Alaska Supplement to MIEC Claims Alert #17

Revised July 2001

Informed Consent Revisited: What is expected of physicians

This supplement contains excerpts from Alaska laws related to informed consent, consent by minors and special consents. Alaska 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.

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In Alaska, the law on informed consent is derived largely from common law and statutes. Court decisions modify and explain the law. The judge in an informed consent case may instruct the jury that:

> "A physician is required to give his patient enough information to make an informed decision whether or not to undergo the treatment. If the physician does not do so, he may have to pay for the patient's injury, even though the treatment itself was performed with reasonable care.
>
> "For the plaintiff to win on his claim that he did not give his informed consent, you must decide it is more likely than not that the following things happened:
>
> "1. The treatment was a legal cause of the patient's injury;
>
> "2. The defendant did not tell the plaintiff about the common risks of or reasonable alternatives to the treatment; and
>
> "3. The plaintiff, had he known about these common risks and reasonable alternatives, could not have consented to the treatment given." [*Trial court adaptation of Alaska Jury Instruction 8.06, partial*]

The Alaska Supreme Court has held that a physician is obligated to provide, in layman's terms, the information that a reasonable person in the patient's position would need to know in order to make an informed and intelligent decision about the proposed treatment. A physician must disclose all "material" risks. A risk is material if the

probability of that type of harm is a risk a reasonable patient would consider in deciding on treatment. A physician must not only disclose the identity of all known material risks, but also the likelihood of their occurrence in meaningful terms. [*Korman v. Mallin*, 858 P.2d 1145 (Alaska 1993)]

Alaska law recognizes that on some occasions a candid and thorough disclosure of information will have an adverse effect on the patient's condition or health. The law allows the physician, in his or her discretion, to withhold such information or to phrase it in a manner that will not upset the patient: "it is a defense to any action for medical malpractice based upon alleged failure to obtain informed consent that ...the health care provider after considering all of the attendant facts and circumstances used reasonable discretion as to the manner and extent that the alternatives or risks were disclosed to the patient because the health care provider reasonably believed that a full disclosure would have a substantially adverse effect on the patient's condition." [*A.S., Section 09.55.556(b)(4)*]

The decision to withhold such information is based on a practitioner's medical judgment and must be substantiated in order to stand up in a court of law. Three basic criteria should be taken into account in reaching the conclusion that information should be withheld or phrased in such a way as to not upset the patient:

1) The physician must take into account the facts and circumstances of the patient's case. Included in the evaluation should be the patient's physical and emotional condition, whether the patient can assimilate information in a candid and rational manner, and whether the informed consent process or treatment could be delayed under the circumstances, among other considerations.

2) The physician must believe that full disclosure of information will probably have a substantially adverse effect on the patient's condition. Mild upset of the patient would not justify failure to provide full disclosure; the patient must be in danger of significant detriment and impairment of his or her condition.

3) The physician must use reasonable discretion in the manner and extent of disclosure. If a decision is made against full disclosure, the disclosure must be tailored to meet the needs of the patient and geared to avoid an adverse impact on the patient's well-being. Documentation written at the time is necessary to support the decision to withhold information. A detailed note in the patient's health record must be made by the physician, including the physician's observations of the patient, reasons why the physician believes certain details should be withheld, a description of the information that was not disclosed, a summary of the medical findings used to justify the decision not to disclose, and the details that were disclosed to the patient. Where there has been a decision to forego or limit the consent discussion, defense attorneys advise physicians to have a consent discussion with the patient's closest relative. A discussion with a relative may help the doctor determine the value of withholding certain details from the patient. Discussions with relatives should be noted in the chart.

Physicians are excused from disclosing risks if the patient requests not to be informed: "It is a defense to any action for medical malpractice based upon an alleged failure to obtain informed consent that ... the patient stated to the health care provider that the patient would undergo the treatment or procedure regardless of the risk involved or that the patient did not want to be informed of the matters to which the patient would be entitled to be informed." [See citation above] The patient's refusal to have the risks explained should be documented.

Who may give consent?

Those who may consent for treatment of a patient include the patient himself, the nearest living relative (i.e., a spouse or parent), or the parent or guardian of a minor.

The courts have held that in certain urgent situations, in emergencies, and in cases in which the patient is unable to give consent, the physician may proceed without the formality of a consent discussion.

When a patient is mentally incapable of giving informed consent, a physician or mental health professional is required to obtain informed consent from the patient's guardian, spouse, or parent; where there is no guardian and the patient designates a specific adult, the designee may give consent. When necessary, application can be made to the court for an order to permit the treatment.

A patient who is capable of giving informed consent has an absolute right to refuse electroconvulsive therapy or aversive conditioning. The law also provides that a patient who lacks substantial capacity to make that decision may not be given such therapy without a court order.

Physicians should be familiar with each hospital's policy concerning obtaining consent from legally or mentally incompetent patients.

Who is responsible for obtaining consent?

In Alaska, statutory law makes a health care provider liable for failure to obtain the informed consent of the patient. Alaska law goes on to define health care provider as including a physician, chiropractor . . . and an employee of a health care provider. On its face, the statute may suggest that the task of obtaining informed consent can be delegated to an employee of a physician. *However, MIEC's legal counsel recommends that the physician not delegate to an employee the task of explaining the nature of a procedure or treatment that the physician proposes to do, or the risks attendant thereto, or the alternatives to the procedure or treatment. The physician should personally undertake this task.*

Consent for treating minors

The age of majority in Alaska is 18 years. A minor may, in certain circumstances, consent to receive medical and dental services, including the diagnosis, prevention and treatment of pregnancy, and the diagnosis and treatment of sexually transmitted disease. A minor may consent to medical treatment under these additional circumstances:

1. The minor lives apart from his or her parents and is managing his or her own
financial affairs;

2. If a parent cannot be contacted, or if the parent is unwilling to grant or withholds consent, provided that the physician counsels the minor;

3. When the minor is the parent of a child; the minor parent may consent to medical treatment for him or herself, as well as for the child.

Payment for treatment of a minor

The parents or guardian of a minor who consents to his or her own medical treatment under any of the circumstances outlined above, absent an emergency, are not responsible for payment for medical services rendered to the minor.

Treating minors in emergencies

In case of an emergency in which any minor is in need of immediate hospitalization, medical attention or surgery and, after reasonable efforts have been made, the parents or guardian of the minor cannot be located for the purpose of consenting to medical care, consent for emergency medical attention may be given by any person standing *in loco parentis* to the minor.

Parental consent for minor seeking an abortion

On February 25, 1998, Alaska Superior Court Judge Sen Tan ruled in the case of *Planned Parenthood of Alaska v. State of Alaska* that it is unconstitutional to require written parental consent before a doctor may perform an abortion on an unemancipated minor under the age of 17. Specifically, Judge Tan indicated in his decision that such a requirement breaches a minor's right to privacy and her fundamental reproductive rights, which include the right to have an abortion.

The Court's decision also negates the "judicial bypass" procedure whereby a pregnant unemancipated minor under the age of 17 can file a complaint with the superior court to request the issuance of an order authorizing the minor to consent to her abortion.

The State of Alaska appealed Judge Tan's decision to the Alaska Supreme Court. The case was argued before the Court in December 1999. As of July 2001, Alaska's Supreme Court justices have not rendered a decision. MIEC will notify Alaska policyholders of the Supreme Court's ruling.

Because this is an unsettled issue, physicians who have a question about a specific patient or who need legal advice are encouraged to contact MIEC's Claims Office for assistance.

REQUEST A PUBLICATION

'Informed Refusal'

Patients have the right to refuse medical treatment, surgery, or diagnostic tests. When a test or procedure is recommended but initially declined, physicians are encouraged to inform patients of the consequences of their refusal to undergo recommended treatment, surgery, or diagnostic tests. Because it is not always possible to know the eventual effect of the patient's failure to accept a physician's advice, the consequences of the patient's decision sometimes must be discussed in general terms. When the consequences are likely to be significant, such as the worsening of an existing condition, serious bodily harm or death, or the possibility that a serious disease will go undetected, the physician should review these possibilities with the patient. Whenever a patient refuses to undergo recommended treatment, surgery, or diagnostic tests, the physician should note the patient's decision in the medical chart, and also indicate that the risks of the decision have been discussed with the patient. As with all entries, such notes should be initialed and dated.

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