California Supplement to MIEC Claims Alert #17

Informed Consent Revisited: What is Expected of Physicians

This supplement contains excerpts from California laws related to informed consent, consent by minors and special consents. California physicians who have questions about a specific patient or who require legal advice may call MIEC's Claims Department in Oakland at 800.227.4527. For general liability questions, physicians and their staff can call MIEC's Loss Prevention Department in Oakland, CA at 800.227.4527.

Informed consent

In California, the current law on informed consent is derived largely from the case of *Cobbs vs. Grant* (1972) 8 Cal.3d 229, in which the Supreme Court held "an integral part of the physician's overall obligation to the patient…is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." (*Id*. at 243) To that end, a physician is required to disclose "all information relevant to a meaningful decisional process." (*Id*. at 242)

Over the years, other decisions (relying on *Cobbs*) have influenced the current definition of informed consent, including *Mathis v. Morrissey* and *Truman v. Thomas:*

> "When a doctor recommends a particular procedure then he or she must disclose to the patient all *material information* necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances." (*Mathis v. Morrissey* (1992) 11 Cal. App.4th 332, 343)

What constitutes "material information" may vary, depending on the circumstances. The court in *Truman v. Thomas* said "material information" is:

> "That which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. (Cite.) To be material, a fact must also be one which is not commonly appreciated. (Cite.) If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure." (Cite.) (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291)

In a case in which the plaintiff alleges that the physician failed to obtain informed consent, Judicial Council of California Civil Jury Instructions (CACI) 532 and 533 must both be read to the jury. CACI 532 defines informed consent and 533 elucidates the essential factual elements necessary to prove failure of informed consent:

> **532. Informed Consent – Definition:**
> A patient's consent to a medical procedure must be 'informed.' A patient gives an 'informed consent' only after the [*insert type of medical practitioner*] has adequately explained the proposed treatment or procedure. [A/An] [*insert type of medical practitioner*] must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand. [A/An] [*insert type of medical practitioner*] must give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed. [A/An] [*insert type of medical practitioner*] is not required to explain minor risks that are not likely to occur. (*New September 2003; Revised December 2005, October 2008, June 2014*)

> **533. Failure to Obtain Informed Consent—Essential Factual Elements**
> [*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she] performed [a/an] [*insert medical procedure*] on [*name of plaintiff*] without first obtaining

[his/her] informed consent. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] performed [a/an] [*insert medical procedure*] on [*name of plaintiff*];
2. That [*name of defendant*] did not disclose to [*name of plaintiff*] the important potential results and risks of, [and alternatives to] the [*insert medical procedure*];
3. That a reasonable person in [*name of plaintiff*]'s position would not have agreed to the [*insert medical procedure*] if he or she had been adequately informed; and
4. That [*name of plaintiff*] was harmed by a result or risk that [*name of defendant*] should have explained. (*New September 2003; Revised June 2014*)

MIEC's defense attorneys recommend that doctors tell patients in lay terms the nature and purpose of the proposed surgery or treatment. The *Cobbs* Court stated that ". . . the patient's interest in information does not extend to a lengthy polysyllabic disclosure on all possible complications. A mini course in medical science is not required; the patient is concerned with the risk of death or bodily harm, and the problems of recuperation." The risks, complications, expected benefits of the recommended treatment, as well as alternatives, including the absence of treatment, and the consequent risks and benefits should be explained. The physician should advise the patient why one mode of treatment is more desirable than others, but should not accede to a patient's demand for treatment the physician knows would be inappropriate, ineffective, or harmful. (See discussion below regarding the doctrine of "Informed Refusal.")

When a Patient is Incompetent

Adults who have been legally adjudged incompetent usually cannot consent to medical treatment. Consent must be obtained from the patient's guardian or conservator. There is little direct authority on the right to consent where an adult has not formally been adjudged incompetent, but his or her reasoning is impaired due to mental illness, intoxication, pain or other causes. In the absence of a legal guardian or conservator, defense attorneys advise that the right to consent passes to whomever has a power of attorney for the patient, or has been named as the personal representative of the patient. If the patient has no one who is a personal representative or holds a power of attorney, then attempt to locate the spouse, child or other close relative of the patient and document the relationship. If there is no relative, emergency consent may be implied and necessary treatment rendered if a genuine emergency exists. If the patient's mental disability is temporary (for example, if the patient is delirious with pain), the patient's own consent for further treatment must be obtained as soon as he or she is able to reason for him or herself.

If the patient does not possess decision-making capacity, the decision-making authority passes to: the Attorney-in-Fact under a Durable Power of Attorney for Health Care or advance directive, if any; the conservator or guardian, if any; the closest available relative; or court order, if circumstances warrant. Physicians should be familiar with each hospital's policy concerning obtaining consent from legally or mentally incompetent patients. [See generally, Business & Professions Code §2397.]

Consent for Treating Minors

The age of majority in California is 18 years. In California, as a general proposition, a minor's guardian or parent must consent to medical care. However, there are exceptions to this rule. The exceptions pertain to minors who are deemed emancipated; to the prevention and treatment of pregnancy; to testing and treatment for reportable infectious diseases, including but not limited to sexually transmitted or infectious diseases; to drug and alcohol diagnosis and treatment; to outpatient mental health services and rape and sexual assault-related services. [Family Code §§6900, et seq.] As with incompetent patients, as discussed above, in an emergency, medical care may be rendered to a minor patient without minor or parental consent. [Business & Professions Code §2397]

Married Minor: Any minor who is or was married (whether or not the marriage has terminated by divorce) may consent to medical, surgical, psychiatric, or hospital care without parental consent or knowledge. Health professionals may require the minor to produce a marriage certificate. [Family Code §7002 and §7050 (e)(1)]

Minor Emancipated by a Court Order: A minor may petition the superior court of the county in which the individual resides, or is temporarily living, for a declaration of emancipation. The minor must be at least 14 years of age, willingly lives separate and apart from his or her parents or guardian (who have consented to this arrangement), and manages his or her own financial affairs. An emancipated minor is considered an adult for many purposes and may consent to medical care. [Family Code §§7120, 7122, 7050, 7002]

Self-Sufficient Minor: A person 15 years of age or older living separate and apart from his or her parent(s) or legal guardian, with or without the parents' consent, and managing his or her own financial affairs, regardless of the source of income, is capable of giving consent for medical or dental care without parental consent or financial liability. Physicians may wish to ask such minors to complete a form which provides information demonstrating that the minor falls within the statute. A physician may, with or without the consent of the minor patient, advise the minor's parent or guardian of the treatment given or needed if the physician has reason to know, on the basis of the information given by the minor, the whereabouts of the parent or guardian. [Family Code §6922]

Minor on Active Duty: Regardless of age, any minor serving on active duty with any branch of United States armed services may consent to treatment without parental approval. [Family Code §7002 and §7050 (e)(1)]

Pregnant Minor: Any minor, without respect to age or marital status can consent to care for the prevention or treatment of pregnancy, except that a minor cannot consent to sterilization. [Family Code §6925] Pregnancy is not included among the conditions that emancipate a minor. [Family Code §§7002, 7120 and 7122] However, a pregnant, *unemancipated* minor may consent to an abortion. Former Health and Safety Code §123450, which required minors to obtain parental consent or a court order before obtaining an abortion, was ruled unconstitutional by the California Supreme Court as violative of a patient's right to privacy in the 1997 case *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307.

Minor with an Infectious Disease: A minor who is 12 years or older and may have come into contact with a contagious, infectious, or communicable disease, including sexually transmitted infections of the type which must be reported to the local health officer and a variety of non-reportable sexually transmitted infections, may consent to care related to the diagnosis or treatment of the disease. A minor who is 12 years or older may consent to care related to the prevention of sexually-transmitted infections. [Family Code §6926] Minors over the age of 12 may consent to the performance of a blood test to detect HIV antibodies, though a minor under 12 years of age may not consent to HIV testing or treatment without consent of a parent, guardian or the court. [Health & Safety Code §121020]

Rape Victims and Victims of Sexual Assault: Sexual assault includes unlawful acts of rape, some forms of statutory rape, sodomy, and oral copulation. [Family Code §6927 and §6928; California Penal Code §§261, 286, 288a] A minor under the age of 18 who is alleged to have been sexually assaulted may consent to treatment for the condition. A minor age 12 or older who alleges to have been raped may consent to care related to the diagnosis and treatment of the condition. [Family Code §6927 and §6928]

The professional person providing medical treatment shall attempt to contact the minor's parent or guardian and shall note in the minor's treatment record the date and time the professional person attempted to contact the parent or guardian and whether the attempt was successful or unsuccessful. This subdivision does not apply if the professional person reasonably believes that the minor's parent or guardian committed the sexual assault on the minor. In this event, the professional should document that contact was not attempted and/or why it was not. [Family Code §6927 and §6928] As a mandated reporter,

the health professional should also document compliance with sexual abuse reporting laws when appropriate. [For example, see Penal Code §11166.]

Minor with Drug or Alcohol-Related Problems: A minor age 12 years or older may consent to medical care and counseling for drug- or alcohol-related problems. Counseling services must be rendered by a provider under a contract with the state or county to provide alcohol or drug abuse services. [Family Code §6929(a)(1)] [Narcotic replacement treatment requires parental consent.] While the consent of the parent or guardian is not required, the parent or guardian must be afforded an opportunity to participate in the treatment or counseling, unless the treating professional, or treating facility, considers this inappropriate. The refusal or objection to the minor's treatment by the parent or guardian so notified does not require the professional to discontinue the treatment. The treating health professional must document efforts to contact the parent or guardian or the reasons why it was inappropriate to make such contact.

A parent or legal guardian can seek medical care and counseling for a drug- or alcohol-related problem of a minor child without the minor's consent. Notwithstanding any other provision of law, in cases where a parent or legal guardian has sought the medical care and counseling for a drug- or alcohol-related problem of a minor child, the physician and surgeon *shall* disclose medical information concerning the care to the minor's parent or legal guardian upon his or her request, even if the minor child does not consent to disclosure, without liability for the disclosure. [Family Code §6929, emphasis added.] So while disclosure of this otherwise confidential information is mandatory under this statute, health care providers are given immunity from liability for making such a disclosure.

Mental Health Treatment of Minor: A minor age 12 or older may consent to mental health treatment or counseling on an outpatient basis, or specifically defined residential shelter services, if the minor is: considered mature enough to intelligently participate in the program; in a situation in which a present danger of serious physical or mental harm to the minor or others exists if the minor is not permitted to participate in the program; an alleged victim of child abuse or incest. The minor described in this section may not receive convulsive therapy, psychosurgery, or psychotropic drugs without parental or guardian consent. The parent or guardian must be afforded an opportunity to participate in the treatment or counseling, unless the treating professional considers this inappropriate. The treating health professional must document efforts to contact the parent or guardian or the reasons why it was inappropriate to make such contact. [Family Code §6924] The refusal or objection to the minor's treatment by the parent or guardian so notified does not require the professional to discontinue the treatment. Further, under Health & Safety Code & Safety Code §123115, if a professional believes it will harm their ability to treat a minor if the minor's parent is told about the treatment, the professional may elect not to do so. The treating professional will not be found liable for non-disclosure unless it is determined that he or she acted in bad faith.

Other:
Minors 17 and older may consent to donate blood. Minors 15 years and older may consent to give blood if the minor's parents or legal guardian and a physician authorize the donation in writing. [Health & Safety Code §1607.5]

A minor's parent(s) or guardian may sign a statement authorizing a third party to consent to a minor's medical care in the parents' absence. If a physician treats a minor with the third party's informed consent, the physician should keep a copy of the parental authorization in the medical record. [Family Code §6910]

As a general proposition, parents may have access to their children's medical and mental health records, including non-custodial parents (but not necessarily step-parents). [Family Code §3025; Health & Safety Code §123105] However, consistent with the exclusions set out above, there are some exceptions. Also, it should be noted that minors have some confidentiality rights to their medical information, as well. Minor consent statutes restrict parents' access to records of treatment to which the minor consented; as a corollary, a minor patient can only consent to the release of medical information for which he or she had the capacity to consent to receive. [Civil Code §56.11]

Medical providers can refuse to give parents a child's medical or mental health records when "the health care provider determines that access to the patient records … would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well-being." [Health & Safety Code § 123115(a)(2)]

Special consent requirements

Physicians should be aware that California law mandates special consent requirements, including the distribution of certain written information and/or the signing of specific consent forms for some treatments, procedures, and surgeries. These include: breast, prostate and gynecological cancer treatment, silicone breast implants and collagen injections, dimethyl sulfoxide (DMSO) treatment, hysterectomies, sterilization for both men and women, assisted reproduction treatment, certain vaccinations for children and adults, experimental procedures, electroconvulsive therapy, psychosurgery, HIV testing, the administration of antipsychotic drugs, and prescription of a drug for the purpose of ending a patient's life, pursuant to the End of Life Option Act.

Informed consent laws as they apply to blood transfusion lack specificity; however, it is prudent for physicians to discuss the relevant information with patients, obtain their informed consent to a blood transfusion, and document the discussion in the patient's medical record.

The Paul Gann Blood Safety Act [Health & Safety Code §1645] makes it mandatory for a physician to inform patients of the benefits and risks of receiving various types of blood transfusions "whenever there is a reasonable possibility that a blood transfusion may be necessary as a result of a medical or surgical procedure." This requirement applies to all non emergent medical and surgical procedures, not only those which are "elective."

Physicians also are required to dispense to patients a standardized summary of those options in a brochure entitled, *A Patient's Guide to Blood Transfusions*, produced by the California Department of Health Services. This is the responsibility of the physician, rather than the hospital. This brochure may be downloaded in either English or Spanish at no cost from the Medical Board of California web site at http://www.mbc.ca.gov/Publications/Brochures/Blood_Transfusions.aspx. The standardized literature may be photocopied. The law requires doctors to note in patients' charts that the brochure was dispensed.

Consult MIEC's Loss Prevention Department for further information about special consent requirements and corresponding consent forms.

Telehealth

Business & Professions Code §2290.5 replaced the terminology of "telemedicine" with "telehealth" to reflect the broader range of services and applications of telehealth technology, and applies the definition to all appropriately licensed health professionals. "Telehealth" is specifically defined as "the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient's health care while the patient is at the originating site and the health care provider is at a distant site. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers." This revised definition does not specifically exclude telephone conversations or e-mail messages. "Synchronous interaction" is defined as a real-time interaction between a patient and a health care provider located at a distant site. Prior to the delivery of health care via telehealth, the health care provider initiating the use of telehealth shall inform the patient about the use of telehealth and obtain verbal *or* written consent from the patient for the use of telehealth as an acceptable mode of delivering health care services and public health. The consent shall be documented in the medical record. An additional, written consent form with the patient's signature is no longer required.

Informed refusal

In 1980, the California Supreme Court created a new legal doctrine, "Informed Refusal," which holds that a physician may be liable for failing to tell patients the consequences of refusing to have

diagnostic tests or medical treatment. [*Truman v. Thomas* (1980) 27 Cal.3d 285, 291] Informed consent and informed refusal are related in that "a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736)

The CACI jury instructions define and delineate the factual elements necessary to prove a cause of action for Informed Refusal. CACI 534 and 535 state:

534. Informed Refusal, Definition:
[A/An] [*insert type of medical practitioner*] must explain the risks of refusing a procedure in language that the patient can understand and give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding not to have [a/an] [*insert medical procedure*]. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is refused. [A/An] [*insert medical procedure*] is not required to explain minor risks that are not likely to occur. (New September 2003)

535. Risks of Nontreatment—Essential Factual Elements:
[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she] did not fully inform [*name of plaintiff*] about the risks of refusing the [*insert medical procedure*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] did not perform the [*insert medical procedure*] on [*name of plaintiff*];

2. That [*name of defendant*] did not disclose to [*name of plaintiff*] the important potential risks of refusing the [*insert medical procedure*];

3. That a reasonable person in [*name of plaintiff*]'s position would have agreed to the [*insert medical procedure*] if he or she had been adequately informed about these risks; and

4. That [*name of plaintiff*] was harmed by the failure to have the [*insert medical procedure*] performed.
(New September 2003; Revised June 2014)

MIEC's legal counsel advises physicians to tell patients the consequences of their refusal in broad terms. It is not necessary to discuss every conceivable problem which might occur. Just as important as telling the patient the risks of refusal is documenting that you discussed the possible consequences of refusal. A brief, but meaningful note suffices. Some doctors write: "Patient refuses test (treatment); explained consequences of not having treatment and degree of urgency, and patient understands."

Insureds are encouraged to call MIEC Claims or Loss Prevention Departments (see **How to Reach MIEC**) with any questions about the doctrine of Informed Refusal and how it applies to their practice.

We thank Renee A. Richards, Of Counsel with Hassard Bonnington LLP, San Francisco, California, for her review of this publication.

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How to Reach MIEC

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