

Idaho Supplement to MIEC Claims Alert #17

Informed Consent Revisited: What is Expected of Physicians

This supplement contains excerpts from Idaho laws related to informed consent, consent by minors and special consents. Idaho physicians who have questions about a specific patient or who require legal advice may call MIEC's Claims Department in Boise at 208.344.6378. For general liability questions, physicians and their staff can call MIEC's Loss Prevention Department in Oakland, CA at 800.227.4527.

Informed consent

Idaho law provides that consent, or refusal to consent, for the furnishing of health care, treatment or procedures “shall be valid in all respects if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting the need for, the nature of, and 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.” The consent obtained is considered valid “if the health care provider to whom it is given or by whom it is secured 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.” “The term “in the same community” refers to that geographic area ordinarily served by the licensed general hospital at or nearest to which consent is given.” (*Idaho Code §39-4506*)

Who may give consent?

“Any person who comprehends the need for, the nature of and the significant risks ordinarily inherent in any contemplated

hospital, medical, dental, surgical or other health care, treatment or procedure is competent to consent thereto on his or her own behalf.” (*Idaho Code §39-4503*) The person giving consent must appear to the health care provider securing the consent to possess the requisite intelligence and awareness to understand the discussion.

In emergency situations, a health care provider can forego obtaining informed consent when the patient 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 such hospital, medical, dental, surgical or other health care to such person and the person has not communicated and is unable to communicate his or her treatment wishes...” (*Idaho Code §39-4504*)

In the event a patient is not competent to give consent, a competent parent, spouse, adult child, legal guardian, or person named in the patient’s “Living Will and Durable Power of Attorney for Health Care” may give consent. If none of these individuals is readily available, consent may be provided by any competent relative representing himself or herself to be an appropriate, responsible person to

act under the circumstances, or any other competent individual representing himself or herself to be responsible for the health care of the patient. (*Idaho Code §39-4504*)

Form of consent

Written consent executed or initialed by a person competent to give consent for himself or another and expressly authorizing the care, treatment or procedures to be furnished is presumed to be valid; the advice and disclosures of the attending physician or dentist, as well as the level of informed awareness of the giver of consent are presumed to be sufficient. (These presumptions may be invalidated in the presence of convincing proof that consent was secured maliciously or by fraud.) (*Idaho Code §39-4507*)

Responsibility for consent and documentation

“Obtaining sufficient consent for health care is the duty of the attending health care provider upon whose order or at whose direction the contemplated care, treatment or procedure is rendered; provided however, 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 consent by securing the completion and execution of a consent form or statement . . .” (*Idaho Code §39-4508*)

Consent for treating minors

As noted above, Idaho statutes state that “any **person** [emphasis added] who comprehends the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental surgical or other health care treatment or procedures is competent to consent thereto on his or her own behalf.”

Although the law refers to “any **person**” rather than to “any **adult**,” some Idaho attorneys believe that, except when a specific statute allows a minor to give consent, an unmarried or unemancipated minor in Idaho is not legally competent to give consent to medical treatment under ordinary circumstances. Other attorneys disagree, believing that the reference to “any person” includes minors who meet the other criteria that define persons who are capable of giving consent to medical treatment. The question of whether “any person” includes a minor has not been adjudicated in Idaho courts.

Because it is an unsettled issue, some MIEC defense attorneys recommend that, except in emergency situations or circumstances in which Idaho statutes specifically permit minors to give consent, physicians should obtain the consent of a parent or guardian to treat the minor.

- A minor fourteen years of age or older may consent to their own treatment for certain infectious or communicable diseases (including sexually transmitted infections). (*Idaho Code §39-3801*)
- A minor fourteen years of age or older may consent to their own hospitalization for certain mental health care. (*Idaho Code §66-318*)
- A minor sixteen years of age or older may consent to their own treatment for drug abuse. (*Idaho Code §37-3102*)
- Physicians and other licensed practitioners may provide examinations, prescriptions, devices and informational materials regarding contraception if the physician deems the patient to have sufficient intelligence and maturity to understand the nature and significance of the treatment (see below for information on minor consent for abortion). (*Idaho Code §18-604*)

Physicians who are uncertain what to do in a specific case (such as a self-supporting minor who has not been formally emancipated or a minor serving in the military) should contact the Boise Claims Office; if necessary, a claims representative can obtain appropriate legal advice or refer the physician to an MIEC defense attorney.

Consent for abortion

Idaho Code §18-609 requires that certain pre-abortion information be provided to the patient regarding the description of

services available to assist a woman at childbirth, description of the physical characteristics of a normal fetus and description of the abortion procedures used in current medicine. This information shall also be posted on a website by the Department of Health and Welfare. Physicians or their agents must provide women inquiring about obtaining an abortion with the address to this website before or while scheduling an abortion-related appointment. Prior to the performance of an abortion, the attending physician or the physician’s agent must certify in writing that the materials have been provided to the pregnant patient at least twenty-four hours before the performance of the abortion.

Written certification of prior notice is not mandated in the case of a medical emergency. In such cases, the attending physician or the physician’s agent shall deliver to the Department of Health and Welfare a report signed by the attending physician (preserving the patient’s anonymity) denoting the medical emergency that excuse compliance with the duty to deliver the materials. The report must be submitted within thirty days of performing an abortion without certification and delivery of the materials.

Consent for abortion: minors

A physician is prohibited from performing an abortion on an unemancipated minor absent written consent from one of the minor’s parents or the minor’s guardian or conservator. A judge

of the district court may authorize a physician to perform the abortion if the judge determines that the pregnant minor is mature and capable of giving informed consent to the abortion; or the performance of an abortion would be in her best interests.

Parental consent or judicial authorization is not required if a medical emergency exists for the minor or if the pregnant minor certifies to the attending physician that the pregnancy resulted from rape¹ or sexual conduct with the minor by the minor's parent, stepparent, uncle, grandparent, sibling, adoptive parent, legal guardian or foster parent. (*Idaho Code §18-609A*)

Consent for blood testing

“A physician may consent to ordering tests of a patient's or a deceased person's blood or other body fluids for the presence of blood-transmitted or body fluid-transmitted viruses or diseases without the patient's prior consent if:

1. There has been or is likely to be a significant exposure to the patient's or a deceased person's blood or body fluids by a person providing emergency or medical services which may result in the transmittal of a virus or disease; and
2. The patient is unconscious or incapable of giving informed consent and the physician

¹ Rape as defined in *Idaho Code §18-6101*, excepting subsections (1) and (2): Where the female is under the age of sixteen years and the perpetrator is eighteen years of age or older; Where the female is sixteen or seventeen years of age and the perpetrator is three years or more older than the female.

is unable to obtain consent pursuant to section 39-4504, Idaho Code.”

(*Idaho Code 39-4505*).

(See “Who May Give Consent?” section above.) Results of the tests which confirm the presence of a blood- or body fluid-transmitted virus or disease shall be reported to the Department of Health and Welfare and the exposed person shall be informed of the test results (not including the name of the patient). The Department of Health and Welfare is charged with defining “significant exposure” and promulgating protocols for reporting and records.

Consent for sterilization, Medicaid

Patients who are covered under Medicaid and wish to undergo sterilization must sign Consent Form HW0034 (available in English and Spanish at www.idmedicaid.com); a thirty-day waiting period is also required.

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Visit MIEC's Patient Safety Toolbox at www.miec.com

(Under the Managing Your Risk tab)

Practical. Accessible. Timely. This web-based Patient Safety Toolbox contains products and resources - vetted by MIEC - that help you keep your patients safe and reduce your liability.

ACOG's SCOPE Program

The SCOPE for Women's Health program is a comprehensive patient safety review program for medical practices in which obstetrics and/or gynecology services are provided. SCOPE focuses solely on processes associated with enhancing the safety environment and reducing risk for patients in the office setting. To learn more about SCOPE, visit www.scopeforwomenshealth.org or call 800/266-8043. For more information about fee reimbursement, call Loss Prevention at 510/428-9411 or toll free at 800/227-4527.

MIEC will pay half of ACOG SCOPE fees for OB/Gyn policyholders who successfully complete SCOPE certification.

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MIEC has partnered with ELM Exchange, Inc., to provide case-based, online CME programs that teach health-care providers to identify and mitigate risk in their clinical practices. This no-cost, convenient curriculum is proven to help physicians create a culture of enhanced patient safety and increased quality of care.

Book: *Responsible Opioid Prescribing: A Clinician's Guide* - CME

Earn up to 7.25 AMA PRA Category 1 Credits. *Responsible Opioid Prescribing: A Clinician's Guide* offers clinicians effective strategies for reducing the risk of addiction, abuse and diversion of opioids that they prescribe for their patients in pain. Written by pain medicine specialist Scott M. Fishman, M.D., this revised and expanded edition translates best-practice guidelines from leading pain medicine societies and the Federation of State Medical Boards into pragmatic steps for risk reduction and improved patient care.

Patient evaluation, including risk assessment; treatment plans that incorporate functional goals; informed consent and prescribing agreements; periodic review and monitoring of patients; referral and patient management; documentation; compliance with state and federal law; patient education on safe use, storage and disposal of opioid medication; and termination strategies for chronic opioid therapy are all topics covered in this informational publication.

This publication is available in paperback or as an e-book through the Federation of State Medical Boards for \$16.95. Visit www.fsmb.org/book/index.html for a copy. Complete the CME and MIEC will reimburse the \$25 fee. Contact Loss Prevention at 510/428-9411.

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