

# 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 Office in Boise at 208/344-6378 or in Oakland, CA 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

Idaho law provides that consent for medical treatment or surgery “shall be valid in all respects if the person giving it is sufficiently aware of pertinent facts respecting the need for, the nature of and the significant risks ordinarily attendant upon a patient 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 physician 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 physician or dentist of good standing practicing in the same community.” (*Idaho Code, §39-4304, 39-4306*)

Idaho precedent establishes that physicians are required to disclose facts which like physicians in the same community would disclose. In malpractice cases alleging lack of informed consent in Idaho, the plaintiff must prove a reasonable person in the plaintiff's position would not have undergone the treatment in question if adequately informed of the risks.

### Who may give consent?

“Any person of ordinary intelligence and awareness

sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental or surgical care, treatment or procedure is competent to consent thereto on his own behalf.” (*Idaho Code §39-4302*) The person giving consent must appear to the physician securing the consent to possess the requisite intelligence and awareness to understand the discussion.

In emergency situations, a physician can forego obtaining informed consent when the patient presents a medical emergency “...or there is substantial likelihood of his or her life or health being seriously endangered by withholding or delay in the rendering of such hospital, medical, dental, or surgical care to the patient...” (*Idaho Code §39-4303*)

In the event a patient is not competent to give consent, a competent parent, spouse or legal guardian may give consent. If no parent, spouse or legal guardian 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. In the case of a mentally incompetent person or a minor who has never been married, consent may be given by any

competent individual representing himself or herself to be responsible for the health care of such person. (*Idaho Code §39-4303*)

### Consent for treating minors

As noted above, Idaho statutes state that “any **person** [emphasis added] of ordinary intelligence and awareness sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental or surgical care, treatment or procedure is competent to consent thereto on his 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 considered 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.

Physicians who are uncertain what to do in a specific case should contact the Boise Claims Office or the Claims Department in Oakland; if necessary, a claims representative can obtain appropriate legal advice or refer the physician to an MIEC defense attorney.

#### **Consent for abortion**

Consent for the abortion can be given by a minor who, as defined in the previous paragraphs, passes the test for competence under Idaho law. Idaho law provides that if the pregnant patient is unmarried and under 18 years of age or unemancipated, the physician must provide notice of the abortion, if possible, to the parents or legal guardian at least 24 hours before

the abortion is performed.

*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.

Such materials need not be disclosed to the patient if the attending physician determines that the information would cause a severe and long lasting detrimental effect on the health of the patient. In the event that these materials are not dispensed to the patient, the attending physician must submit a written report to the Health and Welfare Department identifying the specific circumstances that excused his or her compliance with the statutory requirements. Finally, the statute requires that the attending doctor certify in writing that the required materials were provided to the

pregnant patient, if it was reasonably possible to do so, at least 24 hours before the abortion.

A minor fourteen years of age or older who may have come in contact with any infectious, contagious, or communicable disease, can give consent to the furnishing of medical, surgical, and hospital care related to the diagnosis and treatment of such disease, if the disease or condition is one which is required to be reported to the local health officer.

A person of any age may request treatment and rehabilitation for addiction or dependency to virtually any drug or narcotic, except alcoholic beverages or tobacco. If the patient who seeks such treatment is sixteen years of age or older, information about the treatment may not be disclosed to the patient's parents or legal guardian without the patient's consent.

**Revised October 1998**

**From the Loss Prevention Department, Medical Insurance Exchange of California  
6250 Claremont Avenue, Oakland, CA 94618  
Phone: 800/ 227-4527 ● Fax: 510/ 420-7066 ● E-mail: lossprevention@miec.com**

**In Boise: MIEC Claims Office, P.O. Box 2668, Boise, ID 83701  
Phone: 208/ 344-6378 ● Fax: 208/ 344-7903 ● E-mail: CassandraR@miec.com**