- Palliative Care promises cost savings from reducing length-of-stay and readmissions
- Cost savings are always less appealing than revenue enhancement
  - Cost savings means someone is making less
  - Revenue enhancement means someone is making more
- Hospitals fear “Demand Destruction”
The Promise for Palliative Care under Healthcare Reform

Under healthcare reform Palliative Care will become more important.

- The population is aging
- In the future hospitals and physicians will be paid for performance (P4P).
- Quality rather than volume will generate revenue.
- Complete transparency of charges and outcomes will force cost down and improve quality
- More out-patient and community based treatment
- More costs will be pushed to the consumer which will result in
  - More responsible purchasers of healthcare.
  - Greater healthcare literacy
- Healthcare providers will have to be more patient centered, PC promises benefits in all these areas.
Accountable Care Organizations

HMO’s on steroids

- Payors pay on a capitated basis for a defined population
- The only way to improve the bottom line is to increase the number of patients in the program or reduce costs
- Move to out-patient and community based care
  - Lower cost and greater patient satisfaction
- Prevent quality reduction by:
  - Payments dependent on favorable quality outcomes.
  - Required reporting on quality and patient satisfaction indicators
  - Percent of PMPM payments dependent on rank at or above national average on indicator scores
  - Patients will be free to switch ACO’s if unsatisfied
Greater Emphasis on Palliative Care and Associated Ethical Concerns

- Palliative care is often the lowest cost, most compassionate, most appropriate and best quality of care for many.
  - Healthcare industry and patient’s will be more acutely driven by the financial implications of end-of-life decisions.
- As the leaders in lower cost care, Palliative Care providers must be watchful for ethical conflicts;
  - is Palliative Care ordered as the best quality care for the patient or the most favorable financial alternative.
  - Healthcare organizations need to anticipate these ethical issues, draft policies, develop training of physicians, staff and patients relative to the policies.
  - All policies must be informed by evidence based medicine and best practices to be ethically and legally defensible.
Thank you

Any Questions?