



COOPERATIVE OF
AMERICAN PHYSICIANS

Decisions Before Dilemmas: Empowering Patients and Limiting Risk Through Advance Care Planning

Yvette Ervin, JD
Monica Ludwick, Pharm.D.
Rikki Valade, RN, BSN, PHN



Disclosure to Learners



No planner, reviewer, faculty, or staff for this activity has any relevant financial relationships with ineligible companies.



Objectives

1

2

3

4

5

Differentiate
• Between decisional capacity and competency.

Integrate
• Methods and tools used to assess decisional capacity in clinical practice.

Distinguish
• The benefits of identifying surrogate decision makers.

Develop
• A process to integrate advanced healthcare planning discussions into visits and bill for services.

Implement
• Standardized processes and tools for advanced health care planning to help reduce the influence of implicit bias.

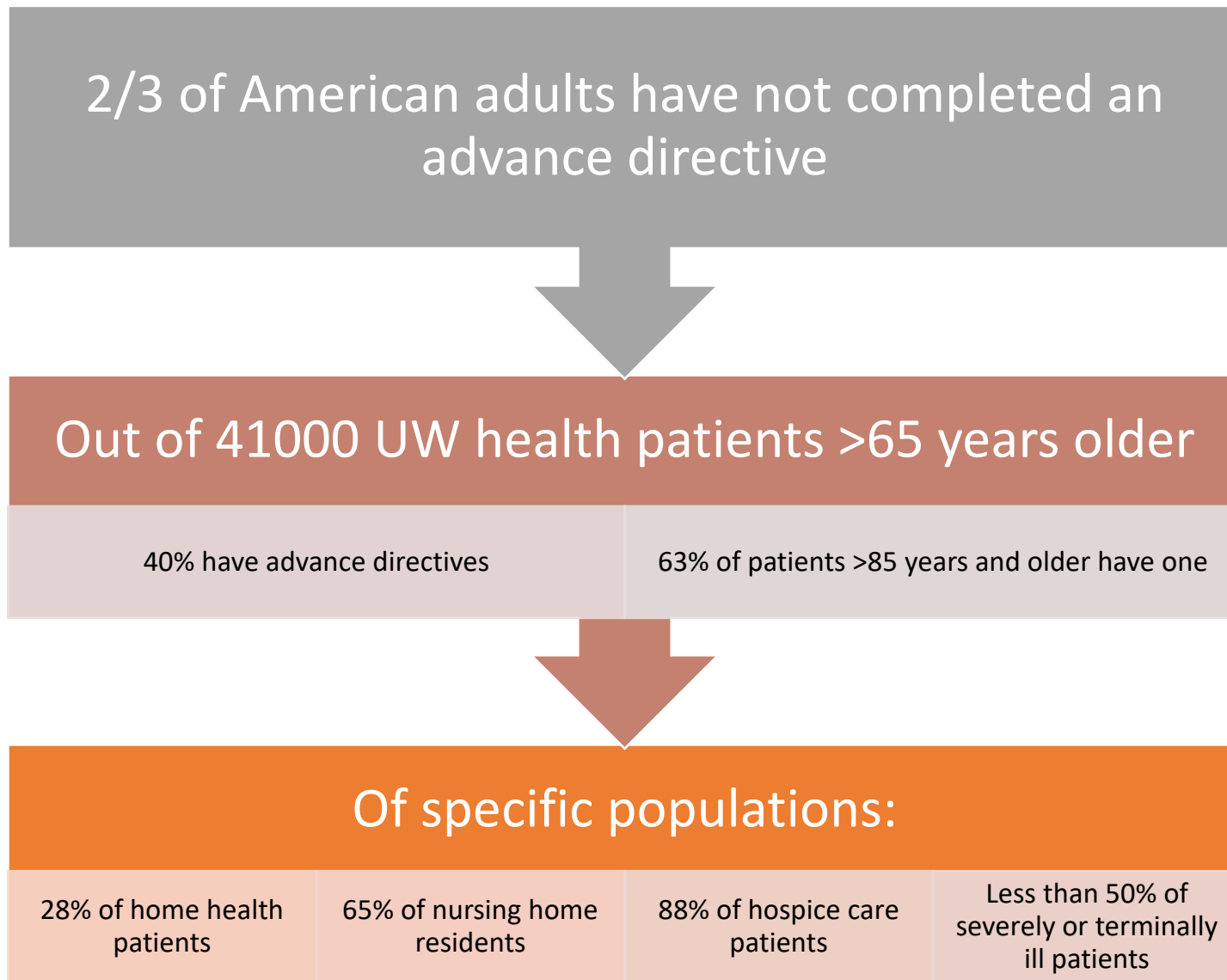


"It's always too early, until it's too late."

- No one plans to get seriously sick, or to get in an accident
- Let people know what kind of care is wanted
- Loved ones left to make difficult decisions
- *Advance care planning is not just for serious illness*



Statistics around
Advance
Healthcare
Planning (ACP)



Advance Care Planning- Guiding Principles

Patient Autonomy

- Self- Determination- ACP enables individuals to make decisions about their medical care in advance
- As physicians, it is essential to respect patients' values, beliefs, and preferences
- ACP empowers patients to have a voice in their care, even when they may lack capacity to make decisions in the future

Informed Decision-Making

- ACP provides valuable guidance to physicians when patients are unable to communicate their wishes
- ACP helps to ensure you have a comprehensive understanding of your patients' treatment preferences, goals, and priorities



Advance Care Planning- Guiding Principles

Reducing Family Conflict

- ACP provides clarity and minimizes uncertainty, preventing disagreements and emotional distress for both families and healthcare providers

Legal and Ethical Responsibilities

- Physicians have legal and ethical obligations to honor patients' wishes
- ACP promotes trust and strengthens the physician-patient relationship



Advance Care Planning- Guiding Principles

Improved End-of-Life Care

- ACP supports discussing patients' values and goals, facilitates conversations about palliative care, hospice services, and other appropriate interventions

In summary, these principles provide a comprehensive approach to help ensure that patients receive the care they desire, enhancing quality of life and reducing unnecessary interventions.



American Psychiatric Association indicates there are 4 types of decisional capacity questions that a provider may encounter.

Informed consent

- Capacity is the basis of informed consent

Treatment refusal

Leaving hospital AMA

Participation in discharge planning



What is Capacity?

In Healthcare, we discuss this concept as Decisional Capacity (DC) or Healthcare Decision Making.



American Medical Association: Capacity falls under Medical Code of Ethics. No definition is provided.



American Family Physician Journal 2023: Medical decision-making capacity is the ability of a person to understand the benefits and risks of, and the alternatives to, a proposed treatment or intervention (including no treatment).



California Hospital Association: Ability to understand the nature and consequences of proposed health care including its significant benefits, risks, and alternatives, and to make and communicate a health care decision. CHA Manuel (Appendix 2-D pg 1,2)



DSM 3: Has no definition of 'capacity'.



Merriam-Webster Dictionary: An individual's mental or physical ability



NIH National Library of Medicine: Capacity is defined as “a functional determination that an individual is or is not capable of making a medical decision within a given situation”. (Libby, Wojahn, Nicolini, Gillette May 2023)



Capacity is NOT the same as Competence

- ❑ Competence is a legal term to indicate whether a person has the **legal authority** to make their own decisions related to their finances, personal choices, and medical care. Judges are the only ones who can rule a person is **legally incompetent**. Once a person is declared incompetent the Judge will appoint a guardian for decision-making. Vermont Ethics Network
- ❑ Capacity differs from competence. Although the terms are often used interchangeably, competence is a legal term that is determined by the court system, whereas capacity is a medical term that is determined by the treating physician. Association of American Family Practitioners



Clinical Diagnoses, Situations and Risk Factors that Affect Decisional Capacity

Include but are not limited to:



Neurocognitive Disorders

Delirium, Dementia
Neurological Illness



Substance abuse disorders



Alcohol intoxication



Age-Cognitive decline with age



Mental Health Conditions



Medications and/or Treatment



Sleeping Disorders

Risk Factors for Impaired Medical Decision-Making Capacity

Acknowledged fear of or discomfort with institutional health care setting

Age < 18 years

Age > 85 years

Chronic neurologic condition

Chronic psychiatric condition

Low education level

Significant cultural or language barrier

Evaluating Medical Decision-Making Capacity in Practice. Am Fam Physician. 2018 Jul 1;98(1):40-46. PMID: 30215955.

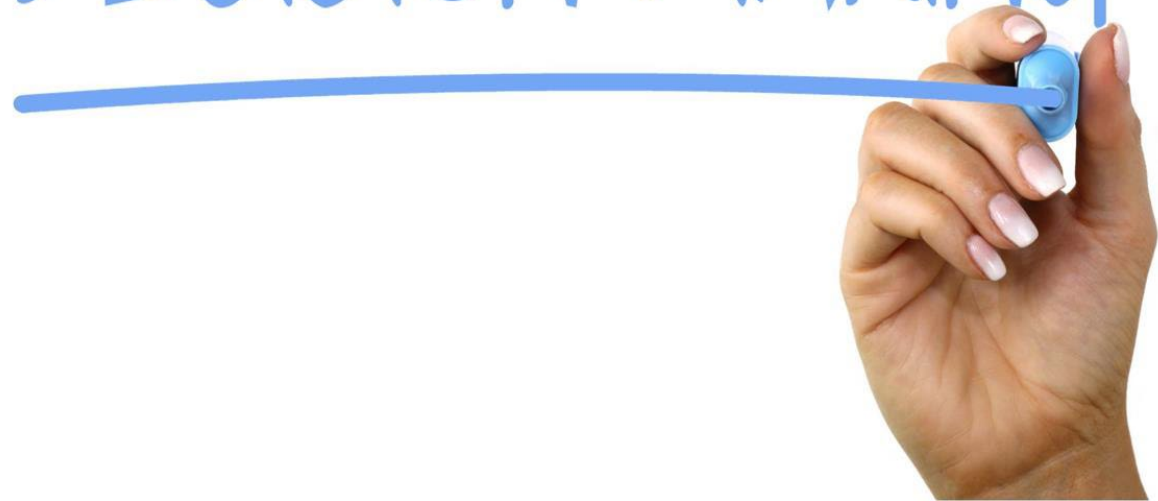
<https://pubmed.ncbi.nlm.nih.gov/30215955/>

The 4 Cs

Four Component
Model of Decisional
Capacity (AKA the 4
C's)

- Understanding
- Appreciation
- Reasoning
- Expression

DECISION MAKING



Levelsof Capacity

The ability to...

... reach a reasonable decision
(reasonable person standard)

...give risk/benefit-related reason

...give a rational reason

... give a reason

...understand relevant information

...understand one's situation and its consequences

...express or communicate a preference or choice

Who can determine Capacity



Licensed Physician



A Licensed PA or NP can determine Decisional Capacity if:

the informed consent is for a procedure within the scope of practice for a PA/NP.

In the hospital setting most physicians look to a Psychiatrist or Neurologist to determine decisional capacity. Any treating physician can make the determination.



Decisional Capacity Determination Tools

- Aid to Capacity Evaluation (ACE)
[Capacity Evaluation Tool \(ACE\)](#)
- Mini Mental State Exam-Created in 1975 by Marshal Folstein
[Mini Mental Exam](#)
- MacArthur Competency Assessment Tool for Treatment (MacCAT-T)
 - Used more in the criminal arena
 - Requires payment for access



Myth:

Two physicians must sign a consent form on behalf of a patient who has been deemed to lack decisional capacity in an emergency.

Only ONE physician is required to document lack of capacity in the medical record in an emergency.





Informed Consent

- Based on the principle of Autonomy/ Self- Determination
- **PROCESS FIRST**, Paper Second
- Requirements:
 - *Capacity to make the decision*
 - *Provider must disclose information on the treatment/test/procedure in question*
 - *Voluntary, without coercion or duress*
 - *When there is a question as to informed consent, the focus would be on whether the decision would have been the same with the new/different/additional information*

*Emergency Situations
Are An Exception*



Unless an emergency situation applies, medical treatment should be withheld until:

- Patient regains capacity
- Agent validly appointed by the patient is available and gives consent



Agents/Surrogate Decision Makers



- Oral Designation of a Surrogate Decision Maker
 - Patient personally informs the supervising health care provider or designee of facility
 - Surrogate takes precedence over any agent identified in a durable power of attorney
 - Only effective for shorter of 1) course of treatment or illness or admission/stay 2) 60 days 3) a period specified by the patient
- Effective 1/1/23, the Healthcare Provider/Designee may choose a surrogate to make health care decision on the patient's behalf



Surrogate Requirements & Considerations

- Surrogate must be an **Adult** that has 1) **Demonstrated Special Care and Concern** for the Patient, and is 2) Familiar with the **patient's personal values and beliefs**, and 3) Reasonably **available and willing** to serve
- Family does NOT have priority and there is no hierarchy.
- Surrogates may be chosen from:
 - Spouse
 - Adult Child
 - Parent
 - Adult Sibling
 - Adult Grandchild
 - Adult Relative/ Close Personal Friend



Things to Consider in Designating a Surrogate

Who understands the patient's clinical status and options?

Who is MOST aligned with the patient's values?

Achieving **consensus**

Ethics Committee?

What do you do when a patient has no reachable or available family/friends/potential surrogates?



Conservatorship- A Last Resort

- In CA, Conservatorship is a court proceeding in which a Judge determines a person is legally incompetent and appoints a responsible person to care for them/their needs
- A patient's physician or institutional representative may file a petition for Conservatorship
- California Probate Code Section 4650(c) states that: "In the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment."

Conservatorship of Wendland

- *In September of 1993, Robert Wendland, under the influence of alcohol, rolled his truck at high speed in a solo accident. He suffered brain injuries, which left him conscious but severely disabled- mentally and physically. Two years later, Rose Wendland, **his wife and conservator**, proposed that Robert's physician remove his feeding tube and allow him to die. Robert's mother and sister objected, and the matter was taken to Probate Court.*
- *Issue: Does a person's Conservator have the authority to end a Conservatee's life?*

Making the Right Decision- Honoring the Person's Wishes

Using an augmented communications device (i.e., "yes/no board"), Robert's physician asked him a series of questions. After asking Robert about his physical state (sitting? Lying down?) and Robert answering correctly most of the time, his doctor asked him the following...

- Do you have pain? Yes.
- Do your legs hurt? No.
- Do you want us to leave you alone? Yes.
- Do you want more therapy? No.
- Do you want to get into the chair? Yes.
- Do you want to go back to bed? No.
- Do you want to die? No answer.
- Are you angry? Yes.
- At somebody? No.

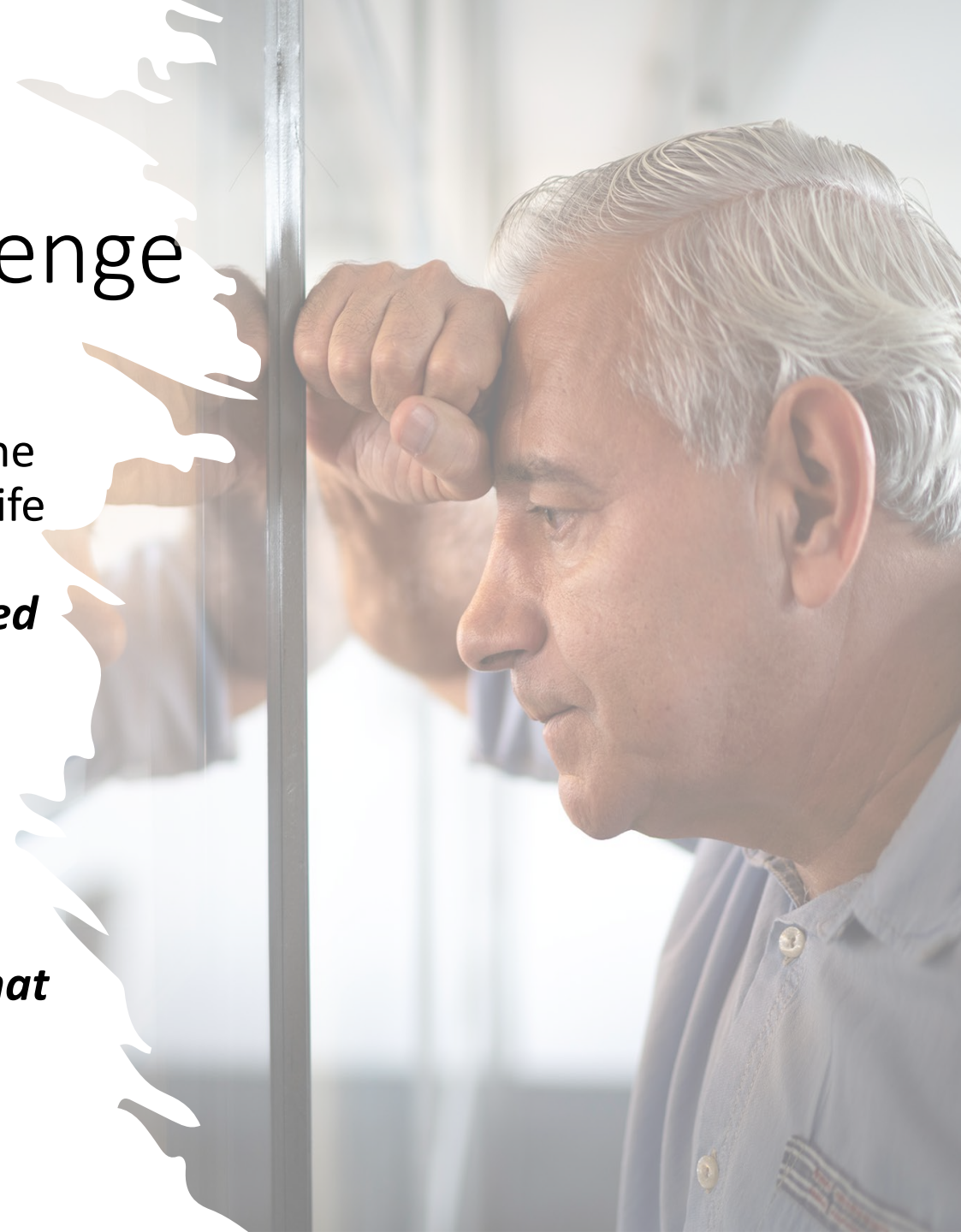
Family Testimony when Robert had capacity---

"if he could not be a provider for his family, if he could not do all the things that he enjoyed doing, just enjoying the outdoors, just basic things, feeding himself, talking, communicating, if he could not do those things, he would not want to live."

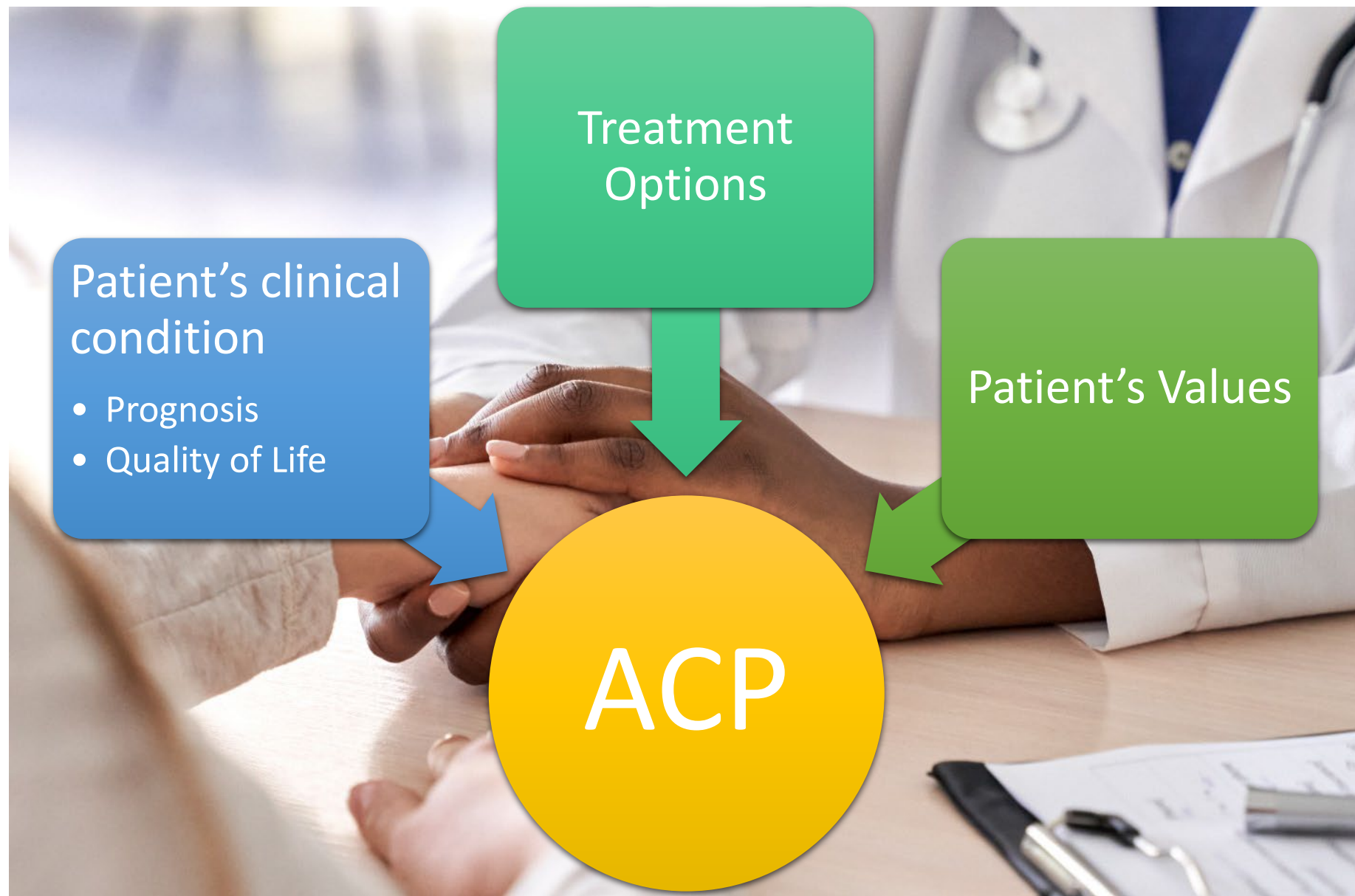


A Seemingly Impossible Challenge

- In *Conservatorship of Wendland*, the California Supreme Court established a high standard of proof for end-of-life decision making on behalf of patients ***who are incompetent but conscious and have a court-appointed Conservator.***
- ***Conservator must show by CLEAR AND CONVINCING evidence that the Conservatee under the circumstances, would want to die OR***
- ***Absent this evidence, the Conservator must demonstrate by CLEAR AND CONVINCING evidence that the decision is in the Conservatee's best interest.***



Proactive & Ongoing Communication



Implicit Bias

- Elderly patients accompanied by (adult) child
- Also experienced by the patient going moving through the health system
 - Often asked about ACP at the end stages, i.e., hospice
- Common cultural beliefs
- Clinician also uncomfortable with the topic

Resource: Project Implicit

- [About the IAT \(harvard.edu\)](#)

Did you know...

Deductibles and coinsurance are waived if an Annual Wellness Visit is completed at the same time as an ACP

(add modifier 33 for Medicare Annual Visit)



Documentation required for billing for ACP Discussions:

- Voluntary ACP conversation during visit
- Explanation of advance directives
- Record the length of the conversation
- Record who was present

CMS link: [Coding Requirements](#)

CPT code	Description	Work RVUs ²	Payment ²
99497	Advance care planning including the explanation and discussion of advance directives such as standard forms (with completion of such forms, when performed), by the physician or other qualified health care professional; first 30 minutes, face-to-face with the patient, family member(s), and/or surrogate.	1.5	\$86.49
99498	Advance care planning including the explanation and discussion of advance directives such as standard forms (with completion of such forms, when performed), by the physician or other qualified health care professional; each additional 30 minutes (list separately in addition to code for primary procedure).	1.4	\$76.04



ACP Forms & Resources

- National Physician Orders for Life Sustaining Treatment (POLST) Prepare for Your Care
- Advance Directive for Dementia
- Five Wishes
- My Directives
- Stanford Letter Project
- The Conversation Project



Scenarios

CASE

- You are a plastic surgeon and your patient is a 22- y/o F who has come in for a minor procedure, requiring light sedation. Prior to the procedure, she was given a valium. You realize that the informed consent wasn't signed. She took the day off work, and her procedure had already been rescheduled. How do you proceed?

CONSIDERATIONS

- Capacity
- Designated healthcare agents?
- Consent



Scenarios

CASE

- 31-y/o F with “intellectual disability”
- Patient resides at a Community Care Center
- Physician attested that patient unable to meet their own needs
- Signed authorization from patient appointing an authorized representative to manage finances, medical needs, and housing.
- Authorized representative (family) requesting tubal ligation



CONSIDERATIONS

- Signed Authorization from the Patient
- Is this a required procedure? NO, it is elective.
- Should the authorized representative be allowed to get this patient sterilized?



References

- American Medical Association Code of Ethics: Decisions for Adult Patients Who Lack Capacity (opinion 2.1.2) <https://code-medical-ethics.ama-assn.org/ethics-opinions/decisions-adult-patients-who-lack-capacity>
- American Psychiatric Association Resource Document: Resource Document on Decisional Capacity Determinations in Consultation-Liaison Psychiatry: A Guide for the General Psychiatrist (Page 1, June 2019) https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/resource_documents/Resource-Document-2019-Decisional-Capacity-Determinations-in-Consultation-Liaison-Psychiatry.pdf
- Libby C, Wojahn A, Nicolini JR, et al. Competency and Capacity. [Updated 2023 May 29]. In: StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2024 Jan-. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK532862/>
- Palmer BW, Harmell AL. Assessment of Healthcare Decision-making Capacity. Arch Clin Neuropsychol. 2016 Sep;31(6):530-40. doi: 10.1093/arclin/acw051. Epub 2016 Aug 22. PMID: 27551024; PMCID: PMC5007079. <https://pubmed.ncbi.nlm.nih.gov/27551024/>
- Vermont Ethics Network Decision-Making Capacity (2024) <https://vtethicsnetwork.org/medical-ethics/decision-making-capacity>



Thank You



COOPERATIVE OF
AMERICAN PHYSICIANS

