

Resolution of Intractable Medical Futility Conflicts on Life-Sustaining Treatment: United States Law & Practice

International Conference on End of Life: Law, Ethics, Policy & Practice, Brisbane, QLD (14 Aug. 2014)

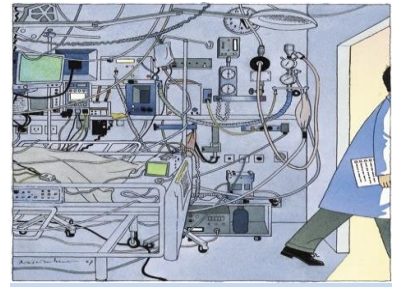
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Introduction



Surrogate
driven
over-treatment

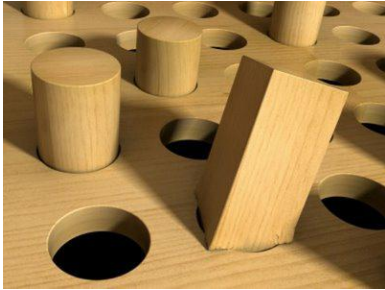
Clinician	Surrogate
CMO	LSMT



Prevention
Consensus
Switch parties
Intractable

Prevent Disputes

Most patients do **NOT** want futile treatment



Advance care planning
More
Better
Earlier

HOW A LIMITED SCOPE OF POLY-TO-OTHER HEALTH CARE PROVIDERS IS NECESSARY

Physician Orders for Life-Sustaining Treatment (POLST)

A. CONSCIOUSNESS RESTRICTIONS (CPR) ...

B. MEDICAL INTERVENTIONS ...

C. ANTIAGENTS ...

D. PATIENTS WITH LIMITED POLY-TO-OTHER HEALTH CARE PROVIDERS ...

E. SUMMARY OF GOALS ...

Limits to Prevention

PewResearchCenter

NUMBERS, FACTS AND TRENDS SHAPING THE WORLD

NOV 21, 2013

Views on End-of-Life Medical Treatments

Growing Minority of Americans Say Doctors Should Do Everything Possible to Keep Patients Alive

18-29	15%
30-49	33%
50-64	38%
65-74	61%
75+	58%

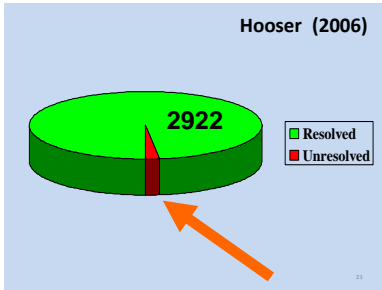
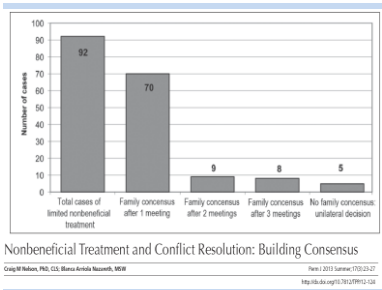
30%
want LSMT

Disputes
will arise

Consensus

**Negotiation
Mediation**

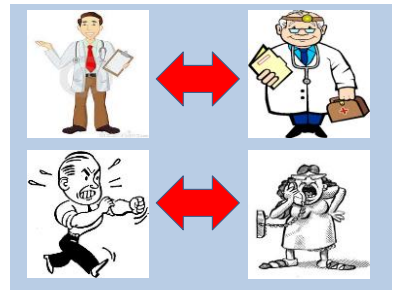
Consensus
Intractable



95%

5%

Switch parties

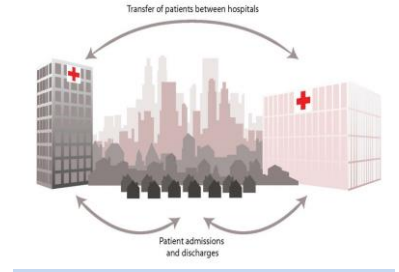


New clinician
New surrogate

28

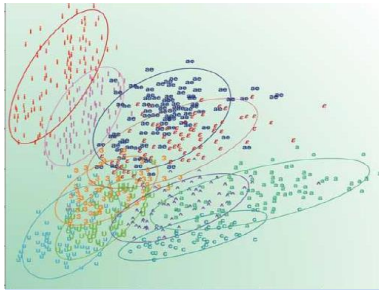
Transfer

29



Rare, but possible

31



Replace Surrogate

32



Substituted judgment
Best interests



35

~ 60% accuracy



More
aggressive
treatment



Surrogate	Advance directive
	

Surrogate	Best interests
	

LIMITS of surrogate replacement

1
Providers cannot show deviation

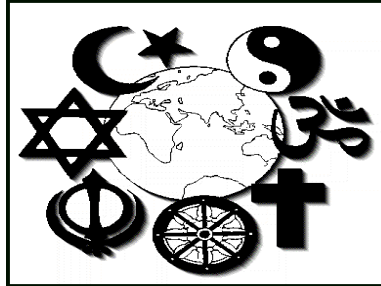


2
Surrogates get benefit of doubt



3

Surrogates
loyal & faithful



Truly
Intractable

Covert
Act w/o consent
Cave-in

Covert



PROPORTION OF PHYSICIANS (n = 726) WHO WITHHELD LIFE-SUSTAINING TREATMENT ON THE BASIS OF MEDICAL FUTILITY

Consent Status	n (%)
Without the written or oral consent of the patient or family	219 (25%)
Without the knowledge of the patient or family	120 (14%)
Despite the objections of the patient or family	28 (3%)

D. Asch, *Am. J. Resp. Crit. Care Med.*, (1995)



Providers have **won**
almost every single
damages case for
unilateral w/h, w/d

IIED
NIED

Secretive
Insensitive
Outrageous

Consultation
expected
Distress
foreseeable

Stop LSMT
without
consent



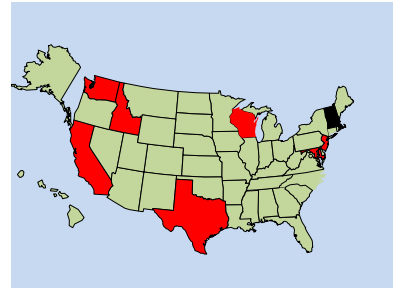
Green



You may stop LSMT for
any reason
with immunity
if your HEC agrees

Tex. H&S 166.046

48hr notice HEC
 Written decision
 10 days to transfer



Resolution 505-08 TITLE: LEGAL SUPPORT FOR NONBENEFICIAL TREATMENT DECISIONS

Author: H High Vincent, MD;
 William Andreck, MD

Introduced by: District 8 Delegation

Endorsed by: District 8 Delegation

Reference Committee

October 4-6, 2008

CA

WASHINGTON STATE MEDICAL ASSOCIATION
 HOUSE OF DELEGATES

WA

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

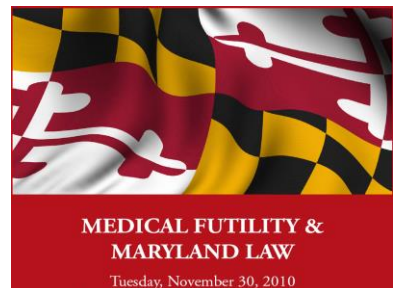
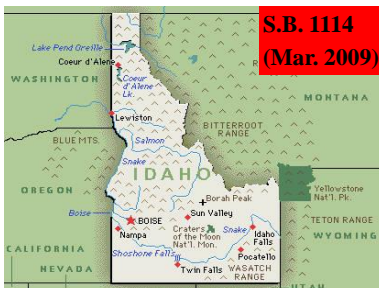
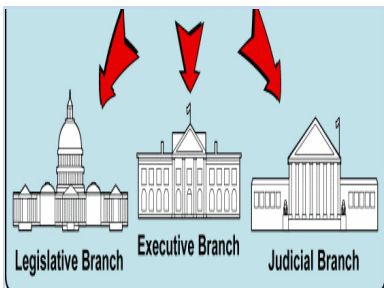
RESOLUTION 1 - 2004
 (read about the action taken on this resolution)

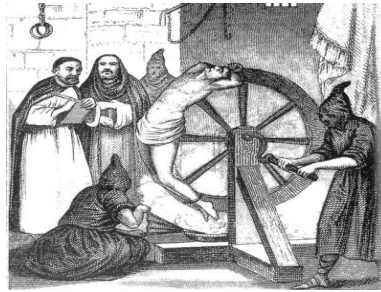
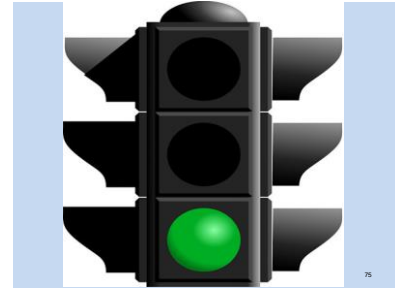
WI

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.



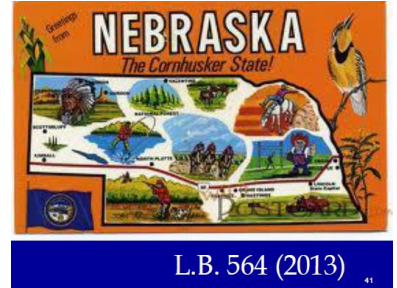


Cal. Prob. Code 4734(a)
 "provider may decline to comply . . . for reasons of **conscience.**"

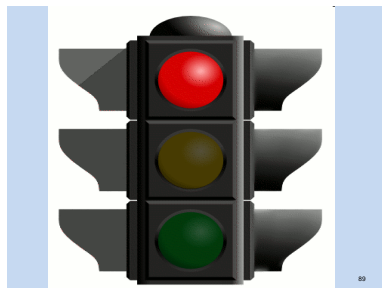
Treat
 'til
 transfer

Want to refuse
 ↓
 Try to transfer

No transfer
↓
Must comply



Red




Consent
always



SDM	Red Light
Agent / POA	Yes
Default surrogate	No; Maybe
Guardian	No; Maybe



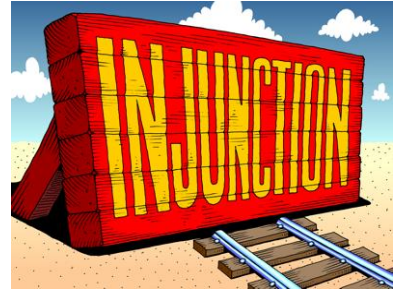
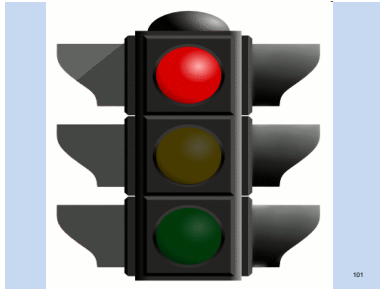
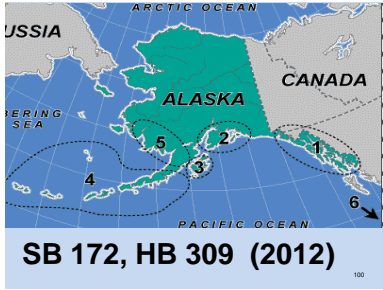
“If surrogate directs [LST] . . . provider that does not wish to provide . . . **shall nonetheless comply . . .**”



Discrimination in Denial of Life Preserving Treatment Act

“Health care . . . **may not be . . . denied** if . . . directed by . . . surrogate”



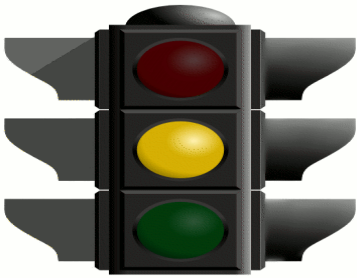


Life & death stakes
 Unclear facts
 Unclear law

TRO



Yellow



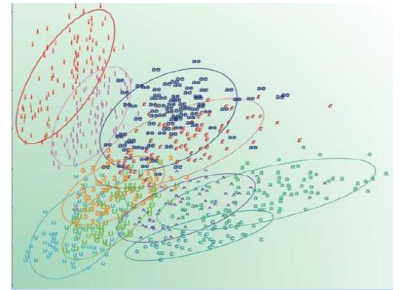
“provider . . . **may decline** to comply . . . contrary to generally accepted health care standards . . .”

Cal. Prob. Code 4735

“provider . . . **not subject** to civil or criminal liability or to discipline. . .”

Cal. Prob. Code 4740

“generally accepted health care standards”



Standard of Care

S

Standard of Care

S



Safe harbor attributes

- Clear
- Precise
- Concrete
- Certain

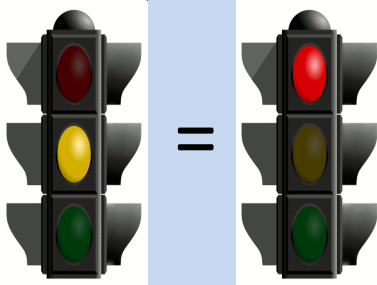
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TX

- Measurable
- Purely procedural

CA

- Vague
- Substantive



Cave-in

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“follow the . . .
SDMs **instead** of
doing what they feel
is appropriate . . .”

CMAA 20071977(10):1201-8

Very few
judgments &
settlements

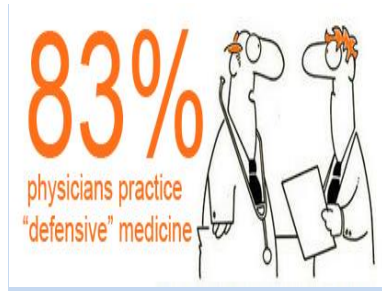
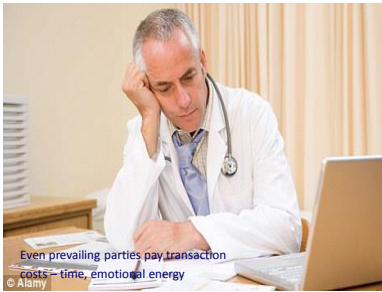
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Risk > 0

125

Liability averse
Litigation averse

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Patient will die soon
 Provider will round off
 Nurses bear brunt

Conclusion

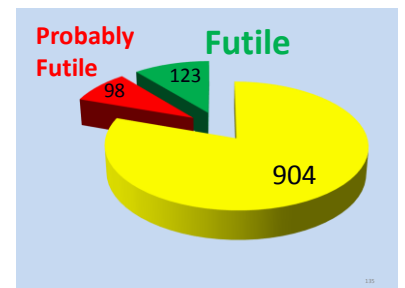
"Conflict . . . in ICUs . . . epidemic proportions"

> 33% ethics consults

Original Investigation
The Frequency and Cost of Treatment Perceived to Be Futile in Critical Care

Thanh N. Hoynh, MD, MSHS; Eric C. Kiberup, MD; Joshua F. Wiley, MA; Terrance D. Savitsky, MBA, MA, PhD; Diana Guse, MD; Bryan J. Garber, MD; Neil S. Wenger, MD, MPH

JAMA Intern Med. 2013;173(20):1887-1894. doi:10.1001/jamainternmed.2013.10261
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References

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Medical Futility Blog

Since July 2007, I have been blogging, almost daily, to medicalfutility.blogspot.com. This blog is focused on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning medical futility and end-of-life medical treatment conflict. The blog has received over 650,000 direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.

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