



The AGE of Consent

by Kenneth S. Ross, DC, JD, LHRM

A lawsuit concerning “The Physicians’ Duty Under the Law,” can be avoided by obtaining a valid, informed consent.

A large proportion of medical procedures that give rise to law suits are allegations of a lack of informed consent by the provider. Informed consent is the basis for many lawsuits for two reasons. One is that patients have the right to information about their treatment and second, the right to accept or refuse such treatment. When they are not given this information, a suit may follow if the patient has perceived an injury.

The legal history of the informed consent goes back to 1957, when the concept of informed consent was conceived by the Appellate Court in *Salgo vs. Leland Stanford Jr, University Board of Trustees*. The court recognized for the first time that the doctor might be held liable for failure to disclose important information beyond the “bare bones” nature of the procedures. A health care provider cannot touch or treat a patient until the provider has given the patient information regarding the proposed treatment, and the patient has agreed to such treatment. It requires the doctor to obtain a patient’s permission before rendering any treatment, and the doctor may not materially extend the scope of the authorized treatment. The doctor has two general duties owed to the patient under law. The first duty is to disclose information about the treatment, and the second is to obtain a valid consent before providing such treatments. If the doctor breaches this duty, he or she can be held liable in a malpractice suit.

A patient must be informed of his or her diagnosis, alternative methods of treatment, and the risks and benefits of each treatment, including the probability of success or failure. Informed consents

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are the responsibility of the doctor, and simply letting the patient read a consent without any explanation is not adequate to protect the doctor. Currently, the courts in various states have developed three theories of informed consent models:

Patient reference rule: This requires all alternative methods of treatment and the serious risks associated with each treatment to be explained.

Traditional standards rule: The majority of courts has adopted this rule and considers the community practice by other doctors. This rule considers what a reasonable provider would have done under similar circumstances.

Prudent patient rule: This is based upon a general rule of objective standard of reasonableness, rather than what the doctor believes is appropriate.

The definition of express consent is where a patient gives by word or writing their consent. The problem that arises in proving an effective consent by word may be substantial. Always secure a written consent from the patient. Implied consent is defined as that which arises by reasonable inference from the conduct of the patient that the procedure or treatment has been authorized. Here again, there is a gray area, and the interpretation is left up to the court.

For medical care rendered, the most satisfactory way to prove that a provider has consent to treat is by the integrated use of a written consent, which serves as evidence of the patient's voluntary submission to treatment. This is generally self-evident by their signature and the doctor's responsibility to inform the patient verbally. Proper use of a written medical informed consent should satisfy the requirement of a valid consent.

Elements of a valid consent include: the diagnosis, nature and purpose of the treatment for which the consent is sought, all material

risks and consequences of the procedures/treatments, assessment of the likelihood that the procedure will accomplish the desired objective, any reasonable alternative treatments, and prognosis of not getting treatment for the patient's conditions.

There are exceptions to medical consents, which include Good Samaritan Laws, unexpected situations occurring during surgery, and waiver of the consent by the patient (must be documented by the doctor). I would advise against this. Any competent adult, a minor's guardian or parent, mature minors, and special considerations are persons who can sign a medical consent.

The actual decision-making process of the informed consent by the doctor should be made and governed by the principles of patient autonomy and professional responsibility of the provider in the process of obtaining an informed consent. The written consent provides proof of the patient's consent to the treatment. It also provides the doctor a written document against a frivolous malpractice suit that can cost money regardless of the outcome. If a provider commits gross malpractice, is involved in reckless and outrageous conduct, or commits an intentional tort of battery on the patient, the consent will not shield the provider from a lawsuit and/or criminal charges. Always obtain a valid written medical informed

consent that meets the standard of informed consents. This is the best protection against a lawsuit for failure to provide a duty to patients. ■

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