

Hawaii Supplement to MIEC Claims Alert #17B

Informed Consent Revisited: What is Expected of Physicians

This supplement contains excerpts from Hawaii laws related to informed consent, consent by minors and special consents. Hawaii physicians who have questions about a specific patient or who require legal advice may call MIEC's Claims Office in Honolulu at 808/545-7231 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

In the state of Hawaii, physicians must obtain informed consent from a patient prior to proposed medical or surgical treatments and diagnostic or therapeutic procedures. Hawaii's informed consent statutes read, in part:

“ . . . (b) The following information shall be supplied to the patient or the patient's guardian or legal surrogate prior to obtaining consent to a proposed medical or surgical treatment or a diagnostic or therapeutic procedure:

- (1) The condition to be treated;
- (2) A description of the proposed treatment or procedure;
- (3) The intended and anticipated results of the proposed treatment or procedure;
- (4) The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;
- (5) The recognized material risks of serious complications or mortality associated with:
 - (A) The proposed treatment or procedure;
 - (B) The recognized alternative treatments or procedures; and
 - (C) Not undergoing any treatment or procedure; and

(6) The recognized benefits of the recognized alternative treatments or procedures. ...”

A risk is considered “material” when “...a reasonable person, in which the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy.” [As defined in *Canterbury v. Spence*, 464 F.2d 772 (D.C.Cir. 1972)]

As of 2004, Hawaii's Uniform Health Care Decisions Act (HRS Chapter 327E) allows an adult or emancipated minor to designate a legal surrogate who can make health care decisions for the person when it is determined that the patient lacks the capacity to make his/her own health care decisions and when a guardian has not been appointed. Physicians are required to obtain informed consent from a patient's legal surrogate whenever a surrogate is authorized to act for a patient.

If a physician initiates complex treatment that relies upon multiple practitioners for completion, the referring physician is obligated to inform the patient of all the necessary steps of treatment before commencement of the initial step:

On February 25, 1998, in the case of *O'Neal v. Hammer*, the Hawaii Supreme Court decided:

“...if a combined treatment plan is carried out in which one step depends on another and the patient is *required* to proceed with the

remainder of the plan as soon as the first step is accomplished, it is not sufficient to inform the patient about the risk inherent in each individual step immediately prior to the performance of that step. Rather, to ensure the patient's right to intelligently and knowingly make his or her decision, *all necessary information must be provided before the first irrevocable step in the treatment process is initiated* [by the physician who initiates the first *irrevocable* step].”

For example, an obstetrician/gynecologist diagnoses a breast lump and believes it may be cancer. He/she refers the patient to a *surgeon*, who does an examination and recommends excision of the lesion followed by radiation therapy and chemotherapy. In order to allow the patient to give an informed consent, the surgeon should review: the risks and benefits of the proposed surgery (e.g., lumpectomy with wide excision vs. mastectomy); discuss the risks and benefits of both radiation therapy and chemotherapy, if indicated; and review with the patient any additional information that will help the patient make a decision and give consent including alternative treatment(s) and non-treatment. The discussion between the surgeon and patient should take place *before* the first irrevocable step, the surgical procedure. The radiation oncologist and oncologist who will administer the chemotherapy will also review with the patient the risks, benefits, and alternatives of their respective therapies.

Finally, the patient's obstetrician/gynecologist, who may be responsible for post-treatment monitoring, should be kept informed of the patient's care and treatment, as communication among co-treating physicians is essential to optimal care and patient safety.

The Court also extended the duty to inform the patient of the risks associated with proposed treatment or surgical procedure to "second opinion physicians." The Court said that a "second opinion physician" is a doctor "called in directly *by the patient* to advise the patient" of the risks associated with a treatment or surgical procedure. The Court indicated it would be illogical to hold that a second opinion physician does not have to perform his or her primary duty, which is to advise the patient of the risks and alternatives to the suggested treatment or surgery.

Therapeutic privilege may be an exception to disclosure

Under certain **limited circumstances**, a physician may invoke the so-called "therapeutic privilege" and withhold from a patient disclosure of the risks of treatment or surgery. Hawaii law permits a physician to withhold disclosure of any risk to harm when: 1) disclosure is precluded by an emergency situation; 2) the patient has waived his or her right to receive the information; 3) disclosure would be harmful to the patient; and/or 4) the risk is obvious. Legal counsel recommends that physicians use the privilege judiciously, and document its justification thoroughly.

Consent for treating minors

Eighteen years is the age of majority in the State of Hawaii. A minor (for the purpose of consenting to medical care and services) shall

be any person age fourteen to seventeen inclusively.

Absent emergency circumstances, minors usually cannot consent to medical treatment. This general rule has statutory exceptions. A minor who has been married is deemed emancipated and has the right to consent to his or her own treatment. "Unsupported minors" may also consent to primary care treatment (see below).

Minors who are neither emancipated nor unsupported may consent to care for limited purposes. Hawaii Revised Statutes define "medical care and services" to which a minor may consent as "diagnosis, examination, and administration of medication in the treatment of venereal diseases, pregnancy, and family planning services. It shall not include surgery or any treatment to induce abortion." [HRS §577A-1]

The physician may, *at his/her discretion*, inform the spouse, parent, custodian, or guardian of the provision of medical care or services to a minor, or disclose any information pertaining to such, *after consulting with the minor*. This includes discretionary disclosure if:

- The minor is diagnosed as pregnant or has a venereal disease;
- The minor is *not* diagnosed as being pregnant or having a venereal disease. The "application for diagnosis," also may be disclosed. [HRS §577A-3]

Although there is no provision under Hawaii statutes concerning legal consent by female minors for termination of pregnancy, under existing United States Supreme Court rulings, it is unconstitutional

for a state to require consent of a female minor's parent(s). The Supreme Court has ruled, however, that a state may require that parents be informed.

If a female minor is not competent to give consent for termination of pregnancy, consent can be sought from the courts or from the parents.

A minor who consents to receive medical care and services shall assume the financial responsibility for such care and services. The spouse, parent, custodian, or guardian whose consent has not been obtained is not liable for the costs.

Any action to recover costs shall not commence until a minor has reached the age of 18 and must commence within two (2) years of that time.

"Unsupported Minors"

In 2007, the Hawaii legislature enacted a law allowing "minors without support" to consent to primary medical care services. A "minor without support" is one who is "at least fourteen years of age but less than eighteen years of age who is not under the care, supervision, or control of a parent, custodian, or legal guardian." [HRS §577D-1]

According to legislative committee reports, the law is intended to provide access to medical services for those minors whose circumstances prevent parental consent, but who are not technically "emancipated" minors. The reports cite examples of minors who fit the criteria, including:

- minors who are homeless;
- minors who are running away from abusive or drug-addicted parents; and
- Pacific Islander minors who have moved to Hawaii on their own.

The statute defines “primary medical care and services” as: “health services that include screening, counseling, immunizations, medication, and treatment of illnesses and medical conditions customarily provided by licensed health care practitioners in an outpatient setting. [It] does not include invasive care, such as surgery, that goes beyond standard injections, laceration care, or treatment of simple abscesses.” [HRS §77D-1]

Minors without support are held financially responsible for the care provided. Barring acts of gross negligence or willful or wanton acts or omissions, health care professionals who provide care to minors in good faith cannot be held liable for treating a minor patient who has misrepresented that he or she is a minor without support. [HRS §77D-2] Health practitioners would be well

advised to document in patient charts discussions in which it is determined that the minor fits the “minor without support” criteria and is therefore able to consent to primary medical care and services.

Consent when treating patients with mental illness

“(a) Before any nonemergency treatment for mental illness can commence, informed consent, as required by HRS section 671-3 and as defined by the board of medical examiners . . . shall be obtained from the patient, or the patient’s guardian, if the patient is not competent to give informed consent.

(b) A signed consent form reflecting the proceeding shall be obtained and maintained as part of the patient’s record.” [HRS §334E-1]

Special Consents

Physicians have a duty under Hawaii law to obtain written informed consent prior to testing for the presence of HIV infection.

The law also requires that patients for whom a mastectomy has been recommended be given a list of breast cancer treatment alternatives approved by the Hawaii Board of Medical Examiners as part of the consent discussion. [HAR §16-85-29]

When consent is withheld for religious reasons

The appointment of a guardian is indicated when treatment is refused on religious grounds and the patient is a minor or, perhaps, when an adult patient is deemed to lack the capacity to consent to his/her own medical care. If an emergency exists, (i.e., imminent permanent injury or death), a hearing may be held by telephone. However, although a family court judge is available 24-hours per day/7 days per week for such telephone hearings, advanced notice is strongly suggested because of the requirement that all necessary parties appear in the hearing. In the case of a minor, the necessary parties would be the minor’s parents or legal guardians and grandparents (if available).

MIEC’s Honolulu Claims Office will assist insureds who are confronted with a situation in which a court order may be necessary.

We thank Lorena Garwood of the MIEC HI Claims Department for her assistance with this supplement.

Revised February 2008

**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

Hawaii Claims Office: 1360 S. Beretania Street, Suite 405, Honolulu, HI 96814

Phone: 808/545-7231, Fax 808/531-5224, E-mail: BrianT@miec.com or LorenaG@miec.com

Physician's Surgery and Procedure Consent Form

[For completion at conclusion of informed consent discussion]

- ___ 1. I consent to the performance of the following operation or procedure (*technical name*):
Initials _____ upon _____.
(myself or name of patient)
- The purpose of this operation or procedure is (*lay language*): _____ and will be performed by _____ and whomever (s)he may designate as assistants.
- ___ 2. My physician has explained the nature and purpose of the operation or procedure, anesthesia, the
Initials benefits and risks of the operation or procedure, the possibilities of complications, and the alternatives to this operation or procedure and their risks and benefits to me.
- ___ 3. My physician has explained to me that a satisfactory result is expected, but that the following are
Initials some of the complications or effects that could or may occur: bleeding, infection, damage to adjacent tissues or organs, swelling, pain, suture reaction, delayed healing, scarring, anesthesia or medication reaction, recurrence, additional operations, and in rare instances, paralysis or death; other: _____,
_____.
- ___ 4. No one has given me a guarantee or assurance about the results that may be obtained.
Initials
- ___ 5. I (we) understand that my physician may encounter or discover other or different conditions
Initials which require additional or different procedures than those planned. I (we) authorize my physician, and associated technical assistants, and other health care providers to perform such other procedures which are advisable, in their professional judgment, for my immediate well-being.
- ___ 6. I have informed my physician of all my allergies including: _____,
Initials and their associated symptoms: _____.
- ___ 7. I was invited and encouraged to ask any questions I may have. All of my questions have
Initials been answered to my satisfaction. I have read and understand the contents of this form, and I wish to proceed.

Witness

Patient, parent or person authorized to sign for patient (*please print*)

Date: _____

Signature of patient, parent or person authorized to sign for patient