

# Ethics Committee Operation and Function: Current Challenges

Thaddeus Mason Pope, J.D., Ph.D.  
2011 AMBI Clinical Ethics Conference  
Albany, NY • November 18, 2011

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1. Evolution + History
2. Traditional roles
3. Growing power
4. Future directions
5. Challenges

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# Evolution History

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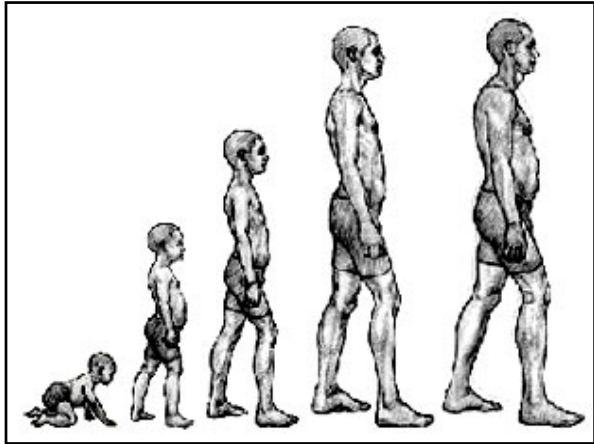
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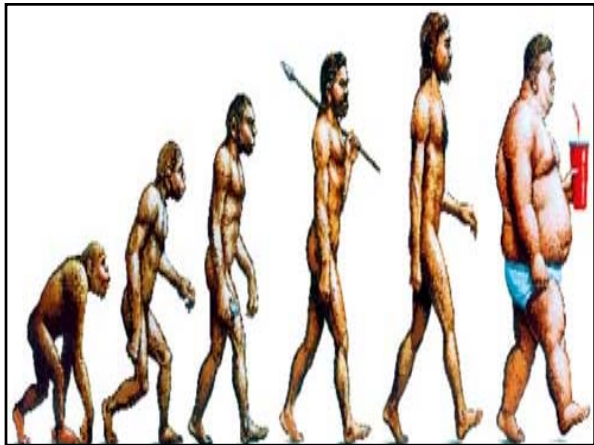
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Therapeutic abortion  
Dialysis allocation  
IRB

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**Gatekeepers**

**Decision-makers**

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	Result Optional	Result Mandatory
Use Optional		
Use Mandatory		

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	Result Optional	Result Mandatory
Use Optional	<b>1</b>	<b>3</b>
Use Mandatory	<b>2</b>	<b>4</b>

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	Result Optional	Result Mandatory
Use Optional	1	3
Use Mandatory	2	4

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# 1950's

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Endanger . . . life of the pregnant woman

Seriously and permanently injure her health

Fetus . . . grave, permanent, and irremediable . . . defect

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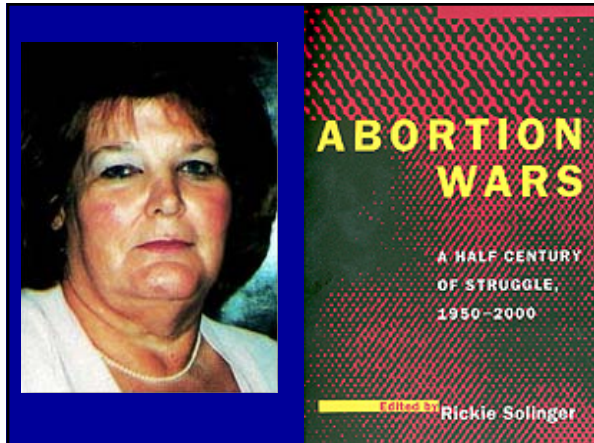
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**1960's**

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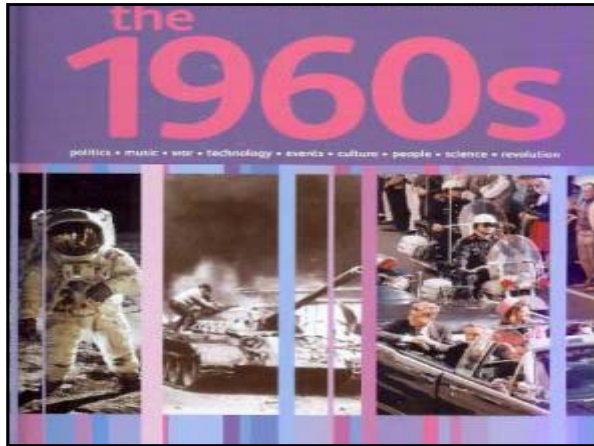
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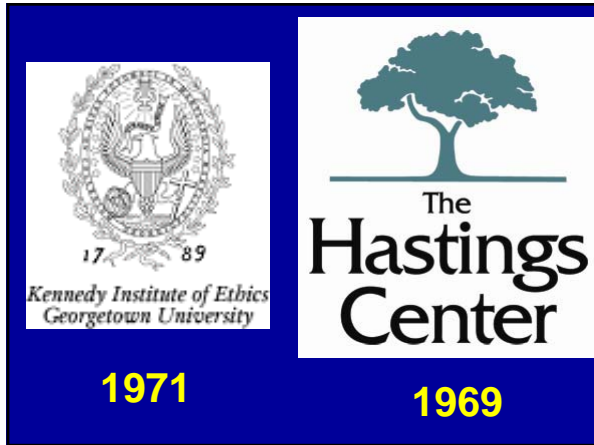
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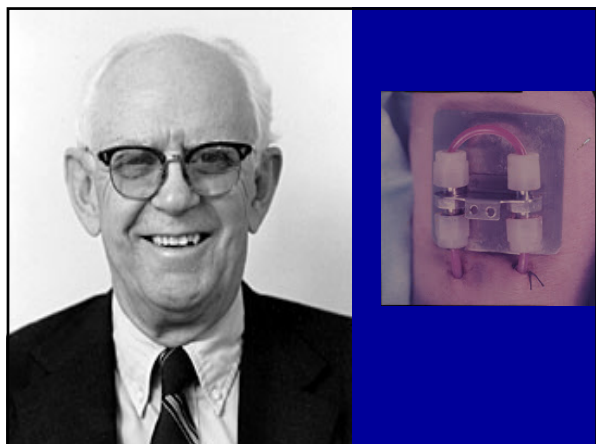
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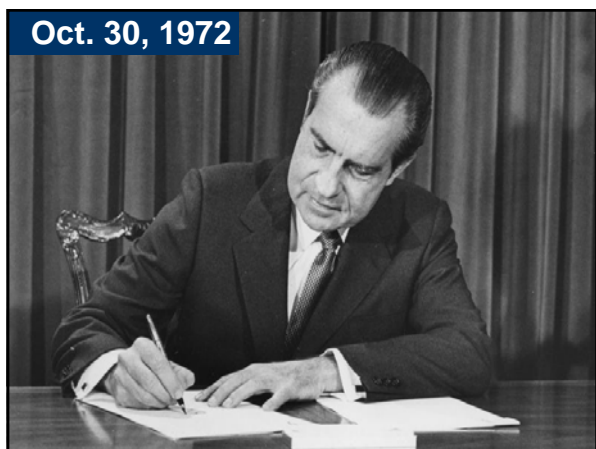
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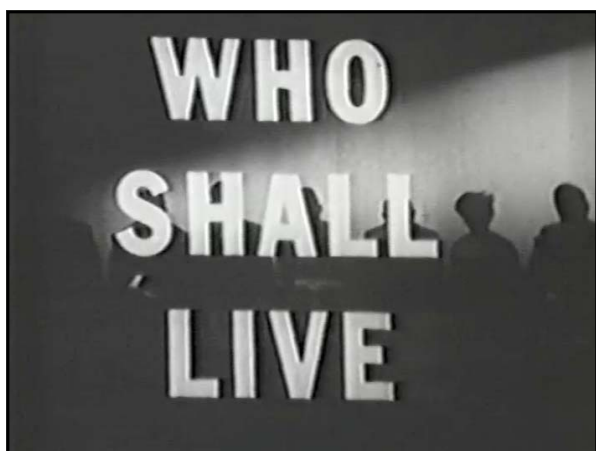
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# 1966

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Journal of Medicine  
Copyright, 1966 by the Massachusetts Medical Society  
Volume 74 JUNE 16, 1966 Number 24  
Special Article pages 154-160  
SPECIAL ARTICLE  
ETHICS AND CLINICAL RESEARCH\*  
Henry A. Beecher, M.D.  
BOSTON

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Surgeon  
General  
William H.  
Stewart

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DOI: 10.1371/journal.pmed.0020009.g001

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## Ancestors

Abortion

Dialysis

IRB

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## Ancestry to birth

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# 1975

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THE PHYSICIAN'S DILEMMA  
A DOCTOR'S VIEW: WHAT THE LAW SHOULD BE

Dr. Karen Teez\*

*It is a fairly recent phenomenon that we find ourselves discussing death with this kind of openness and it is, without question, long*



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1976

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“shall consult with the **hospital’s ‘Ethics Committee’** . . . . If [it] agrees . . . life-support system . . . without any civil or criminal liability”

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Help **screen** cases  
“contaminated by less than worthy motivations of family or physician”

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# 1983

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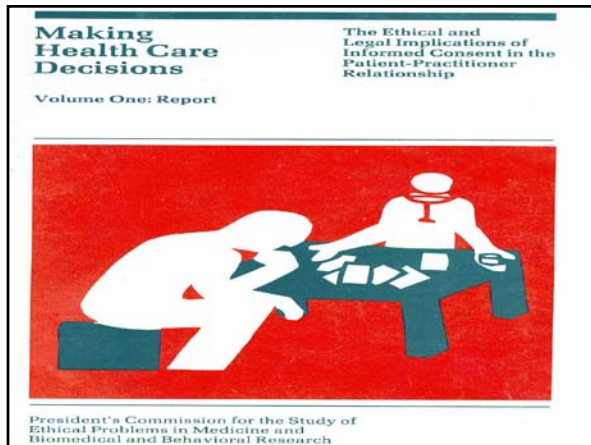
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# 1984

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Infant Care  
Review  
Committee

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1991

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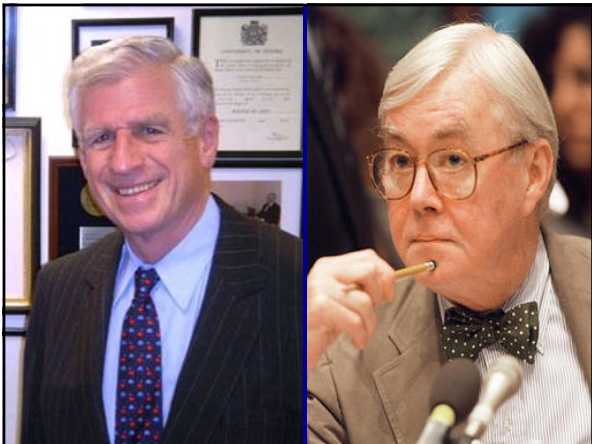
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# 1992

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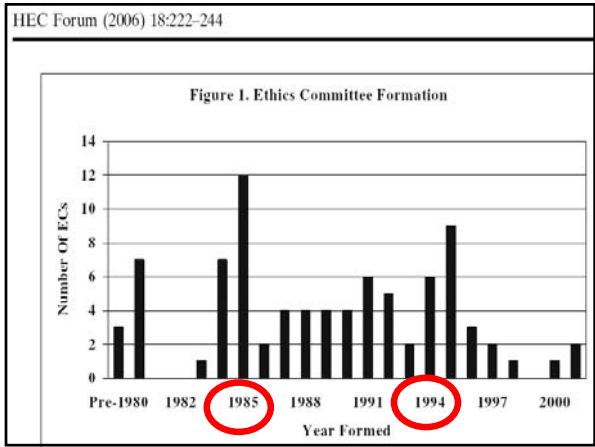
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**RI.1.10**

Develop and implement a “**process** to handle . . . ethical issues that are prone to conflict”

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**LD.04.02.03**

The hospital has [and uses] a **process** that allows staff, patients, and families to address ethical issues or issues prone to conflict.

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Ethical & Religious Directives for Catholic Health Care Services #37

“An ethics committee or some alternate form of ethical consultation should be available . . .”

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# 2005

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Universal Declaration  
Bioethics and Human  
Rights, Art. 19

“Independent, multidisciplinary  
and pluralist ethics committees  
should be established, promoted  
and supported . . . to . . . provide  
advice on ethical problems in  
clinical settings”

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# State mandates

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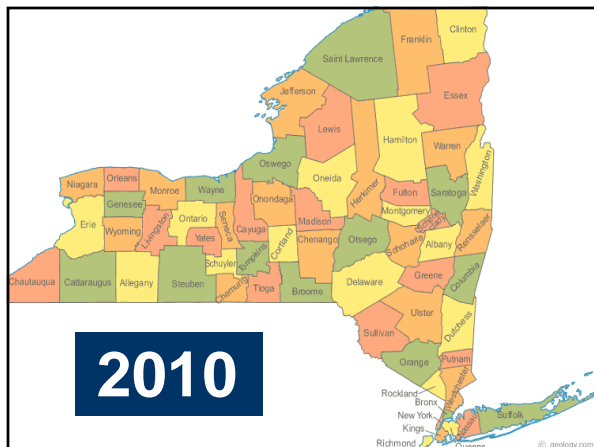
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# Traditional Roles

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## Who does the HEC serve

- Patients
- Institution
- Staff
- Community

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- Education
- Policies
- Cases

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## Educate

Self

Staff

Community

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## Policies

DNAR

Informed  
consent ....

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## Cases

Capacity

Surrogate designation

Surrogate objection to reliance  
on prior wishes

Disagreement about major or  
LST for patient alone

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Prospective

Retrospective

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Proactive

Preventive

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	Result Optional	Result Mandatory
Use Optional	1	3
Use Mandatory	2	4

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# Growing Power

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	Result Optional	Result Mandatory
Use Optional	1	3
Use Mandatory	2	4

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# *De facto* authority

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CANADA  
PROVINCE DE QUÉBEC  
DISTRICT DE MONTRÉAL  
No : 500-17-048988-094

COUR SUPÉRIEURE

MARIE-ÈVE LAURENDEAU, tant personnellement *qu'ès qualité* de tutrice de sa fille mineure, Phébé Mantha, résidant et domiciliée au 392, rue Lafontaine, Châteauguay, Québec, district judiciaire de Beauharnois,  
-et-  
STÉPHANE MANTHA, tant personnellement *qu'ès qualité* de tuteur de sa fille mineure, Phébé Mantha, résidant et domicilié au 392, rue Lafontaine, Châteauguay, Québec, district judiciaire de Beauharnois,

**Demandeurs,**

c.

CENTRE HOSPITALIER DE LASALLE, corporation légalement constituée et ayant sa place d'affaire au 8585, terrasse Champlain, Lasalle, Québec, H8P 1C1, district judiciaire de Montréal;  
-et-  
DOCTEUR NATHALIE GIROUARD, résidant et domiciliée au 4000, boulevard LaSalle, Verdun, Québec, H4G 2A3, district judiciaire de Montréal,  
-et-  
HÔPITAL DE MONTRÉAL POUR ENFANTS, corporation légalement constituée et ayant sa place d'affaire au 2300, rue Tupper, Montréal, Québec, H3H 1P3, district judiciaire de Montréal;

**Défenderesses.**

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“Lumping”

Resource barriers

Judicial deference

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*De jure*  
authority

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“function . . . **make decisions** regarding ethical questions, including . . . life-sustaining therapy”

*Haw. Rev. Code 663-1.7(a)*

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**Adjudicator**  
**Gatekeeper**

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**Adjudicator**

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# Disputes

Futility

Surrogate

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# Role 1:

Adjudicate

Futility Disputes

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You may stop LST  
for **any reason** --  
if your ethics  
committee agrees

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“not civilly or  
criminally liable  
or subject to . . .  
disciplinary action”

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1. 48hr notice
2. HEC meeting
3. Written decision
4. 10 days to transfer
5. Unilateral WH/WD

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April 14, 2006  
Emilio Gonzales  
407 Neches St.  
Lockhart, Texas 78644

## Step 1: Notice HEC meeting

Dear Ms. Gonzales;

We, the physicians and other members of the healthcare team, appreciate you taking your time to attend the patient care conferences regarding your son.

At the last conference, your son's physician discussed his brain condition and the poor prognosis for any further neurological improvement. As you know, the physicians involved in the care of your son believe that his condition is irreversible and that to continue certain treatments will serve to prolong his suffering without the possibility of cure. We understand that you do not agree with this position and want the hospital to continue to provide all current treatments for your son.

When disagreements of this nature arise, Texas law allows hospitals to call the hospital ethics committee meeting to review whether certain treatments are medically appropriate. A meeting has been called for the Seton Family of Hospitals Pediatric Ethics Committee to consider Emilio Gonzales's care. This meeting will be held on February 16, 2007 at 09:00 a.m. in the 3<sup>rd</sup> floor boardroom at Brackenridge Hospital of Austin. The physicians providing care for your son, as well as the ethics committee members will attend the meeting. Under Texas law you have the right to attend and participate in this meeting. While that is not legally required, we strongly encourage you to be present for this discussion. You will be given the opportunity to ask questions regarding your son's care and to provide input into the committee's decision-making process.

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## Step 2: HEC Meeting

A photograph showing a group of people sitting around a long table in a meeting room. They appear to be engaged in a discussion or meeting. There are papers and a coffee cup on the table in the foreground.

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### Step 3: HEC written decision

The Ethics Committee further recommends that

- The treatment plan for the patient be modified to allow only comfort measures (such as hydration, pain control and other interventions designed to decrease the patient's suffering).
- New complications that develop should not be treated, except with additional palliative measures, as appropriate.
- The patient's code status be changed to a DNR.
- Appropriate spiritual and pastoral care resources should be provided to Emilio's mother and family members.

In summary, the consulted members of the Ethics Committee concur with the recommendation by the Attending Physician and patient care team to withdraw aggressive care measures, including use of the ventilator, and to allow palliative care only. The Attending Physician, with the help of the Children's Hospital of Austin, will continue to assist the patient's family in trying to find a physician and facility willing to provide the requested treatment. The family may wish to contact providers of their choice to get help in arranging a transfer.

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### Step 4: Attempt transfer



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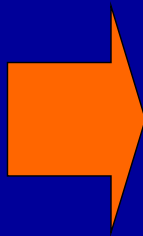
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### Step 5: Unilateral withdrawal

No transfer



Withdraw 11th day

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No judicial review

HEC = forum of  
last resort

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Resolution 505-08      **TITLE:** LEGAL SUPPORT FOR NONBENEFICIAL  
TREATMENT DECISIONS  
**Author:** H Hugh Vincent, MD;  
William Andreck, MD  
**Introduced by:** District 8 Delegation  
**Endorsed by:** District 8 Delegation      Reference Committee **E**  
October 4-6, 2008  
*This resolution constitutes a proposal for consideration by the California Medical Association  
House of Delegates and does not represent official CMA policy.*

**WHEREAS**, it is still common for physicians who feel non-beneficial or futile treatments are being provided or considered to feel threatened by legal action by the patient's family or other surrogates, and thus continue to provide such care against their best medical judgment; and

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WASHINGTON STATE MEDICAL ASSOCIATION  
HOUSE OF DELEGATES  
Resolution: C-5  
(A-09)  
Subject:            Legal Protection for Physicians When  
Treatment is Considered Futile  
Introduced by:    King County Medical Society Delegation  
Referred to:      Reference Committee C

WASHINGTON STATE MEDICAL ASSOCIATION  
HOUSE OF DELEGATES  
Resolution: A-2  
(A-10)  
Subject:            WSMA Opinion on Medical Futility in End-of-Life Care  
Introduced by:    Shane Macatlay, MD, Delegate  
WSMA Board of Trustees  
Referred to:      Reference Committee A

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**RESOLUTION 1 - 2004**

[\(read about the action taken on this resolution\)](#)

**Subject: Futility of Care**

Introduced by: Michael Katzoff, MD and the Medical Society of Milwaukee County

RESOLVED, That the Wisconsin Medical Society, concurrent with a recommendation of the American Medical Association, Medical Futility in End-of-Life Care policy E-2.037, supports the passage of state legislation which establishes a legally sanctioned extra-judicial process for resolving disputes regarding futile care, modeled after the Texas Advanced Directives Act of 1999.

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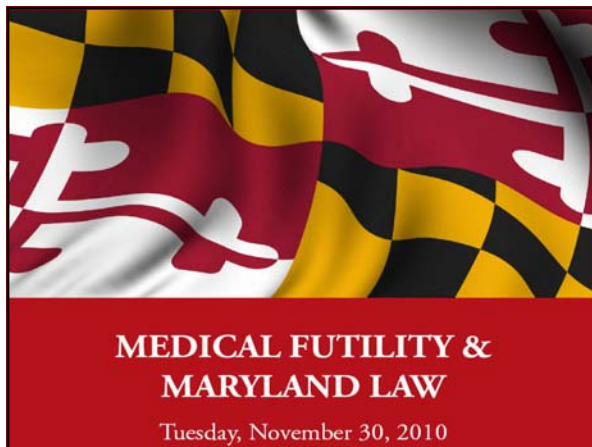
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**Medical Futility**  
Medicine Law & Ethics

Thursday, October 21, 2010  
7:30 am - 12:45 pm  
Education & Resource Center (ERC)  
Hartford Hospital, Heublien Hall



HARTFORD HOSPITAL

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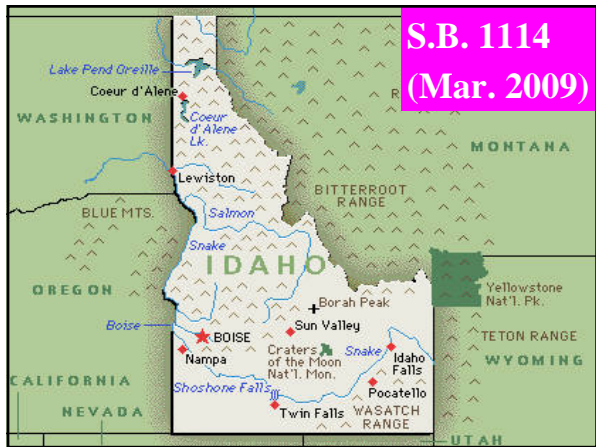
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**Role 2:**  
Adjudicate  
Surrogate  
Disputes

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Spouse  
Adult child  
Parent  
Adult sibling

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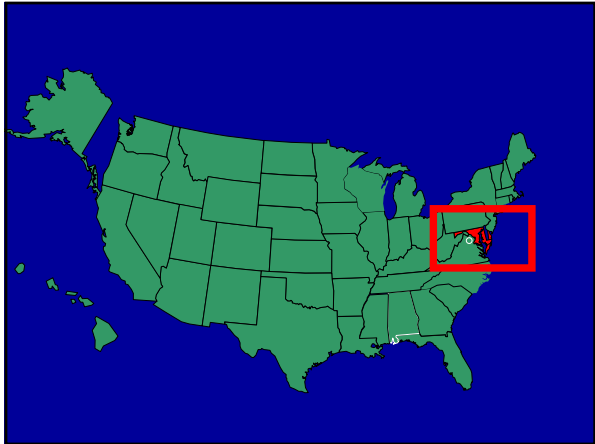
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“A physician who acts in accordance with the recommendation of the committee is not subject to civil or criminal liability or to discipline . . . .”

16 Del. Code 2507(b)(7)

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# Gatekeeper

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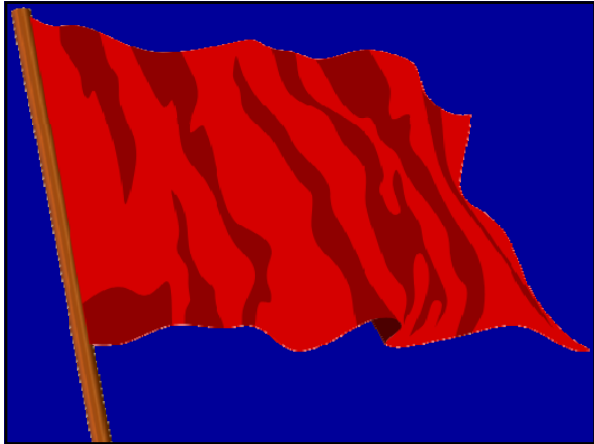
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Unbefriended  
LST decisions

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**Role 3:**  
Gatekeeper for  
“un-befriended”

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Physician alone

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**S.B. 579 (2011)**



Oregon

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Delaware

Wilmington

Court-appointed Guardian

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New York  State

**SDMC**

**Regulations**

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Attending = surrogate

**HEC = check**

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“If [no] surrogate . . . is reasonably available. . . physician may make health care decisions . . . after . . . consults with and obtains the recommendations . . . institution's ethics mechanism”

Tenn. Code Ann. 68-11-1706(c)(5)

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# Role 4: Gatekeeper for LST Decisions

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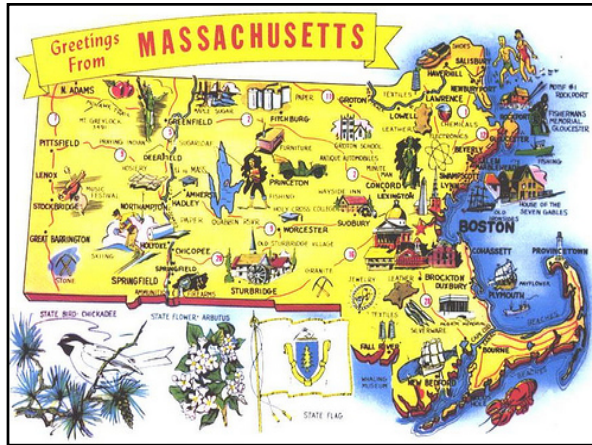
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“In any proceedings related . . . to withdrawal life-sustaining medical treatment, the department shall require a written opinion from . . . the **ethics committee** of the hospital at which the child is a patient . . .”

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**Mandatory - optional**

Disagree capacity 2994-c(3)(d)

MD object 2994-d(1), -(h)(6)

Surrogate object 2994-f(2)

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“Recommendations and advice by the ethics review committee shall be **advisory and nonbinding**, except”

N.Y. Pub. Health Code 2994-m(2)(c)

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Stop LST (other than CPR) **in LTC**

MD objects to surrogate decision to stop **CANH**

**Emancipated minor** decision to stop LST

2994-d(5)(b); 2994-d(5)(c) 2994-e(3)

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**Competence  
of ethics  
committees**

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**Power, authority**

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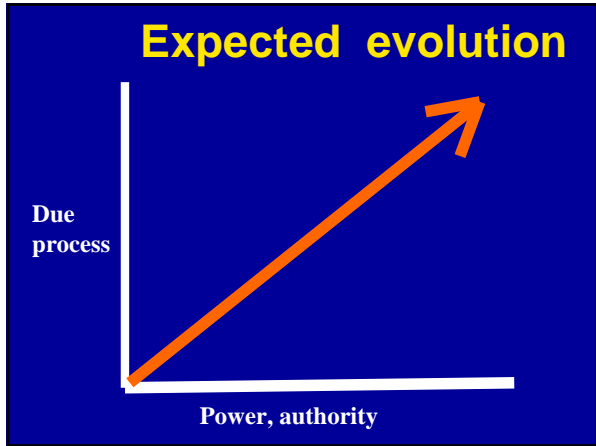
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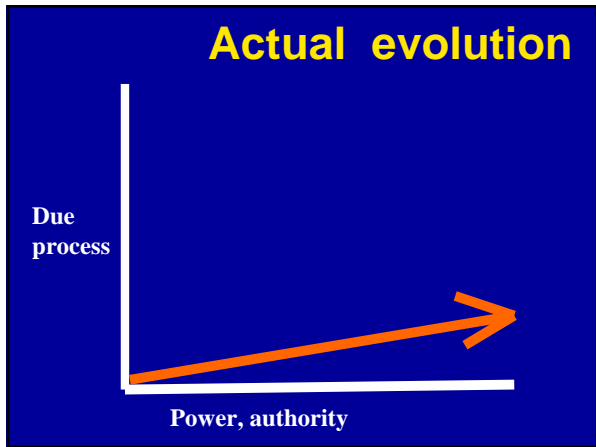
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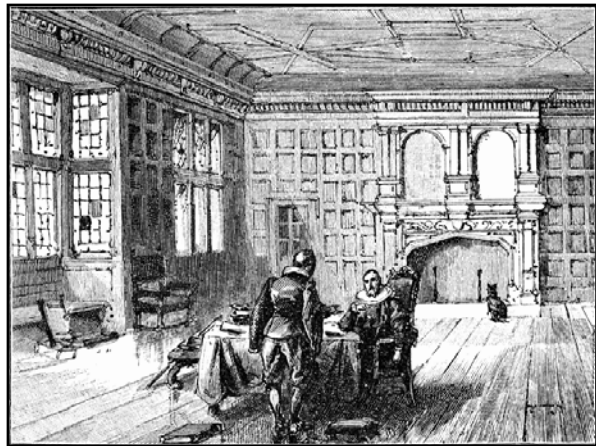
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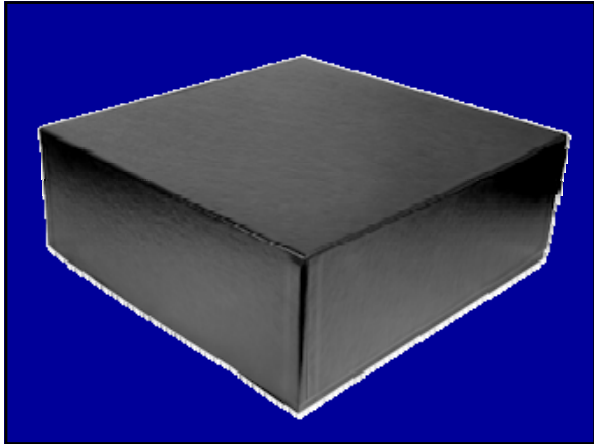
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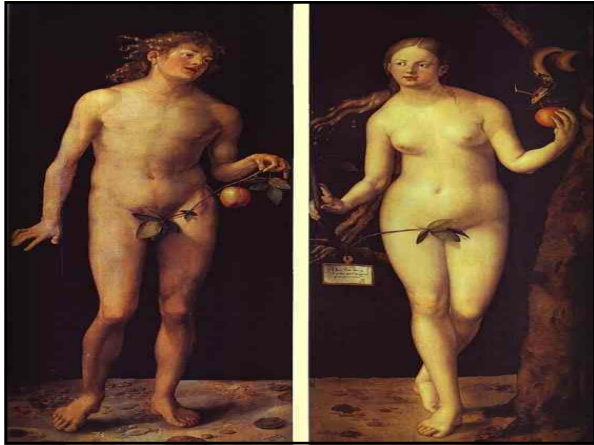
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HEC do more  
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More risk of error

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**Minimize  
4 risks**

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# 1. Corruption

self-interest

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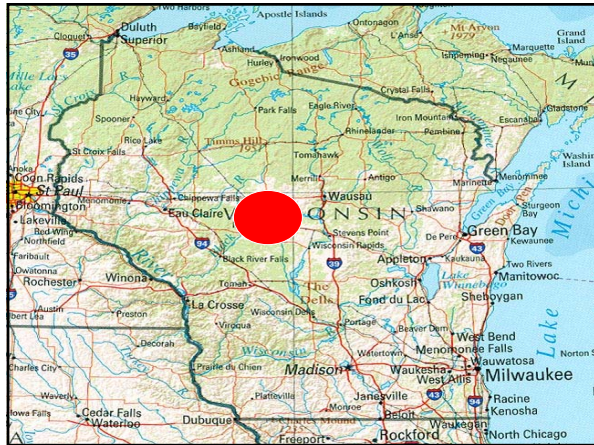
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# 2. Bias

disparaging to  
certain class

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**Solution:**  
Composition

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“Ethics Committee, as an institution, is an ill-defined, amorphous body”

In re Eichner

426 N.Y.S.2d 517 (N.Y.A.D., 1980)

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At least 5 members

3 health or social service

1 MD

1 RN

1 no relationship to hospital

No person connected to case

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Broader

Quorum

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### 3. Carelessness

ill-considered

ill-supported

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### Refuse to credit EC

In re Gianelli

834 N.Y.S.2d 623 (Supreme  
Court, Nassau County, 2007)

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**Solution:**

**Training**

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“demonstrated an interest in or commitment to patient’s rights or to the medical, public health, or social needs of those who are ill.”

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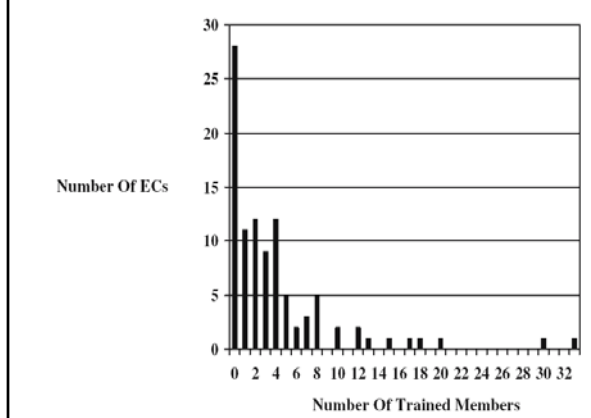
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Figure 6. Members Formally Trained In Bioethics



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## 4. Arbitrariness

Abuse of process norms like notice

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# Solution: Procedures

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**Presentation** by persons connected with case, who may be accompanied by advisor

**Notification** to patient and others  
Pending case  
Information about ERC  
Committee response

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“Multi-Institutional Healthcare Ethics Committees: the Procedurally Fair Internal Dispute Resolution Mechanism,” 31 CAMPBELL L. REV. 257-331 (2009).

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