

CHAPTER 34

INFORMED CONSENT FOR THE NURSE

I. INTRODUCTION

The goal of informed consent is patient autonomy or self-determination. To be autonomous, individuals must be able to control their bodies by controlling their medical care through the right to consent to or refuse treatment. The doctrine of informed consent requires that the patient be provided with sufficient information to be able to give meaningful consent to proposed medical care. In today's legal environment, patient involvement is so important that treating a patient without adequately informing him or her about the treatment is considered negligence, and treating him or her without consent is considered battery.

The foundation for informed consent was established in a 1914 case in which a patient was operated upon without her consent. In determining whether she had a cause of action against the hospital in which the operation was performed, Judge Cardozo wrote:

In the case at hand, the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914).

Informed consent remains as necessary today as it was in 1914. Florida is one of a few states that has codified the need for informed consent.

II. STATUTORY REQUIREMENTS FOR INFORMED CONSENT

Section 766.103, Florida Statutes, known as the "Florida Medical Consent Law," establishes the standards that must be met to obtain a patient's informed consent in Florida. According to Section 766.103(3), Florida Statutes, a patient may not bring an action against a physician for treating him without his informed consent when:

1. the manner in which the physician obtained the informed consent comported with the accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community; and
2. a reasonable individual, from the information provided by the physician, under the circumstances would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment

which are recognized by other physicians in the same or similar medical community who perform similar treatments or procedures; or

3. the patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he or she been advised by the physician, in accordance with the provisions of paragraph(1).

A signed consent which is evidenced in writing and meets the above requirements will raise a rebuttable presumption of a valid consent. Section 766.103(4)(a), Florida Statutes.

In addition to the exemptions set forth above, a patient may not recover in an action against a physician, emergency medical technician or paramedic for failure to obtain informed consent from a patient in two (2) additional circumstances, as set forth in Section 401.445, Florida Statutes (2001). First, no recovery is allowed if the patient is unable to provide informed consent at the time of treatment or examination by reason of intoxication, drugs, or other reason. Second, a patient may not recover for failure to obtain informed consent if the patient is experiencing an emergency medical condition at the time of treatment or examination.

III. THE NURSE'S ROLE IN OBTAINING INFORMED CONSENT

The process of obtaining informed consent is often an issue of contention in hospital settings. Confusion sometimes arises when there is a failure to acknowledge that there are two steps in the informed consent process: the disclosure of information to the patient regarding the treatment and its risks and the act of documenting the informed consent. The distinction is important when defining the responsibilities of the nurse and the physician.

The line between the physician's role and the nurse's role in this process are sometimes blurred. Many hospitals have procedures or protocols that require the hospital staff (including the nursing staff) to check to ensure that there is a properly completed informed consent form signed by the patient prior to a surgical procedure or other major procedure. Additionally, physicians sometimes attempt to delegate the duty of having the form itself taken to the patient for the patient to sign by the nurse.

For procedures performed by a physician, it is the physician's duty and responsibility to inform the patient of all risks, alternatives and other information which the patient should know. It is also the physician's duty and responsibility to obtain the patient's consent for the procedure. Florida law confines liability for a failure to obtain informed consent to medical practitioners. Florida's Medical Consent Law lists the persons against whom there can be recovery for the failure to secure informed consent for a medical procedure. Section 766.103, Florida Statutes. The court in Cedars Med. Ctr., Inc. v. Ravelo, 738 So. 2d 362, 367 (Fla. 3d DCA 1999) found that hospitals have never been and are not included in this listing. The court stated that the reason for this legislative restriction in Section 766.103, Florida Statutes, is that only a treating physician has the training, experience, skill and background facts regarding the patient's condition to obtain from the patient an "informed" decision on whether any particular medical procedure should be performed.

It is important for the nurse to understand her role in the process of obtaining informed consent.

As case law demonstrates, the nurse usually will not have the background and training to obtain informed consent from a patient; therefore, it can only be done properly by the physician. On the other hand, documenting the fact that this has already been performed by the physician and that the patient has already consented to allow the physician to conduct the procedure is an act the nurse can perform. The nurse is competent and capable of taking a form to a patient and witnessing the patient sign the form. However, the nurse should never undertake to explain medical procedures, medical risks and treatment alternatives to a patient when he or she does not have the medical training involved in that particular speciality.

If a nurse is delegated the responsibility of having an informed consent form signed by a patient, the nurse should make sure the physician has properly explained the procedures, risks and alternatives to the patient. A nurse should encourage communication with the patient in order to determine if the patient understands the treatment he or she will receive. If the nurse suspects that the patient does not understand the treatment, the nurse should notify the physician and the physician should return and speak with the patient again. The nurse should not attempt to answer medical questions regarding these matters in order to get the patient's signature on a form.

For most routine matters in the hospital, such as physical examinations, injections, nursing treatments and nursing procedures, the hospital will have obtained the patient's consent when the patient was originally admitted to the hospital, through use of a general consent form. Therefore, as a general rule, the nurse does not have to worry about having this informed consent documented. However, the nurse should always explain to the patient what nursing treatment or procedure is going to be conducted and make sure that the patient understands and does not object to it. Where feasible, this should also be documented in a nursing note. This is especially true in the case of injections, or anything invasive or potentially embarrassing to the patient.

The fact that the nurse has explained what the nurse intends to do to the patient and that the patient has not objected will usually be deemed to be evidence enough that the patient has consented to the procedures or treatments.

IV. WHO MAY CONSENT TO MEDICAL CARE OR TREATMENT

Ordinarily, the nurse or the physician should obtain informed consent from the patient. However, in some circumstances, the patient may not have the legal capacity to consent to medical care or treatment.

Generally, minors do not have the legal capacity to provide informed consent. Prior to treating a minor, the nurse or physician should obtain the informed consent of the minor's legal representative. A legal representative is a natural or adoptive parent, a legal custodian (foster parent) or a legal guardian. If the provider is unable to reach the parent, legal custodian or legal guardian of the minor, the provider may obtain informed consent from the following persons in the order of priority listed: a person who possesses a power of attorney to provide medical consent for the minor, a stepparent, a grandparent, an adult sibling or an adult aunt or uncle. In some circumstances, select personnel of the Department of Children and Family Services or the Department of Juvenile Justice may consent to care or treatment of a minor. See Section 743.0645, Florida Statutes. There are instances in which a minor may consent to treatment. For example, a minor may consent to crisis intervention.

Persons who have been adjudicated incapacitated or found to be incompetent may not provide informed consent to treatment. In such cases, a provider must obtain express and informed consent to treatment of the incapacitated or incompetent patient from the patient's guardian or guardian advocate. Section 394.459(3), Florida Statutes. However, a developmentally disabled person may consent to treatment, unless a court has appointed a guardian advocate to make treatment decisions for the disabled person. Section 393.12, Florida Statutes; Section 393.13, Florida Statutes.

V. EVIDENCE REQUIRED TO ESTABLISH A CLAIM FOR LACK OF INFORMED CONSENT

If a plaintiff intends to establish a claim based on lack of informed consent, he needs to provide evidence on the nature of the risks of the treatment he underwent, as well as the reasonable medical standard of disclosure. To submit to a jury, the issue of to what extent specific risks of surgery should be disclosed to a patient in securing the patient's informed consent to a procedure, evidence is required as to the nature and extent of the risks and the standard prevailing in the medical community as to whether a reasonable medical practitioner in the community would make such disclosure under the same or similar circumstances. It is insufficient for the plaintiff to argue that had he known that the result which ultimately occurred could have occurred, he would not have given consent. Florida courts have also explored the necessity of the plaintiff to present expert evidence regarding the extent of the disclosure required. In Copenhaver v. Miller, the plaintiff claimed that his dentist failed to disclose to him the risks of numbness inherent in a dental procedure that the defendant dentist had performed. The court recognized that the duty of the dentist to disclose certain risks attributable to a particular procedure would vary in each case, resulting in the necessity of expert testimony to establish whether a dental practitioner in the community would make the pertinent disclosures under the same or similar circumstances.

The plaintiff's own opinions as to what he or she would not have consented to had all the risks been disclosed is not sufficient to make out a claim for lack of informed consent. The plaintiff's claims must be backed up by expert testimony as to what risks should have been disclosed under the particular circumstances of the case.

VI. WHAT RISKS MUST BE DISCLOSED

When obtaining a patient's informed consent, a physician does not need to disclose all of the possible risks inherent in a procedure or proposed course of treatment, but only those of a serious nature. In making these disclosures, patients are not presumed to be totally ignorant, but instead are obliged to exercise ordinary standards of intelligence and knowledge. When explaining the duty imposed on a doctor Florida's Fifth District Court of Appeal said in Ritz v. Florida Patient's Compensation Fund that:

the law does not contemplate that a doctor need conduct a short course in anatomy, medicine, surgery, and therapeutics nor that he do anything which in reasonable standards of practice for medicine in the community might be inimical to the patient's best interests. The doctrine of informed consent does not require the doctor to risk frightening the patient out of

should undertake, nor does the rule assume that the patient possesses less knowledge of medical matters than a person of ordinary understanding could reasonably be expected to have or by law should be charged with having.

The information that a doctor must provide a patient is such information which a reasonably prudent physician of the medical community should or would know to be essential to enable a patient of ordinary understanding to intelligently decide whether to incur the risk by undergoing the treatment or avoid that risk by foregoing the treatment.

There are additional statutory requirements for some providers, including providers of HIV testing, blood banks, mental health providers and midwives. For instance, mental health providers must provide specific information to mental health patients or their representatives. See Section 394.459(3), Florida Statutes. In addition, there are discharge requirements for mental health patients who refuse to consent or revoke consent to treatment. Section 394.4625(2), Florida Statutes, states that a voluntary patient who is unwilling or unable to provide express and informed consent to mental health treatment must either be discharged or transferred to involuntary status. For additional information on a particular speciality or type of practice, consult the relevant practice act or statutes governing the facility for the provider or facility in question.

VII. CONCLUSION

A nurse' role in obtaining a patient's informed consent is limited in nature. A nurse should only obtain the consent of a patient for procedures which she has the training, experience, skill and background knowledge of the patient's information. Despite this limited nature of obtaining a patient's informed consent, nurses should be familiar with the informed consent laws of Florida. A nurse who is familiar with the informed consent laws of the state can help to ensure that her patients have given their doctor the informed consent necessary to have a procedure performed by that doctor. Furthermore, a nurse is in the best position to advocate for her patient's right to self-determination because she will be able to find out if the patient has granted the doctor their informed consent to have a procedure performed after the physician has obtained what appears to be the patient's informed consent.

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