

# Medical Risk Resource **ADVISOR**



- **Promoting** Patient Safety
- **Providing** Sound Advice
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## Physicians' Responsibility to Obtain Informed Consent

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A patient's absolute right to make informed decisions regarding his or her medical care is the foundation of informed consent. The American Medical Association states, "Physicians should sensitively and respectfully disclose all relevant medical information to patients. The quantity and specificity of this information should be tailored to meet the preferences and needs of individual patients."

Informed consent as a legal requirement began in earnest with a New York lawsuit back in the early 1900s. Justice Cardozo of the New York Court of Appeals stated, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body..."<sup>1</sup> This Appeals Court decision laid the framework for our modern-day informed consent laws and rules.

Over the years, case law relating to informed consent has evolved—with some states introducing statutes governing consent requirements for healthcare providers.

Informed consent laws differ by state in the amount of information a healthcare provider is required to disclose to the patient. Some states employ a "reasonable physician" standard, meaning a healthcare provider must provide the amount of information a reasonably prudent physician would provide in the same or similar circumstances.<sup>2</sup> Other states use a "reasonable patient" standard, requiring that a physician provide information that a reasonable patient would need to make an informed decision.<sup>3</sup>

Generally speaking, physicians do well to provide patients with enough information to be able to make a fully informed decision about medical care. Exceptions to the informed consent requirement can be made for emergencies where the patient is unconscious and arrives at a facility needing a life-saving procedure. Be sure to check your state's laws so you know what is required for your informed consent discussions with patients.

### Pediatric Patients

A parent may consent to treatment for his or her own child. There are certain instances where a minor (under age 18) may consent to his or her own treatment. These instances differ by state, but generally include treatment for drugs/alcohol abuse, sexually transmitted diseases, HIV/AIDS testing, and reproductive health. Be sure to check your state's laws before allowing a minor to be treated *without* parental consent.

Practices routinely ask our Risk Resource Department what to do in situations of children with divorced parents. Typically, each parent maintains his or her right to consent to medical treatment for the child.

When you encounter a divorce decree granting full legal and/or physical custody to one parent, he or she has the sole right to make healthcare decisions for the child. If one parent has sole physical custody but legal custody is joint, then both parents maintain the right to make healthcare decisions for their child. These guidelines may not hold true in all situations. Please consult an attorney when you have questions regarding the ability of a divorced parent to consent to treatment for a child.

**Generally speaking, physicians do well to provide patients with enough information to be able to make a fully informed decision about medical care.**

<sup>1</sup> *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129 (1914).

<sup>2</sup> *Thaw v. North Shore Univ. Hosp.*, 129 A.D.3d 937, 939 (2015).

<sup>3</sup> *Janusauskas v. Fichman*, 264 Conn. 796, 810 (2003).

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You also may encounter situations where a parent's rights have been terminated by the court. Then the guardian of the child will have related documentation. We encourage you to keep a copy of this documentation in the patient's record so healthcare providers with access to the record know who is allowed to consent to treatment for the child.

## Consent to Treat Foster Children

Foster children present a unique dilemma for many practices. Often, foster parent(s) will have documentation from the court giving them permission to make decisions on behalf of the child for routine healthcare.

Birth parents do maintain parental rights with most foster care situations. Usually the foster parent or guardian will have authority to consent to routine healthcare for a child, whether via court order or the birth parent(s) signing a document giving the foster parent this right.

Questions also arise as to whether the parent maintains a right to request the child's medical record when the child is under the care of a foster parent. A birth parent's right to review a foster child's medical record is a tenuous situation best handled on a case-by-case basis. Please contact our Risk Resource Department with questions.

If your practice treats foster children, consider contacting your state or local foster care agency to determine your legal obligations when treating these children. You also may wish to contact a local attorney to assist you in determining protocols to ensure that the proper person is consenting for a child's treatment.

## The Vaccination Challenge

When parents decide not to vaccinate their children, some practices have made the decision to refuse to provide healthcare to those pediatric patients. That said, how do you handle patients whose parents have decided to cease their children's vaccinations? You have two options: continue to treat the patients or terminate them from the practice.

Termination from the practice is best handled delicately and by the physician. If you decide to terminate, consider having several conversations to determine if the parents are willing to reconsider before acting. If the parents hold their position, proceed to share your decision to end your care, explaining you will continue care until such time the parents are able to find another physician. This may require more than 30 days of care. Offer any assistance you have available to help these parents find another pediatrician.

If you decide to continue caring for patients whose parents refuse to allow vaccinations, document all conversations you have with the parents regarding risks related to the refusal. If you strongly advocate for vaccinations, you may want to counsel parents to consider vaccinating.

It may be helpful to obtain input from all healthcare providers and staff before implementing a practice-wide policy refusing to treat patients whose parents refuse vaccinations. It is important that all healthcare providers are on the same page and agree on such a policy.

## Recurring Treatments

Treatments such as allergy shots, certain trigger point injections, dialysis, radiation, and chemotherapy are just a few examples of treatments that may continue over time. How should consent be handled for such treatments?

When a patient agrees to undergo this type of treatment, the initial informed consent process ideally covers the entire course of treatment. Patients are told they may question the treatment process, as well as each individual treatment. Informed consent may require more than one conversation, especially in the case of chemotherapy, radiation, or dialysis.

Consider having an in-depth, detailed informed consent discussion with each patient before you begin recurring treatments. Have the patient sign an informed consent document acknowledging that discussion and the patient's consent to the course of treatment. Verifying with the patient at each visit that he or she wishes to continue the course of treatment is a good idea—as is noting that verification in the medical record.

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## Elderly Patients

Elderly patients may present consent issues not routinely encountered. Examples include powers of attorney (POA), guardianships, mental competence, etc. Who, if not the patient, do you need to obtain consent from for an elderly patient's medical care?

Powers of attorney come in various forms; limited, general, durable, and healthcare are the most common. A POA is a document where a "principal" names an attorney-in-fact ("agent") to act on his or her behalf. The POA will usually outline the breadth of the agent's decision-making authority. Depending on how it is drafted and the type of POA, the agent may have very limited or virtually unlimited authority to make decisions on behalf of the principal.

The type of POA provided to your practice will have a large impact on whether the individual named in the POA has the authority to make healthcare decisions on behalf of the patient. A healthcare POA is the most straight-forward type of POA. This document specifically outlines healthcare decision-making authority granted to the agent by the principal.

We encourage you to read healthcare POAs carefully to determine the authority granted to the agent. If you are unsure, contact the ProAssurance Risk Resource department or a local attorney to assist you.

Non-healthcare POAs typically do not give the agent the authority to make healthcare decisions. Exceptions exist. Outside of a healthcare POA, if healthcare decision-making authority is not specifically granted within a POA, do not make presumptions.

You also may encounter patients who lack the mental capacity to continue to make healthcare decisions. Patients with dementia or Alzheimer's present consent issues you should be ready to address. You may be confronted with family disputes, court orders, conflicting POAs, or other documents that cloud the consent issue for a mentally incapacitated patient.

One of the best ways to avoid the confusion of consent for an elderly patient is to establish consent when the patient is still of sound mind. Ask your elderly patients if they have executed any type of POA, living will, or other document outlining who has decision-making authority in the event they become incapacitated or otherwise unable to make decisions. Request a copy of documentation outlining decision-making authority for your patients. Maintain this documentation in the medical record. Consider reviewing this with the patient periodically to ensure it is still current.

## Refusing Consent Due to Lack of Funds or Reimbursement

Payment concerns are becoming more prevalent today due to high deductible health plans, uninsured patients, and lower reimbursement rates. What do you need to consider in these situations?

If you have self-pay patients, you may implement a pre-pay policy to ensure payment prior to rendering services. Difficulty may present when a patient requires an expensive diagnostic test or procedure that they cannot afford. Depending on the situation, consider establishing a policy addressing financial hardship and an associated payment plan for expenses that cannot be paid in one lump sum. If you choose to do this, be sure payment arrangements are in writing; this will help if you have issues with receiving payments.

A more challenging scenario occurs when a patient refuses to consent to a test or procedure because he or she cannot afford it. These are particularly challenging in potentially life-threatening situations. An example is a woman in labor who adamantly refuses a C-section because she cannot afford it—even after being told she, or her baby, may die if vaginal delivery is continued.



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**Medical Risk Resource Advisor** is published twice annually by ProAssurance's Risk Resource Department, **844-223-9648**; [RiskAdvisor@ProAssurance.com](mailto:RiskAdvisor@ProAssurance.com).

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Medical battery is a very real issue with real consequences. The most likely scenario for a medical battery claim is when the patient expressly refuses treatment and the physician performs the treatment over the patient's objection. The C-section situation above is an excellent example.

If a patient is asked to consent to a C-section and expressly refuses, the physician's hands are effectively tied unless he or she can get the patient to change her mind. Certain situations require you or your practice to obtain pre-approval for a test or procedure from a third-party payer. These pre-approvals will sometimes be denied. If a third-party payer denies a pre-approval, you are left with two options: either appeal the denial or ask the patient to pay for the test or procedure.

If you decide to appeal the denial, each third-party payer has an appeals process you must follow. If the appeal is unsuccessful, you may try calling the payer directly, asking to speak with a physician reviewer. Once all efforts are exhausted, it's time for a documented conversation with the patient to explain the situation.

If a patient accepts responsibility for the cost of a test or procedure, consider putting that in writing. If your practice offers financing arrangements, you may wish to have a written document outlining both parties' expectations. 📄

**Consent issues are some of the most frequently asked questions that ProAssurance's Risk Resource Department receives. If you are faced with an uncertain situation or something new, call our Risk Resource line at 844-223-9648 and speak with one of our Advisors.**