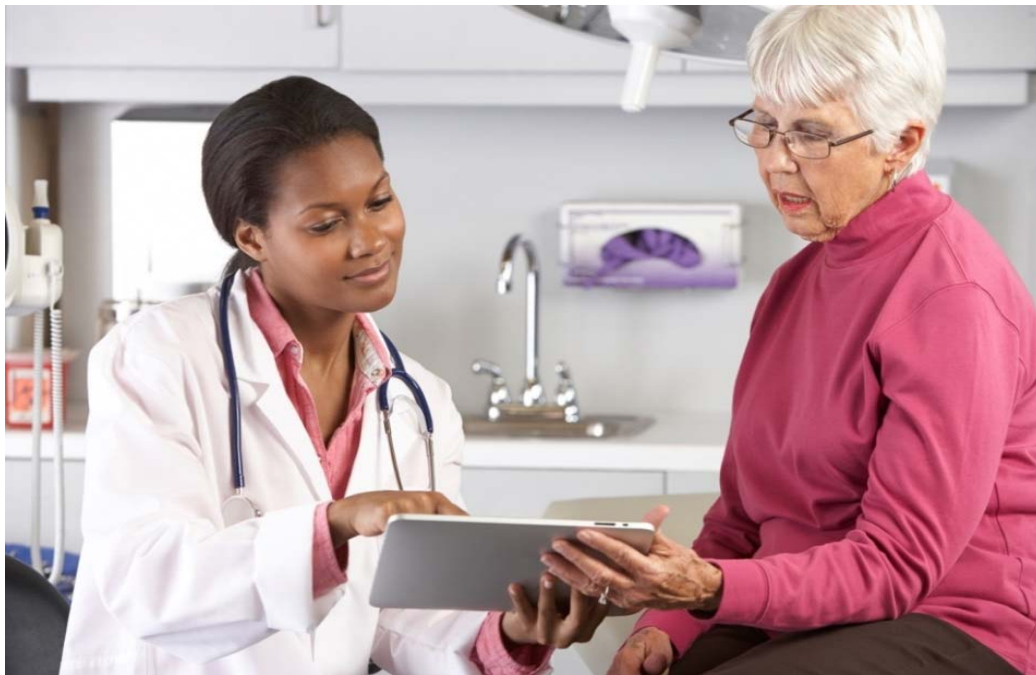

Consent, Refusal, and Advance Directives



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Compliance
Bootcamp
(2-18)

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Written Materials

- Idaho Medical Consent Act, IC 39-4501 et seq.
- Stanger, *Informed Consent v. Consent Form*
- Article, *Medical Consents in Idaho: A Primer*, Univ. of Idaho L. Review
- Sample Informed Consent Policy
- Idaho Mental Hold Law, IC 66-326
- Idaho Shelter Care Act, IC 16-2411

Informed Consent



Consent: General Principles

- Must have valid consent for treatment.
- If patient lacks capacity to consent:
 - Check for advance directive, or
 - Obtain consent from authorized representative.
- In an emergency and no time to obtain consent, provide necessary care.
- Must provide sufficient information to ensure that the consent is informed.

Consent: Liability

- Failure to obtain consent =
 - Lack of informed consent tort
 - Battery
 - False imprisonment
 - Malpractice
 - Other?
- Penalties
 - Criminal fines
 - Prison
 - Civil damages
 - Adverse licensure action

**Informed
consent is a
defense**

Lack of Informed Consent

- Treat patient who lacks capacity to consent to their own care (e.g., patient medicated, intoxicated, underage, etc.).
- Ignore patient's prior wishes or decisions (e.g., provides care contrary to advance directive).
- Continue treatment even though patient has objected or withdraws consent.
- Provides treatment that exceeds scope of consent.
- Fails to inform patient of sufficient info reasonably necessary to enable patient to make an informed decision.
- Fails to effectively communicate with patient so as to convey or receive informed consent (e.g., limited English proficiency, disability, etc.).

Medical Consent and Natural Death Act (IC 39-4501 et seq.)



Capacity

- “Any person who **comprehends the need for, the nature of and the significant risks** ordinarily inherent in, any contemplated ... health care, treatment or procedure is competent to consent thereto on his or her own behalf.”
- “Any health care provider may provide such health care and services in reliance upon such a consent if the consenting person appears to the health care provider securing the consent to possess such requisite comprehension at the time of giving consent.”

(IC 39-4503, emphasis added)

Capacity: Minors

- May minors consent to their own care?



Minor's Capacity

- Consent for the furnishing of health care to [1] any person who is not then capable of giving such consent or [2] **who is a minor** may be given or refused by the following, provided that the surrogate decision maker shall have sufficient comprehension as required to consent to his or her own health care:
 - Court appointed guardian.
 - Person named in living will and durable power of attorney.
 - Spouse.
 - Adult child.
 - Parent.
 - Delegation of parental authority per IC 15-5-104.
 - Relative.
 - Any other competent person representing himself or herself to be responsible for health care.

(IC 39-4504(1))

Capacity: Minors

- Conservative approach: do not allow minor to consent to their own care unless:
 - Minor is emancipated.
 - Statute authorizes minor to consent to their own care.
 - Statute authorizes care regardless of consent.
- Mature minor doctrine might apply, but be careful.

Minor's Capacity: Emancipation

- Minor is probably emancipated and able to consent to their own healthcare if:
 - **Married or has been married** (*see* IC 18-604(3))
 - **In armed forces** (*see* IC 18-604(3))
 - **Living on own and self-sufficient** (*see* IC 66-402(6))
 - **Court declares them emancipated** (*see* IC 16-2403(1))
- Must still satisfy the basic test, i.e., be able to “comprehend the need for, the nature of and the significant risks ordinarily inherent in, any contemplated ... health care...”
(IC 39-4503)

Minor's Capacity: Emancipation

- Pregnancy is probably not an emancipating event.
 - “Capacity to become pregnant and capacity for mature judgment concerning the wisdom of bearing a child or having an abortion are not necessarily related.”
(IC 18-602)
 - “To protect minors from their own immaturity”, abortions for “pregnant unemancipated minors” generally require:
 - Parental/guardian consent, or
 - Judicial finding that minor is mature and capable of giving informed consent.
(IC 18-602, 18-609A)
- *If pregnancy were an emancipating event, you would not need parental consent for abortion.*

Minor's Capacity: Statutes Allow Minor Consent

- Emergency medical exam and stabilizing treatment in hospital. (HHS Interpretive Guidelines to 42 CFR 489.24)
- Examinations, prescriptions devices, and info regarding contraceptives if practitioner determines that minor has sufficient intelligence and maturity to understand the nature and significance of treatment. (IC 18-603)
- Family planning services funded by Title X of the Public Health Services Act. (42 USCX300(a))

Minor's Capacity: Statutes Allow Minor Consent

- Drug treatment or rehab. (IC 37-3102)
 - If minor is age 16 or older, cannot notify parents without minor's consent.
- Age 14: testing or treatment for reportable infectious or communicable disease. (IC 39-3801)
- Age 14: hospitalization for observation, evaluation and treatment for mental condition. (IC 66-318(a)(2))
 - Treating facility must notify parents
- Age 17: unpaid blood donations. (IC 39-3701)
- Others?

Mature Minor Doctrine

- In other states, minors with sufficient maturity may consent to their own care.
- Idaho statutes are ambiguous.
 - IC 39-4503 states “any person” of sufficient comprehension may consent to or refuse their own care. *See also* IC 18-603 and 18-609A; Idaho AG Op. (2/16/10).
 - IC 39-4504 identifies those who may consent for minors.
- No Idaho cases resolving the conflict.

Mature Minor Doctrine

- At some point, constitutional right of privacy or parenthood will likely be decisive.
 - Individual probably has fundamental right to make decisions about themselves and their offspring, especially in matters of reproductive rights. *See, e.g., Carey v. Population Services Int'l* (S.Ct. 1977)
 - But we don't have any Idaho cases regarding this right now.
- Until then, you may want to consider what Idaho judge or jury would think...

Mature Minor Doctrine

- Risks of allowing minor to consent to their own care absent express statute or case:
 - May expose practitioner to liability if court concludes minor lacked capacity to consent.
 - May limit ability to disclose info to parents.
 - May limit ability to obtain payment.

Mature Minor Doctrine

- As general rule, practitioners should require parental consent unless minor is emancipated or statute applies.
- If rely on mature minor doctrine, be careful; consider, and document relevant factors.
 - Age
 - Maturity, intelligence and understanding per IC 39-4503
 - Nature of treatment, including risks

Authority: Surrogates

- “Consent for the furnishing of ... health care ... to [1] **any person who is not then capable of giving such consent ...** or [2] **who is a minor** may be given or refused in the order of priority set forth hereafter; provided
 - **that the surrogate decision maker shall have sufficient comprehension** as required to consent to his or her own health care, and
 - the surrogate decision maker shall not have authority to consent to or refuse health care contrary to such person's **advance directives, POST or wishes** expressed by such person while the person was capable of consenting to his or her own health care.”

(IC 39-4504(1))

Authority: Surrogates

- **Surrogate decision makers**
 - Court appointed guardian.
 - Person named in living will and durable power of attorney if conditions triggering authority are satisfied.
 - Spouse.
 - Adult child.
 - Parent.
 - Delegation of parental authority per IC 15-5-104.
 - Relative representing himself as appropriate responsible person to act under the circumstances.
 - Any other competent person representing himself or herself to be responsible for health care.

(IC 39-4504(1))

Authority: Emergency

- “If the person [1] presents a **medical emergency** or there is a substantial likelihood of his or her life or health being seriously endangered by withholding or delay in the rendering of ... health care to such person and the person [2] **has not communicated and is unable to communicate his or her treatment wishes**, the attending health care provider may, in his or her discretion, authorize and/or provide such health care, as he or she deems appropriate, and all persons, agencies and institutions thereafter furnishing the same, including such health care provider, may proceed as if informed, valid consent therefor had been otherwise duly given.”

(IC 39-4504(1); see also IC 56-1015)

Authority: Statutes

Some statutes allow treatment without consent.

- Treatment of infant by “safe haven”. (IC 39-8203)
- Minor brought to “shelter care”. (IC 16-2411)
- Certain tests and treatments for newborns, including germicide and PKU tests. (IC 39-903, -909, -912)
 - Parents may refuse based on religion.
- Limited testing or treatment ordered by law enforcement, such as blood test for DUI or testing of prisoners for communicable diseases. (IC 18-8003, -8002; 39-604)

Authority: Statutes

Some statutes allow treatment without consent.

- Mental holds at hospital (IC 66-326)
 - The person is **gravely disabled** due to mental illness or
 - the person's continued liberty poses an **imminent danger** to that person or others, as evidenced by a threat of substantial physical harm.
- Shelter care at hospital for minors (IC 16-2411)
 - an **emergency condition** exists, and
 - child is suffering from a **serious emotional disturbance** as a result of which he is likely to cause harm to himself or others or is manifestly unable to preserve his health or safety, and
 - immediate detention and treatment is **necessary to prevent harm to the child or others.**

Form of Consent

- “It is not essential to the validity of any consent ... that the consent be in writing or any other specific form of expression.”

(IC 39-4507)

- Under Idaho law, consent may be:

- Implied

- Oral

- Written

The more significant the treatment, the greater the need to document informed consent.

- Other laws or payor standards may require documented consent, e.g.,
 - COPs 42 CFR 482.13(b), 482.24(c)(2)(v), 42 CFR 482.51(b)(2); 485
 - Joint Commission RC.02.01.01

Form of Consent

- “When the giving of such consent is recited or documented in **writing** and expressly authorizes the care ..., and when such writing or form has been executed or initialed by a person competent to give such consent for himself or another, such written consent, in the absence of convincing proof that it was secured maliciously or by fraud, is **presumed to be valid** for the furnishing of such care..., and the advice and disclosures of the attending [practitioner], as well as the level of informed awareness of the giver of such consent, shall be presumed to be sufficient.”

(IC 39-4507)

Form of Consent: Suggestions



Invasiveness and Risks

- **Specific consent: significant treatment**
 - Communication about specific treatment.
 - Pre-published forms may help provide info and document consent, but beware undue reliance.
 - Medical record notes confirming that elements of consent satisfied, e.g., patient competency, discussion, understanding, questions/answers.
- **General consent: upon registration**
 - Covers basic treatment activities, e.g., physical exams, basic medications, diagnostic tests, labs and pathology, photos, etc.
- **Implied consent**

Form of Consent: Consent Form

- Name and signature of patient or legal representative.
- Name of the provider.
- Name of treatment or procedures.
- Name of all practitioners performing the procedure and individual significant tasks if more than one practitioner.
- Risks and benefits.
- Alternative procedures and treatments and their risks .
- Date and time consent is obtained.
- Statement confirming procedure was explained to patient.
- Signature of person witnessing the consent.
- Name and signature of person who explained the procedure to the patient or guardian.

(See CMS SOM to 42 CFR 482.24(c)(2)(v))

Informed Consent

- “Consent, or refusal to consent, for the furnishing of health care ... shall be valid in all respects if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting [1] **the need for**, [2] **the nature of**, and [3] **the significant risks** ordinarily attendant upon such a person receiving such care, as to permit the giving or withholding of such consent to be a reasonably informed decision.”

(IC 39-4506)

Informed Consent

- “Any such consent shall be deemed valid and so informed if the health care provider ... has made such disclosures and given such advice respecting pertinent facts and considerations as would **ordinarily be made and given under the same or similar circumstances, by a like health care provider of good standing practicing in the same community.** As used in this section, the term "in the same community" refers to that geographic area ordinarily served by the licensed general hospital at or nearest to which such consent is given.

(IC 39-4506)

- *“What info would other practitioners in community give?”*

Informed Consent

Informed Consent = Communication

- Practitioner communicates info relevant to treatment
- Patient understands the material facts, e.g., benefits, risks, and likely consequence of the proposed treatment and alternatives.
- Patient makes informed decision to consent or refuse treatment.

Consent form = Documentation

- Supplements oral or other info given by the practitioner.
- Documents that the communication process took place, e.g., that practitioner communicated relevant info, patient understood info, and patient made voluntary, informed decision.

Informed Consent

- Beware situations where consent may not be informed.
 - Patient lacks sufficient education, intelligence or maturity to understand relevant considerations.
 - Patient does not speak the same language or suffers from disability.
 - Patient is medicated, distracted, stressed, etc.

Informed Consent

- Ensure that patient **understands**.
 - Evaluate whether patient is in a condition so as to be able to process relevant info.
 - Speak at the patient's level of understanding.
 - Beware language barriers.
 - Discrimination statutes may require interpreters, translators, or communication aids.
 - Supplement oral communications with written or visual material and documentation.
 - Give the patient an opportunity to ask questions and receive answers.

Scope and Duration

- Consent is generally limited to specific procedure or course of treatment for which consent was given and any incidental, included procedures.
- Consent generally does not extend to procedures outside scope of original consent.
- New consent should be obtained if change in circumstances, e.g.,
 - change that impacts risk.
 - change in method or treatment.
 - change in providers.
 - significant lapse in time.

Responsibility for Obtaining Consent

- “Obtaining sufficient consent for health care is the **duty of the attending health care provider** upon whose order or at whose direction the contemplated health care ... is rendered.”

(IC 39-4508)

- Practitioner is the person with the knowledge, training and licensure necessary to diagnose condition and have effective communication.
- Practitioner is the person who will be liable for failure to obtain informed consent.

Refusal of Treatment



Refusal of Treatment: Patient Self-Determination

- Idaho “recognizes the established common law and the fundamental right of [competent] persons to control the decisions relating to the rendering of their medical care, including the decision to have life-sustaining procedures withheld or withdrawn....”

(IC 39-4509)

- Right to consent = right to refuse care or withdraw consent.

(See IC 39-4502(7), “‘Consent to care’ includes refusal to consent to care and/or withdrawal of care.”)

Refusal of Treatment: “Against Medical Advice”

- Provide sufficient info to allow patient to make informed refusal.
- Document in chart:
 - Patient’s competency.
 - Explanation of risks and benefits.
 - Practitioner’s attempt to obtain patient’s informed consent.
 - Patient’s signature confirming voluntary decision.
 - Witnesses.
- Attempt to obtain patient’s signed refusal.

Refusal of Treatment: Surrogates

- Consent for health care “may be given **or refused**” by the authorized surrogate.

(IC 39-4504(1))

- “Health care ... shall be withdrawn and denied in accordance with a valid directive” from:
 - a competent patient,
 - a patient's health care directive, or
 - by a patient's surrogate decision maker.

Exception: developmentally disabled person.

(IC 39-4514(3))

Refusal of Treatment: Surrogates

- Child neglect = “**without proper ... medical or other care ... necessary for his well-being** because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them.”

(IC 16-1602(25))

- Vulnerable adult neglect = “**failure of a caretaker to provide ... medical care reasonably necessary to sustain the life and health** of a vulnerable adult...”

(IC 39-5302(8))

- Providers must report suspected neglect.

(IC 16-1605; 39-5303)

- Court may order treatment.

Refusal of Treatment: Developmentally Disabled

- To withhold or withdraw life-sustaining treatment, attending physician + one other physician must certify:
 - Patient has terminal condition such that the application of artificial life-sustaining procedures would not result in the possibility of saving or significantly prolonging the life of the developmentally disabled patient;
 - Procedures would only prolong the moment of the patient's death for a period of hours, days or weeks; and
 - Death is imminent, whether or not the life-sustaining procedures are used.

(IC 66-405(8))

- With modern technology, it is very difficult to satisfy this standard.

Refusal of Treatment: Baby Doe Regs

- Baby Doe Regs apply to “infants”.
 - less than one year of age, or
 - older than one year of age but less than two years of age who has been continuously hospitalized since birth, who was born extremely prematurely, or who has a long term disability.

(IDAPA 16.06.05.004.07)

- Providers must report neglect of infants, including “withholding of medically indicated treatment from disabled infants with life-threatening conditions.”

(IDAPA 16.06.05.020)

Advance Directives



Advance Directives

- Competent adult patients “have the fundamental right to control the decisions relating to their rendering of their medical care, including the decision to have life-sustaining procedures withheld or withdrawn.”

(IC 39-4509)

- Competent adult may express their directives through:
 - Direct instructions by competent patient.
 - Be sure to document same.
 - Advance directives executed in case the patient becomes incompetent or unable to communicate.
(See IC 39-4510)

Advance Directives

- Living Will
- Durable Power of Attorney
- Physician's Order for Scope of Treatment ("POST")
- Do Not Resuscitate ("DNR")
- Mental Health Care Directives
- Others?

Advance Directives

- Do not get too hung up on technical compliance with form.
- “It is not essential to the validity of any consent for the furnishing of hospital, medical, dental or surgical care, treatment or procedures that the consent be in writing or any other specific form of expression.” (IC 39-4507).
- “It is the intent of the legislature to establish an effective means for such communication. It is not the intent of the legislature that the procedures described in sections 39-4509 through 39-4515 [e.g., living wills, DPOAs, or POSTs] are the only effective means of such communication.... Any authentic expression of a person's wishes with respect to health care should be honored.”

(IC 39-4509(3)).

Revocation of Advance Directive

- Maker may revoke at anytime by:
 - Intentionally canceling, defacing, obliterating, burning, tearing, or otherwise destroying the document by maker or in maker's presence and at maker's direction.
 - Written revocation signed by maker.
 - Oral revocation by maker.
- * *What about other manifestation?*
- Maker is responsible for notifying provider.
- Provider not liable for failing to act on revocation unless provider has actual knowledge of revocation.

(IC 39-4511A)

Suspension of Advance Directive

- Advance directive is NOT automatically suspended during surgery.
- Maker may suspend an advance directive at anytime by:
 - Written, signed suspension by maker expressing intent to suspend.
 - Oral expression by maker expressing intent to suspend.
- * *What about other manifestation?*
- Upon meeting the termination terms of the suspension as defined by the maker, the living will, DPOA, POST or other advance directive will resume.



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