

Consent

Levels of Consent

The decision to undergo a medical procedure rests with the patient who, if competent, retains the right to exercise control over his or her body. Thus, the physician owes the patient a duty to obtain consent before rendering medical services except in cases of emergency. Consent may be given by the patient, or by someone authorized to give consent on behalf of the patient. There are two levels of consent — basic consent and informed consent.

Basic consent. The physician must have permission to touch the patient. Often, basic consent is implied. For example, if the patient comes to the physician for removal of a mole, the patient's consent for its removal is implied. Likewise, if the patient comes to the physician for treatment of a sore throat, the patient is impliedly giving consent to the physician to examine his throat. Failure to obtain basic consent exposes the physician to a claim of medical battery.

Two questions must be asked to determine whether the physician may be liable for medical battery. Was the patient aware that the physician was going to perform the procedure? If so, did the patient authorize the procedure? If the answer to either of these questions is “no,” the patient has a claim for medical battery.

Informed consent. Before a patient can make an informed decision about what medical care to accept or reject, the patient must have adequate information. Physicians have a duty before performing a procedure to provide adequate explanation to assist the patient's decision-making process.

Generally, informed consent should include pertinent information about:

- The diagnosis and nature of the patient's problem;
- The purpose of the proposed treatment and its benefits;
- Any material risks of the proposed treatment;
- The risks and benefits of reasonable alternative

treatments;

- The prognosis if the proposed treatment is refused; and
- Whether the proposed treatment is experimental.

To prove a lack of informed consent claim, a patient must show that:

- A reasonable person in patient's position would not have consented to the procedure if the information had been disclosed, and
- A reasonable doctor would have disclosed the information under similar circumstances.

Informed consent usually is not required in these circumstances:

- The risk is insignificant or extremely unlikely to occur;
- The risk is obvious or already known to the patient;
- The risk is unforeseeable or unknowable;
- An emergency makes it unfeasible; or
- Full disclosure would be detrimental to the patient's care.

Who gets consent?

The attending physician is responsible for obtaining a patient's informed consent. This duty may be delegated to someone else, such as a nurse, but if the information provided proves to be inadequate, it is the attending physician who will be held liable.

Who gives consent?

Competent adults, emancipated minors, or mature minors can consent to their health care treatment. Incompetent adults and unemancipated or immature minors must have someone else give consent for their health care treatment.

Incompetent adults. A patient who lacks capacity to make or understand health care decisions cannot give consent, and the physician must get consent from someone else before rendering medical care except in an emergency. The following people, in order of priority, have the right to give consent on behalf of an incompetent adult:

- Health care agent (appointed by patient while still competent in an advance directive);
- Guardian (a judicially appointed guardian or conservator having authority to make health care decisions);
- Patient-designated surrogate (if patient, while

still competent, has personally informed doctor and no agent or guardian has been appointed).

If the patient lacks capacity, and if an agent, guardian, or patient-designated surrogate has not been appointed or is not reasonably available, the doctor may identify a surrogate to make health care decisions on behalf of the patient. The doctor must choose someone who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, who is reasonably available, and who is willing to serve. Consideration may be given, in the order of descending preference to:

- The patient's spouse (unless legally separated);
- The patient's adult child;
- The patient's parent;
- The patient's adult sibling;
- Any other adult relative of the patient; and
- Any other adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, who is reasonably available, and who is willing to serve.

If none of the eligible people are reasonably available, the physician may make health care decisions for the patient after the physician has either:

- Consulted with and obtained recommendations

from the institution's ethics committee; or

- Obtains concurrence with a second physician who is not directly involved in the patient's health care and who is independent of the treating physician.

A surrogate must make health care decisions in accordance with the patient's instructions, if any, and other wishes to the extent known to the surrogate. Otherwise, the surrogate makes decisions in accordance with the surrogate's determination of the patient's best interest.

Emancipated Minors. An emancipated minor is someone under the age of 18 who is independent of parental control and support. Legally, an emancipated minor is treated the same as an adult and can make his or her own health care decisions. He or she can also appoint a health care agent or surrogate.

Unemancipated Minors. For a minor who is not emancipated, the underlying rule is that a physician must get parental (or guardian) consent before rendering medical treatment, except in cases of emergency. However, the legislature and the courts have carved out exceptions to this rule that allow a minor to consent to medical treatment under certain conditions.

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By statute in Tennessee, a physician can treat a minor without parental consent for certain health issues, such as drug abuse, venereal disease, contraception, and prenatal care. Also by statute, a physician may render emergency care to a minor without parental consent. After a reasonable effort has been made to contact a minor's parent or guardian, a physician may render emergency medical treatment to a minor without parental consent if the physician has a good faith belief that the emergency treatment is necessary to save the life of the minor or prevent further deterioration of the minor's condition. In Tennessee, an unemancipated minor cannot obtain an abortion without parental consent or judicial bypass.

The courts in Tennessee have also adopted the "mature minor" doctrine that allows a physician to treat a mature minor without parental consent. In determining who is a "mature minor" Tennessee follows the "Rule of Sevens."

- Under the age of seven there is no capacity, and the physician must have parental consent to treat (unless a statutory exception applies).
- Between the ages of seven and fourteen, there is a rebuttable presumption that there is no capacity, and a physician generally should

get parental consent before treating (unless a statutory exception applies).

- Between the ages of 14 and 21 (now 18), there is a rebuttable presumption of capacity, and the physician may treat without parental consent unless the physician believes that the minor is not sufficiently mature to make his or her own health care decisions.

In states that do not follow the "mature minor" doctrine, such as Georgia, parental consent is required before medical treatment can be given to an unemancipated minor except in cases of emergency or unless it is specifically exempted by statute.

Withdrawal of Consent.

If a competent patient withdraws consent, the health care provider should not begin the treatment or procedure. If the consent is withdrawn after the procedure or treatment has begun, the health care provider should assess whether it is medically feasible to stop. If not, the treatment should be continued until it becomes medically feasible to stop. The reasons for continuing treatment after consent has been withdrawn should be well-documented in the medical record.

Informed Refusal.

The right to consent to treatment is meaningless unless the patient has the corollary

right to refuse treatment. Consistent with the right to refuse treatment is the right to make an informed refusal. For procedures that carry material risks, the risks of refusing treatment should be covered in the informed consent process. But, what about procedures that do not involve a material risk to the patient, such as a Pap smear? If a patient refuses a risk-free procedure or test, the doctor should inform the patient of the risks of not getting the test, even though informed consent would not have been necessary to do the procedure.

Conclusion.

Getting informed consent is more than simply getting the patient to sign a consent form. Educating the patient so that he or she can make an informed decision either to accept or reject the proposed treatment gives meaning to patient autonomy and ensures the bodily integrity of every patient.

Disclaimer: The information contained in this factsheet is educational in nature and provided as a public service. It is not intended as legal advice nor should it be relied upon as such. The information is based upon Tennessee law, and the law in other states may be different. Laws may change without notice, rendering the information contained in this factsheet inaccurate. If you have specific legal questions, please consult an attorney.

Written by: Carol A. Schwab, J.D., LL.M., Director of Medical/Legal Education, Office of Academic, Faculty & Student Affairs, Professor, College of Pharmacy, University of Tennessee Health Science Center, Memphis, TN.