

Principles for Decision-Making

Precedence Protocol for Advocacy

There are three primary principles that guide decision-making:

1. Informed consent
2. Best interest
3. Substituted judgment

If a person has decision-making capacity, the doctrine of informed consent applies. Someone who is unable to give informed consent may have decisions made by someone else on his/her behalf according to the principles of best interest or of substituted judgment. There is frequently a history of group decision-making: medical personnel, family members and the resident decide what is to be done. Sometimes these decisions are made without the resident's full participation, even if the person is competent. Such group processes can exert undue influence upon the resident.

- **How does an ombudsman determine informed consent for the purpose of pursuing an investigation or resolution?**
- **Which of these forms of decision-making should an ombudsman support?**
- **What does an ombudsman use to support his/her actions?**

1. Informed Consent

The intent of this doctrine is to safeguard the autonomy of an individual's decision-making in both treatment and research settings. There are three general components:

- a) disclosure to the person of information relevant to the proposed treatment or research;
- b) the person's freedom of choice in a noncoercive environment;
- c) competency of the person to make [and communicate] a decision on his/her own behalf (Stanley et al. 1988).

Of course, the determination that someone can exercise informed consent hinges upon the individual's decision-making capacity. Other influential factors are: the environment, who explains the alternatives, how the options are presented, who determines that a reasoned decision in fact has been made. (For a more in depth discussion of Decision Making Capacity, see "Working Through Ethical Dilemmas in Ombudsman Practice," written by Sara Hunt, 1989)

2. Best Interest

A principle of acting in the interests of someone's well-being, health and welfare. This principle has its origins in the judicial system as cases have been litigated regarding treatment for patients who are incompetent. In the medical field, it implies that the benefits of treatment are weighed with the burden of treatment in order to determine what best interest is. It is acting with beneficence or benevolence. Patient health and welfare are the controlling values (Caplan, 1985).

If someone were applying this principle, the "reasonable person" standard would be used. The patient's interests are promoted as they would probably be conceived by a reasonable person in the patient's circumstances, selecting from within the range of choices that reasonable people would make. (The Hastings Center, 1987)

The outcome of this principle depends upon the way best interest is determined. The person making the decision about best interest, a surrogate decision-maker, plays a critical role in what happens.

Key questions are:

- Who is making this decision: family members? physician?
- If there's more than one physician, which one(s) decides?
- Are decisions made according to the best interest of the patient/resident or for the family/caregiver?
- Is best interest determined on the basis of allocation of health care resources?
- Does ageism influence the decision-making process?

3. Substituted Judgment

Clinicians, or other decision-makers, attempt to decide about the acceptability of medical interventions as the patient would have decided had he or she been fully competent. Individual autonomy, following what the individual wants or would choose, is a priority value (Caplan, 1985). This takes into primary consideration what is known about the person's values and preferences. It usually requires some reflection about statements the individual made, actions which indicate personal values, preferences the individual expressed, talking with the individual's closest family members or friends, and looking at the individual's lifestyle and enduring characteristics.

Comparison of these 3 Principles

By definition these 3 principles, informed consent, best interest and substituted judgment, are quite distinct. The principle of informed consent presumes that the individual can make a decision for himself/herself. In the case of best interest or substituted judgment, someone else is making a decision for the person.

If the best interest standard is used, the decision-maker uses his/her own values, knowledge, and expertise regarding treatment/services to make a decision for someone else. The underlying assumption is that the decision will be for the individual's "good," will support their well-being and health.

In the case of substituted judgment, decision-makers ask, "What would this person choose, if he/she were able to express a choice?" An attempt is made to identify what is known of the values and preferences of that individual. Then a decision is made according to that knowledge. At least one research study has shown a significant congruence between the

decisions generated by this approach and what elderly individuals would choose for themselves. (Tomlinson, 1987)

For individuals who cannot exercise informed consent as a decision-making process, it seems that the principle of substituted judgment is more compatible with the principle of individual autonomy than best interest. The beginning point for this principle is trying to determine what the individual might choose were he/she able; thus upholding the concept of self-rule, autonomy.

Guidance for Ombudsmen

- Ombudsmen should seek to assure that informed consent is utilized to the greatest extent possible.
- When the principle of informed consent isn't applicable, ombudsmen may choose to advocate for the use of substituted judgment as a decision-making principle. Undoubtedly it may be more time consuming and difficult than using best interest as the decision-making principle.
- There may be situations where best interest may either be appropriate or the only recourse. Other cases may call for a combination of substituted judgment and best interest, with neither being applied to the exclusion of the other.
- Ombudsmen must consider a resident's decision-making capacity and ways to reinforce the resident's autonomy when choosing which decision-making principle would be applicable to a case..