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The Coronavirus and Older People: Legal and Ethical Concerns

Marshall B. Kapp, J.D., M.P.H.
Professor Emeritus, FSU College of Medicine
Adjunct Professor, FSU College of Law

FLORIDA STATE UNIVERSITY



Introduction

- Legal and Ethical Public Health **Authority**
 - Federal level
 - Interstate commerce power
 - Taxing and spending power
 - State and local level
 - Police power
 - *Parens patriae* power



- **Limits** on govt. public health authority
 - Federal constitutional rights
 - State constitutional rights
 - Federal and state statutes and regulations
 - Common law doctrines



Selected Issues

- End of life planning and care in a pandemic
- Crisis standards of care/Allocating scarce resources
- LTC duties to isolated/quarantined residents
- Legal immunity legislation for HC/LTC providers



End of Life Planning and Care in a Pandemic

- Attention focused on mortality among older persons
 - Institutional reputational and legal/regulatory anxieties
 - Cultural (death=failure) biases
- Are all deaths bad? Are some deaths implementation of, or at least consistent with, patient/resident autonomy?



- How to protect individual autonomy in a PH crisis?
 - Providers likely are strangers
 - No planning documents or inaccessible
 - Sufficient specificity of prior statements/Need for particularity?
 - Availability of surrogates/advocates



- How to provide a humane dying experience for patient/resident and family while managing institutional risks (legal and health)?



- C. Choi, *Letter, Peaceful Goodbyes: Providing End-of-Life Care to Patients with COVID-19*, JOURNAL OF THE AMERICAN GERIATRICS SOCIETY (2020), doi:10.1111/jgs.16637
- J. Randall Curtis et al., *The Importance of Addressing Advance Care Planning and Decisions About Do-Not-Resuscitate Orders During Novel Coronavirus-19*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (2020), doi:10:1001/jama.2020.4894



Crisis Standards of Care/Allocating Scarce Resources

- Prime goal: Avoiding scarcity
- Allocating resources, Triage≠Rationing
- Avoiding discrimination based on irrelevant factors, while taking [clinically] relevant factors into account



- Potential criteria:
 - First come, first served
 - Lottery
 - Financial capacity
 - Most in need



- Social worth (Utilitarian)
- Most likely benefit
 - Survival (e.g., Sequential Organ Failure Assessment [SOFA] score to predict mortality)
 - Life-years saved
 - Quality-adjusted life-years (QALYs)



- “ETHICS GUIDELINES FOR CRISIS STANDARDS OF CARE IN PUBLIC HEALTH EMERGENCIES” published by Florida Bioethics Network (May 1, 2020), endorsed by Florida Hospital Association Board of Trustees
<https://fbn.miami.edu/assets/pdf/resources/covid-19-resources/csc-fbn-6.pdf>



- T.W. Farrell et al., *AGS Position Statement: Resource Allocation Strategies and **Age-Related** Considerations in the COVID-19 Era and Beyond*, JOURNAL OF THE AMERICAN GERIATRICS SOCIETY 68(6):1136-1142 (2020)
- T.W. Farrell et al., *Rationing Limited Healthcare Resources in the COVID-19 Era and Beyond: Ethical Considerations Regarding **Older Adults***, JOURNAL OF THE AMERICAN GERIATRICS SOCIETY 68(6):1143-1149 (2020)



- I.G. Cohen et al., *Potential **Legal Liability** for Withdrawing or Withholding Ventilators During COVID-19: Assessing the Risks and identifying Needed Reforms*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (online April 1, 2020), doi:10:1001/jama.2020.5442
- J.P. Leider et al., *Ethical Guidance for Disaster Response, Specifically Around Crisis Standards of Care: A Systematic Review*, AMERICAN JOURNAL OF PUBLIC HEALTH 107(9):e1-e9 (2017)



LTC Duties to Isolated/Quarantined Residents

- Primary concerns
 - Avoiding resident deaths
 - Avoiding other resident infections
 - Avoiding staff and visitor infections
- Deleterious physical and mental health ramifications of prolonged isolation
- How to reconcile competing interests?
- What weight to give family interests?
 - Assumption of risk?



- Assigning Authority:
 - CDC Guidelines
 - CMS Rules
 - State emergency rules
 - <https://www.floridadisaster.org/globalassets/covid19/dem-order-20-009-signed.pdf> (Sept. 1, 2020)
 - Facility discretion



- DHHS, CMS, Center for Clinical Standards and Quality/Quality, Safety & Oversight Group, *Nursing Home Reopening Recommendations for State and Local Officials*, Ref: QSO-20-30-NH (May 18, 2020), at <https://www.cms.gov/files/document/qso-20-30-nh.pdf>
- DHHS, CMS, Center for Clinical Standards and Quality/Quality, Safety & Oversight Group, *Frequently Asked Questions on Nursing Home Visitation* (June 23, 2020), <https://www.cms.gov/files/document/covid-visitation-nursing-home-residents.pdf>



- DHHS, CMS, Center for Clinical Standards and Quality/Quality, Safety & Oversight Group, *Memo to State Survey Agency Directors: Nursing Home Visitation—COVID-19*, Ref: QSO-20-39-NH (September 17, 2020), at <https://www.cms.gov/files/document/qso-20-39-nh.pdf>



- Toby Jackson, *My Benevolent Incarceration in a New Jersey Senior Home*, WALL STREET JOURNAL (June 5, 2020).
- Joanne Lynn, *Playing the Cards We Are Dealt: COVID-19 and Nursing Homes*, JOURNAL OF THE AMERICAN GERIATRICS SOCIETY (2020), doi:10.1111/jgs.16658



Liability Shield Legislation for HC/LTC Providers

- Balancing competing considerations
 - Traditional goals of tort liability
 - Compensate injured victims
 - Deter undesirable behavior
 - Competing goals
 - Consumer need for **access** to services
 - Avoiding danger of **overdeterrence/ negative defensive practice**



- Is legislation good policy?
 - Details of legislation?
 - Total immunity?
 - Time-limited?
 - Compliance with applicable regulations sufficient?
- Federal +/-or State action?
 - Federalism/Decentralization
 - Traditionally, tort liability is a state matter



- A.W. Mathews 7 J. Gershman, *Hospitals, Nursing Homes Seek More Liability Shields*, WALL STREET JOURNAL (May 23, 2020).



- S. 4317—Safe to Work Act
 - Subtitle B: Health care Providers
 - Limits claims for 5 years to **willful** misconduct or **gross** negligence
 - Clear and convincing evidence requirement
 - Limits punitive damages
 - All claims must be filed in **federal** court