Medicating Patients Involuntarily at Psychiatric Hospitals

I. Introduction

All hospital patients with unimpaired capacity have the right to consent to or refuse treatment unless there is an emergency. In light of this right to informed consent, a patient can only be medicated involuntarily if

- a guardian for the incapacitated patient consents,
- the incapacitated patient has an advance directive that allows treatment over objection,
- a District Court has ordered treatment with an involuntary commitment,
- treatment is authorized following a clinical review panel,
- treatment is authorized following an administrative hearing, or
- a psychiatric emergency exists.

This summary is just an overview of the applicable laws. For more complete information, you should refer directly to statutes about guardianship and advance directives, http://www.mainelegislature.org/legis/statutes/18-A/title18-Ach5sec0.html; to the statutes about involuntary commitment with involuntary treatment ordered, http://www.mainelegislature.org/legis/statutes/34-B/title34-Bsec3864.html; to the statute about clinical review panel process, http://www.mainelegislature.org/legis/statutes/34-B/title34-Bsec3861.html; or to the Rights of Recipients of Adult Mental Health Services regulation RightsRecipients concerning administrative hearings for involuntary treatment or treatment during psychiatric emergencies.

For more complete information related to the content and effect of advance directives, go to the Maine Disability Rights Center's Advanced Health Care Directives Manual http://www.drcme.org/Handbooks.html

II. Consent of a Guardian

A person with a guardian has been determined by a Probate Court to lack capacity to make certain decisions. A guardian with unlimited powers may consent to medication of a patient over the patient's objection. A limited guardian may consent to medication on the patient's behalf only if the guardianship papers confer the right to consent to medical treatment. In either case, though, the guardian's authority to consent to treatment may not include authority to restrain the ward in order to provide the medication. The scope of the guardian's authority in this area has not been addressed by the courts in Maine.

A guardian's powers are limited by an advance directive or durable health care power of attorney. A guardian may neither revoke an advance directive nor pre-empt the health care decisions of an agent with power of attorney without permission of the Probate Court. A guardian must comply with wishes and instructions expressed when the ward had capacity and known to the guardian.

In a civil commitment proceeding related to progressive treatment (so-called outpatient commitment), the District Court may consider the requests of a guardian, but may choose not to honor them.

III. Treatment Based on the Patient's Previously Expressed Wishes

For more complete information related to the content and effect of advance directives, go to DRC booklet.

A person with unimpaired capacity may give specific written or oral instructions about treatment and may appoint an agent to make health care decisions in the event of the person's incapacity. An advance directive often includes written instructions and also names an agent with power of attorney to make health care decisions.

An agent with a durable health care power of attorney can consent to medication over objection of the patient when the patient has been determined unable to make decisions. The agent must, however, follow instructions that were given by the patient while the patient had capacity.

A patient may make oral or written instructions to a health care provider or to a person who would be able to make decisions for the patient (a "surrogate") when the patient is incapacitated and no agent or guardian is reasonably available. Among the people who may act as surrogates for purposes of carrying out the patient's instructions are spouses, life partners, adult children, parents, and adult children. The validity of Maine's surrogate law in the context of psychiatric treatment has not been tested in the courts, however.

In a civil commitment proceeding related to progressive treatment (so-called outpatient commitment), the District Court may consider an advance directive or the requests of an agent with power of attorney, but may choose not to honor them.

IV. Treatment Based on a District Court Order

A District Court may grant a psychiatric hospital to whom a patient has been committed involuntarily authority to implement a recommended treatment plan without a patient's consent for up 120 days or until the end of a commitment, whichever is sooner. To grant that authority, the court must find that the patient is incapacitated, the patient is unwilling or unable to comply with recommended treatment, the need for treatment outweighs risks and side effects, and the recommended treatment is the least intrusive appropriate option. The court findings may also include findings that the failure to treat the illness is likely to produce great harm to the person, or that without the treatment, the person's commitment will likely be significantly extended without addressing the symptoms that pose a likelihood of serious harm.

The hearing on these issues must be part of a commitment hearing, which must include testimony from a medical practitioner who has examined the patient and who is qualified to prescribe medications relevant to the patient's care.

V. Treatment Following a Clinical Review Panel Meeting

The exclusive administrative process for authorization of involuntary medication for civilly committed patients is the clinical review panel. If a patient lacks capacity to give informed consent to proposed treatment and is unwilling or unable to comply the treatment, and if the treating physician believes that the proposed treatment is in the best interest of the patient, the physician may request that a clinical panel be convened to review the patient's capacity and the proposed treatment, and providing with the request information necessary for the panel's decision-making.

Upon receipt of the physician's request, the head of the hospital appoints a panel of at least two licensed professional staff, at least one of whom is licensed to prescribe medication. The panelists may not be professionals who provide direct care to the patient. The panel convenes to gather information about the request. The patient and any lay advisor or attorney have an opportunity to discuss why the patient is refusing treatment, to ask questions of anyone presenting information to the panel, to provide information to the panel, and to present witnesses to the panel. While all meetings of the panel are open to the patient and his or her representatives, the panel may close the meeting during deliberation.

In order to authorize treatment, the panel must find that the patient lacks capacity to make informed treatment decisions, the patient is unwilling or unable to comply with the proposed treatment, the need for treatment outweighs the risks and side effects, and the proposed treatment is the least restrictive appropriate option. The panel findings may also include findings that the failure to treat the illness is likely to produce great harm to the person, or that without the treatment, the person's commitment will likely be significantly extended without addressing the symptoms that pose a likelihood of serious harm. The panel must document its findings.

Authorization by a clinical review panel for involuntary treatment may be for a period of up to 120 days or until the end of the involuntary commitment, whichever is sooner.

VI. Treatment Following an Administrative Hearing

The Rights of Recipients of Mental Health Services describes an administrative hearing process for involuntary medication. Because the clinical review statute is, by its terms, the exclusive administrative method for authorizing involuntary treatment of civil patients, the administrative hearing process is available only for forensic patients.

This administrative hearing process begins with a qualified mental health professional (most likely a psychiatrist) recommending a treatment for a non-civil patient. If the patient objects, the mental health professional must determine whether the patient lacks capacity to consent or object to treatment. If the clinician believes that the recommended treatment is in the patient's best interest, but that the patient lacks capacity, the clinician must seek a second opinion about the patient's capacity.

If both the clinician seeking to treat and the clinician giving the second opinion find that the patient lacks capacity, then the clinician seeking to treat must notify the Disability Rights Center, the patient's next of kin (if the patient doesn't object), a patient representative if the patient designates one, and the head of the hospital.

Before proceeding to a hearing for involuntary medication, the clinician recommending treatment must hold an alternative treatment meeting. In the alternative treatment meeting, the treatment team and the patient explore why the patient refuses treatment and discuss appropriate alternatives that may be available. If the patient and the clinician recommending treatment cannot reach agreement about alternatives, then the clinician or the patient can choose to proceed to an administrative hearing.

Before the hearing, the hospital must notify the patient of the request for an administrative hearing, offer the patient assistance with the hearing, give the patient a notice of his rights, and assist the patient in getting a lawyer.

The hearing is confidential. At the hearing, the hearing officer will first determine whether a mediated solution is appropriate. If not, the hospital must proceed to make a clear and convincing showing that

1. The patient lacks capacity to make a decision about a particular treatment;
2. The proposed treatment is based on adequately substantiated exercise of professional judgment;
3. The benefits of the treatment outweigh the risks and the possible side-effects; and
4. The proposed treatment is the least intrusive appropriate treatment available under the circumstances.

The hearing officer will not authorize treatment if the patient shows that, if he possessed capacity, he would have refused the proposed treatment on religious grounds or on the basis of other previously expressed personal convictions or beliefs. Also, the hearing officer cannot order electroconvulsive therapy. If the hearing officer approves the treatment, the hospital may not begin treatment until at least one full working day after the decision is announced. The hospital may then treat the patient for a period not to exceed sixty days. The patient may appeal the decision to Superior Court.

If the hospital seeks to continue involuntary treatment beyond sixty days, it must first notify family or the public guardian of the potential need for guardianship, and it must undertake the same process that it undertook for the original hearing.

VII. Treatment during a Psychiatric Emergency

A patient, whether voluntary or involuntary, may be treated without informed consent under very limited circumstances for a very limited period of time in an emergency.

Emergency treatment may occur only when

1. as a result of a patient’s behavior due to mental illness, there exists a risk of imminent bodily injury to the patient or to others;
2. treatment is required immediately to ensure the physical safety of the recipient or others;
3. nobody legally entitled to consent on the patient’s behalf is available; and

4. a reasonable person concerned for the physical safety of the patient or others would consent to treatment under the circumstances.

A clinician may not order emergency treatment simply because a patient refuses treatment.

Only a physician or a physician extender may order emergency treatment. The person ordering the emergency treatment must see and document the behaviors that created the emergency. The person ordering the emergency treatment must also document four other things:

- the period (up to 72 hours) for which medication may be administered,
- the expected benefits of the emergency treatment order,
- what behaviors and responses the staff should monitor, and
- how the staff should monitor the patient's behaviors and response to treatment.

Emergency treatment can continue only as long as the emergency continues. If, during the period for which emergency treatment was ordered, the risk of imminent bodily injury ends, then the emergency treatment must be discontinued immediately.

VIII. Conclusion

Every patient has the right to govern his own treatment unless he lacks capacity or there is an emergency. The circumstances of incapacity and emergency are very precisely defined, and must be strictly observed to protect this right.

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