

Substitute Decision Makers

OVERVIEW OF ISSUE

A substitute decision-maker (SDM) is someone permitted by law to make treatment and placement decisions on a patient's behalf in the event of their incapacity. Due to provincial and territorial differences in Canada, reference should be made to relevant legislation. SDM's are usually someone close to the person such as a spouse, partner, or relative. Except in the event of an emergency situation where formal consent is not required (e.g. the patient is not capable/conscious and the SDM can't be expediently located), informed consent must be obtained from the SDM as soon as practical.

KEY POINTS

- The SDM must make decisions based on the prior capable expressed wishes, known values and beliefs of the patient. If the SDM does not know of a wish applicable in the situation, the SDM must act in the patient's best interests.

THINGS TO CONSIDER

- Minimum age for the SDM (reference relevant provincial/territorial legislation).
- The identification/appointment of a SDM may be through formal documents.
- The identification/appointment of a SDM may be achieved through a hierarchy within a legislation when no formal documents exist. (i.e. patient's spouse or partner, child, parent, sibling or relative who are available and willing to assist with health care decisions) or a friend may need to apply to the Consent and Capacity Board. (Ontario).
- Even when a SDM is appointed, the incapable patient should be involved in discussions with the SDM to the extent possible.
- In some jurisdictions, the Office of the Public Guardian and Trustee may serve as SDM as a last resort when no other decision maker identified in legislation is available or willing.
- If the proposing healthcare provider determines the patient is not capable to provide consent, they are to obtain informed consent from the highest ranking SDM unless a delay to obtain that consent is considered an emergency and will put the patient at risk of sustaining serious bodily harm or will prolong suffering.

Accountabilities of the Substitute Decision Maker

- Acts on behalf of the patient who is temporarily or permanently incapable of representing themselves.
- Maintains contact with the patient to remain current with respect to their wishes.
- Entitled to receive information and ask questions about the nature of the treatment, expected benefits, material risks and side effects, alternative courses of action, and the likely consequences of not having the treatment.
- If the incapable patient's wishes are not known, the SDM is expected to make decisions in the best interests of the patient.

Disagreements

- If the proposing healthcare provider does not feel the SDM is acting in the patient's best interests and/or disagrees with the SDM's decisions (even when the decisions are what the patient wants), consensus with the SDM may be sought through open dialogue about the patient's previously expressed wishes, known values, beliefs and best interests.

Substitute Decision Makers

- When this fails, healthcare ethics committees and/or legal counsel may be consulted and follow legislative options available (i.e. Office of the Public Guardian and Trustee if equal ranking SDM's do not agree or avenues that may be available through the Consent and Capacity Board. (Ontario).

Advance Care Planning

Advance care planning documents vary between provinces and territories

- In Ontario, advance care planning is a voluntary process that involves the mentally capable patient identifying for his/her future SDM, their wishes, values, and beliefs about how he/she would like to be cared for in the event of mental incapacity to give or refuse consent. (ACE, 2016).
- Advance care planning wishes are a guide or direction for the patient's SDM that assists the SDM to make future health or personal care decisions on behalf of the incapable patient. Advance care planning is not a substitute for a capable person's consent. (ACE, 2016).
- Advance care planning wishes, values or beliefs may be in documents such as Powers of Attorney for Personal Care.
- In some provinces/territories, some patients record their wishes in an advance care directive. Advance care directives are legal documents prepared by a capable person and provided directly to the healthcare provider, healthcare organization and/or to their appointed proxy (SDM) concerning what and/or how and/or by whom decisions should be made in the event that, at some time in the future, they become incapable to make their own healthcare decisions. It is important for healthcare providers to obtain the advance care directive in writing if possible.
- Although advance directives wording is commonly used, Ontario law does not have any term or provide for documents called "advance directives." (Law Commission of Ontario, 2016, p. 48).
- Because legislation regarding advance care directives varies between provinces and territories, it is advisable that healthcare providers become familiar with their provincial or territorial legal requirements (e.g. in Newfoundland and Labrador, an advance health care directive can be revoked).



REFERENCES

- Advocacy Centre for the Elderly (ACE). (2016). [Advance care planning](#) – Ontario – Summary – Health care consent act.
- [Health Care Consent Act](#), Statutes of Ontario (1996, c.2). Schedule A.
- Irvine J, Osborne P, Shariff M. (2013). Canadian medical law: An introduction for physicians, nurses, and other health professionals (4th ed.). Toronto, CA: Carswell.
- Law Commission of Ontario. (2016). [Health care consent](#), advance care planning, and goals of care practice tools: The challenge to get it right.
- Lazar N, Greiner G, Robertson G, et al. (1996). [Bioethics for clinicians](#): 5. Substitute decision-making. *CMAJ*. 155: 1435-1437.