

Informed Consent



Lauren Prew

5/6/2016


HOLLAND & HART 

Important Information

This presentation is similar to any other seminar designed to provide general information on pertinent legal topics. The statements made and any materials distributed as part of this presentation are provided for educational purposes only. They do not constitute legal advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the speakers. This presentation is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.

All Presentations and Other Materials © Holland & Hart LLP 2016


5/6/2016

HOLLAND & HART 

Informed Consent Outline


- Components of a Valid Consent
- Complex Consent – Minors and Others
- Advance Directives
- Withdrawing Care
- Mental Holds

5/6/2016

HOLLAND & HART 

Informed 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, may provide necessary care without requisite consent.
- Must provide sufficient information to ensure that the consent is informed.

5/6/2016 

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 for providers

5/6/2016 

Actions that Lack Informed Consent


- Treating patients who lack capacity to consent to their own care (e.g., patient medicated, intoxicated, underage, etc.).
- Ignoring patient's prior wishes or decisions (e.g., provides care contrary to advance directive).
- Continuing treatment even though patient has objected or withdrawn consent.
- Providing treatment that exceeds scope of consent.
- Failing to inform patient of sufficient info reasonably necessary to enable patient to make an informed decision.
- Failing to effectively communicate with patient so as to convey information necessary for consent (e.g., limited English proficiency, disability, etc.).

5/6/2016 

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

- “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

5/6/2016 

Medical Consent and Natural Death Act: Minor's Capacity to Consent


- 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))

5/6/2016 

Capacity to Consent: Minors

- Generally, minors should not be permitted to consent to their own care unless:
 - A minor is emancipated.
 - Statute authorizes minor to consent to his or her own care.
 - Statute authorizes care regardless of consent.
- Mature minor doctrine might apply, but use caution when making a determination.

5/6/2016 

Capacity to Consent: Minors

- 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 minor 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)

5/6/2016 

Capacity to Consent: Minors


- 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.*

5/6/2016 

Capacity to Consent: Minors


- What about after a minor parent gives birth?
 - Does minor parent have authority to consent for baby?
 - Does minor parent have authority to consent for herself?
 - What about the minor father?
- “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, among others, a parent.
- Provided “that the surrogate decision maker shall have sufficient comprehension as required to consent to his or her own health care...”

IC 39-4504(1)

5/6/2016 


Capacity to Consent: Minors

- **Emergency medical exam and stabilizing treatment in hospital.** (HHS Interpretive Guidelines to 42 CFR 489.24)
- "A licensed physician or licensed or registered health care provider acting at his direction or medical order may lawfully provide examinations, prescriptions, devices and informational materials regarding prevention of conception to any person requesting the same who, in the good faith judgment of the physician or such provider, is sufficiently intelligent and mature to understand the nature and significance thereof." (IC 18-603)
- **Drug treatment or rehab.**
 - If minor is age 16 or older, cannot notify parents without minor's consent.
(IC 37-3102)

5/6/2016 HOLLAND & HART 


Capacity to Consent: Minors

- **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.**
 - Treating facility must notify parents
(IC 66-318(a)(2))
- **Age 17: unpaid blood donations.**
(IC 39-3701)

5/6/2016 HOLLAND & HART 


Mature Minor Doctrine

- In other states, minors with sufficient maturity may consent to their own care.
- No Idaho cases.
- 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.
 - IC 39-4504 identifies those who may consent for minors.

5/6/2016 HOLLAND & HART 


Mature Minor Doctrine

- At some point, constitutional rights or parenthood may be decisive.
 - Individuals probably have fundamental rights to make decisions about themselves and their offspring.
 - But we don't have any Idaho cases regarding this right now.
- Until then, you may want to consider what an Idaho judge or jury would think...

5/6/2016 


Mature Minor Doctrine

- Risks of allowing minors 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 practitioner's ability to disclose information to parents.
 - May limit practitioner/facility's ability to obtain payment.

5/6/2016 

Mature Minor Doctrine


- As general rule, practitioners should require parental consent unless minor is emancipated or a specific statutory exception applies.
- If relying on the mature minor doctrine, consider and document relevant factors.
 - Age
 - Maturity, intelligence and understanding per IC 39-4503
 - Nature of treatment, including risks

5/6/2016 

Authority: Surrogates

- “Consent for the furnishing of ... health care ... to any person [1] 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))

5/6/2016 

Authority: Surrogates

- Surrogate decision makers
 - Court appointed guardian
 - Durable power of attorney
 - Spouse
 - Adult child
 - Parent
 - Delegation of parental authority
 - Relative
 - Person responsible for health care
- *What about?*
 - *Patient's advance directive*
 - *Noncustodial parent*
 - *Stepparent*
 - *Foster parent*
 - *Significant other*
 - *Estranged spouse*
 - *Father v. mother*
 - *Grandparent v. sibling*
 - *Long term care provider*
 - *Others?*


(IC 39-4504)

5/6/2016 

Authority: Surrogates

- Surrogate who, in good faith, gives consent for another is immune from civil liability.
- Practitioner who, in good faith, obtains consent from apparently competent patient or other authorized surrogate is immune from civil liability.


IC 39-4504(2)-(3)

5/6/2016 

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 therefore had been otherwise duly given.”


(IC 39-4504(1))

5/6/2016 

Authority: Emergency

- “No ... physician or hospital licensed in this state shall be subject to civil liability, based solely upon failure to obtain consent in rendering emergency medical, surgical, hospital or health services to any individual regardless of age where [1] that individual is unable to give this consent for any reason and [2] there is no other person reasonably available who is legally authorized to consent to the providing of such care, provided, however, [3] that such person, physician, or hospital has acted in good faith and without knowledge of facts negating consent.”


(IC 56-1015)

5/6/2016 

Authority: Statutes

Some statutes allow treatment without consent.


- Treatment of infant by “safe haven”
(IC 39-8203)
- Certain tests and treatments for newborns, including germicide and PKU tests.
 - Parents may refuse based on religion.
(IC 39-903, -909, -912)
- 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)

5/6/2016 

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, for example:
 - COPs 42 CFR 482.13(b), 482.24(c)(2)(v), 42 CFR 482.51(b)(2); 485
 - Joint Commission RC.02.01.01

5/6/2016 HOLLAND & HART 

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

5/6/2016 HOLLAND & HART 

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**

5/6/2016 HOLLAND & HART 

Form of Consent: Informed 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 applicable 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))


HOLLAND & HART 

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)

5/6/2016

HOLLAND & HART 


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?”*

5/6/2016

HOLLAND & HART 


Informed Consent

Informed Consent	Consent Form
<ul style="list-style-type: none"> Practitioner communicates information relevant to treatment. Patient understands the material facts, e.g., benefits, risks, and likely consequences of the proposed treatment and alternatives. Patient makes informed decision to consent or refuse treatment and care. 	<ul style="list-style-type: none"> Documents the informed consent provided. 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.

5/6/2016 HOLLAND & HART 


Informed Consent

- Beware of situations where consent may not be informed or adequately conveyed.**
 - 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.
 - Patient is intoxicated and incoherent.

5/6/2016 HOLLAND & HART 


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 of 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 satisfactory answers.

5/6/2016 HOLLAND & HART 


Informed Consent

- Informed consent typically requires disclosure of:
 - Nature of proposed treatment.
 - Potential benefits, risks, side effects, including problems that might occur during recuperation.
 - Likelihood of achieving goals.
 - Reasonable alternatives to proposed treatment.
 - Relevant risks, benefits and side effects of alternatives, including consequences of not receiving care.
 - Persons who will perform significant aspects of treatment.
- *What information would a patient want or need to make informed decision?*

5/6/2016 


Informed Consent: Therapeutic Privilege

- In some states, provider may refuse to disclose certain information to patient if non-disclosure is determined to be in the patient's best interests.
- HIPAA allows provider to refuse to disclose info to patient to avoid substantial risk of harm.
(45 CFR 164.524)
- Use caution when exercising non-disclosure privileges:
 - No Idaho precedent.
 - Contrary to general presumption that patient is entitled to make informed decision.
 - If invoking, document the basis for such non-disclosing privilege.

5/6/2016 

Voluntary Consent

- Consent must be voluntary.
 - Not coerced or obtained through intimidation.
 - Not given under duress, if possible.
 - Not obtained by fraud, i.e., misrepresentation, false info, etc.
 - Not inferred but explicit.

5/6/2016 

Scope and Duration

- Consent is generally limited to specific procedure or course of treatment for which consent was given, including any incidental procedures.
- Consent generally does not extend to procedures outside scope of original consent.
- New consent should be obtained if change in circumstances, including the following types of changes:
 - Those that impact risk.
 - Those that involve a change in method or treatment.
 - Those that result in a change in providers.
 - Those that result in a significant lapse in time.

5/6/2016

HOLLAND & HART 

Scope and Duration

- If possible, obtain consent sufficiently in advance to give patient time to consider and decide on alternatives.
- But not so far in advance that circumstances might change.
 - Obtain or reaffirm consent if too much time has passed or circumstances have changed.
- Beware of “old” consents because circumstances may have changed.

5/6/2016

HOLLAND & HART 

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.

5/6/2016

HOLLAND & HART 

Responsibility for Obtaining Consent

- “A licensed hospital and any employee of a health care provider, acting with the approval of such an attending or other individual health care provider, may perform the ministerial act of documenting such consent by securing the completion and execution of a form or statement in which the giving of consent for such care is documented by or on behalf of the person.”

IC 39-4508

5/6/2016

HOLLAND & HART 

Informed Consent in Hospitals

- Medicare Critical Access Hospital (CAH) Conditions of Participation (COP) require properly executed informed consent form for any procedures specified by medical staff or by applicable law as requiring written patient consent, including:
 - Information*
 - Explanations*
 - Consequences*
 - Options*

(CAH Interpretive Guidelines for 42 CFR 485.638(a)(4))

*As necessary to make the consent truly informed.

5/6/2016

HOLLAND & HART 

Informed Consent in Hospitals

- Include at least:
 - Nature and purpose of procedure
 - Risks and consequences
 - Risks and prognosis if no treatment
 - Probability of success
 - Alternative methods of treatment and associated risks and benefits
 - Who will perform surgical intervention

CAH Interpretive Guidelines for 42 CFR 485.639


5/6/2016

HOLLAND & HART 

Informed Consent in Hospitals

- Per CAH COPs, a properly executed consent form contains at least the following:
 - Name and signature of patient or legal representative
 - Name of hospital
 - Name of procedure(s)
 - Name of practitioner(s) performing the procedure(s) or important aspects of the procedures, including significant surgical tasks (e.g., opening/closing; grafts; dissecting, altering or removing tissue; implanting devices; etc.)
 - Signature of patient or legal guardian
 - Date and time in which consent is obtained
 - Statement that procedure was explained to patient or guardian
 - Signature of professional person witnessing the consent
 - Name/signature of person who explained the procedure to the patient or the guardian


CAH Interpretive Guidelines for 42 CFR 485.638(a)(4) and 485.639; see also Interpretive Guidelines to 42 CFR 482.24(c)(2)(v).

5/6/2016 

Informed Consent in Hospitals

- “Informed consent requires that a patient have a full understanding of that to which he or she has consented. An authorization from a patient who does not understand what he/she is consenting to is not informed consent.”

CAH Interpretive Guidelines for 42 CFR 485.639

5/6/2016 

Refusal of Treatment: 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.”

5/6/2016 


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.

5/6/2016 HOLLAND & HART 


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))

5/6/2016 HOLLAND & HART 

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 to the appropriate authorities.
IC 16-1605; 39-5303

5/6/2016 HOLLAND & HART 

Refusal of Treatment: Religious Beliefs

- Parents or guardians may decline treatment based on religious beliefs.
 - Idaho does not “require the granting of permission for or on behalf of any patient who is not able to act for himself by his parent, spouse or guardian in violation of the religious beliefs of the patient or the patient’s parent or spouse.”


IC 39-4501(3)
– “No child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being.”
IC 16-1602(25)

5/6/2016 

Refusal of Treatment: Surrogates


- “The right to practice religion freely does not include the right to expose the community or the child to ... ill-health or death... Parents may be free to become martyrs themselves. But it does not follow they are free ... to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”

Prince v. Massachusetts, 328 U.S. 158 (1944)

5/6/2016 

Refusal of Treatment: Surrogates

- Court may order treatment despite surrogate’s refusal.
 - For children: IC 16-1627 creates process for obtaining expedited authority to provide emergency care.
 - For adults: ?

5/6/2016 

Refusal of Treatment: Surrogates

- Practical advice for situations where surrogates refuse treatment recommended by provider:
 - If parents disagree regarding treatment:
 - Treatment is not urgent: allow the parents to work out the decision, often addressed in parenting plans if divorced.
 - Treatment is urgent: rely on consent for necessary care.
 - If treatment is not necessary to patient's well-being, provider should generally respect surrogate's authority.
 - If treatment is necessary, provider may need to report matter to appropriate authorities and let them handle.
 - Provider may petition the court directly or through appointment of temporary guardian.
- Beware of providing treatment without requisite authority.

5/6/2016

HOLLAND & HART 

Refusal of Treatment: Developmentally Disabled

- To withhold or withdraw life-sustaining treatment, attending physician and 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.

5/6/2016

HOLLAND & HART 

Refusal of Treatment: Baby Doe Regs

- Baby Doe regulations apply to "infants":
 - Those less than one year of age, or
 - Those 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


5/6/2016

HOLLAND & HART 

Euthanasia or Assisted Suicide

- Idaho's consent statute "does not make legal, and in no way condones, Euthanasia or Assisted Suicide, mercy killing, or assisted suicide or permit an affirmative or deliberate act or omission to end life, including any act or omission described in IC 18-4017, other than to allow the natural process of dying."


IC 39-4514(2)

5/6/2016 

Euthanasia or Assisted Suicide

- "A person is guilty of a felony if such person, with the purpose of assisting another person to commit or to attempt to commit suicide, knowingly and intentionally either:
 - (a) Provides the physical means by which another person commits or attempts to commit suicide; or
 - (b) Participates in a physical act by which another person commits or attempts to commit suicide."
- Penalties
 - 5 years in prison
 - Loss of professional license

IC 18-4017


5/6/2016 

Euthanasia or Assisted Suicide

The Euthanasia or Assisted Suicide Statute does not apply to:


- "A health care professional who administers, prescribes or dispenses medications or procedures to relieve another person's pain or discomfort, even if any such medication or procedure may hasten or increase the risk of death, unless such medications or procedures are knowingly and intentionally administered, prescribed or dispensed to cause death."
- "A health care professional who withholds or withdraws treatment or procedures in compliance with a living will and durable power of attorney for health care, a health care directive, a [POST] form or any other similar document that satisfies the elements set forth in [IC 39-4501 et seq.] or upon a refusal to consent or withdrawal of consent by the patient or [authorized surrogate]."

IC 18-4017(5)

5/6/2016 

Advance Directives



5/6/2016 HOLLAND&HART 


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 the same.
 - Advance directives executed in case the patient becomes incompetent or unable to communicate.
(See IC 39-4510)

5/6/2016 HOLLAND&HART 

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?

5/6/2016 HOLLAND&HART 

Advance Directives


- “Directive,’ ‘advance directive’ or ‘health care directive’ means a document that substantially meets the requirements of section 39-4510(1), Idaho Code, or is a "Physician Orders for Scope of Treatment" (POST) form or is another document which represents a competent person's authentic expression of such person's wishes concerning his or her health care.”

IC 39-4502(8)

5/6/2016 HOLLAND & HART 

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)

5/6/2016 HOLLAND & HART 

www.ag.idaho.gov/livingWills/livingWills_index.html



5/6/2016 HOLLAND & HART 

Presumed Consent to Resuscitation

- Consent for CPR is presumed unless:
 - Surrogate decision-maker communicates patient's wishes not to receive CPR and any conditions have been met;
 - Living will or DPOA is in effect in which patient declined CPR and conditions have been met; or
 - POST is in effect in which patient declined CPR and conditions have been met.

IC 39-4514(5)

5/6/2016

HOLLAND & HART 

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)

5/6/2016

HOLLAND & HART 

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.

(IC 39-4511B)

5/6/2016

HOLLAND & HART 

Immunity for Acting per Advance Directive

- Providers and facilities are immune from liability if:
 - Provider acts in good faith pursuant to the directives in a facially valid advance directive.
 - If provider cannot assist due to conscience, provider makes good faith effort to help patient obtain services of another provider before withdrawing from care of patient.
- Persons who exercise responsibilities of a DPOA in good faith are immune from liability.

IC 39-4513

5/6/2016

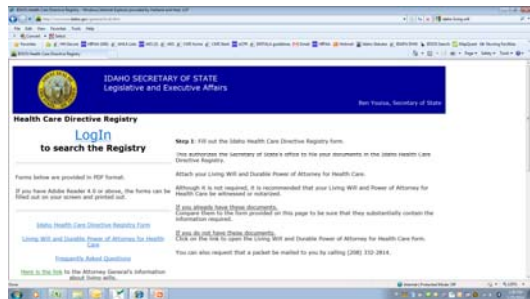
Idaho Health Care Directive Registry

- Patient may register advance directive in the Idaho Health Care Directive Registry at www.sos.idaho.gov/general/hcdr.htm.
- Providers may, but are not required to, check registry.




5/6/2016

www.sos.idaho.gov/general/hcdr.htm



5/6/2016

Questions?



Lauren Prew
laprew@hollandhart.com

Kim C. Stanger
kcstanger@hollandhart.com

5/6/2016

HOLLAND&HART 