21
INFORMED CONSENT

All physicians are required to obtain a patient's informed consent before initiating medical treatment. This means that before a patient agrees to treatment she must be given a fair and reasonable explanation of what the treatment will entail. It must be clear that the patient (or the patient's legal representative) understands what risks the treatment involves or the consent granted will not be effective (i.e., will not shield the doctor from charges of battery or negligence).

DOCUMENTATION

In general, informed consent should be documented. Although standards in jurisdictions may vary, the following should be considered when documenting informed consent:

- Diagnosis;
- Medication being recommended;
- Prognosis;
- Discussion of the risks versus benefits of treatment;
- Discussion of risks of the use of the medication in children under 18;
- Discussion of risks and benefits of alternative treatment; and
- The risks of foregoing treatment should the patient refuse.

SUFFICIENT DISCLOSURE

While the traditional standard for legally sufficient disclosure is based on a professional standard, either the customary disclosure practices of physicians or what a reasonable physician would disclose under similar circumstances; many courts now use a more patient-oriented standard. Instead of the focus being on what a reasonable *physician* thinks the patient *should know*, the focus is on what "material" information about risks a reasonable *person* in the patient's situation *must know to make an intelligent decision*. Several factors are relevant to determining whether a risk is considered material:

- the severity of the risk;
- the likelihood of injurious side-effects or death;
- the need for treatment;
- the likelihood of success of the treatment; and
- the availability of comparable and less dangerous alternatives.

Where a treatment is particularly intrusive or dangerous, disclosure requirements may be much more stringent.

In an informed consent case, the plaintiff must establish that the alleged negligence of the physician to adequately inform the patient about risk was, in fact, the cause of harm. Courts generally require that the plaintiff prove that a reasonable person in his position would not have agreed to the treatment if he had been given the omitted information. However, in other courts the plaintiff may only have to prove that *he* would not have consented if he had been given the information the doctor failed to disclose.

EXCEPTIONS TO THE REQUIREMENT FOR OBTAINING INFORMED CONSENT

There are certain circumstances/exceptions where you may not be required to obtain informed consent. You should, however, be very careful about relying upon these exceptions since courts may be unlikely to expand exceptions that will effectively undermine the doctrine of informed consent. Should you have questions, discuss them with your risk management or legal professional. With this caveat, the exceptions include:

- **Emergencies.** The premise is that a reasonable person facing an acute, life-threatening crisis demanding immediate attention would choose treatment.

- **Therapeutic privilege.** It is sometimes accepted that under certain circumstances physicians have a therapeutic privilege to not provide complete disclosure because such disclosure would have a detrimental effect on the patient's physical or psychological welfare. However, psychiatrists should be very cautious about taking advantage of therapeutic privilege. Even if you are clinically convinced that full disclosure would have harmed your patient and been detrimental to treatment, the court may reject your concerns.

- **Incompetency.** An incompetent patient is, by legal definition, unable to give informed consent. If you are treating such a patient you should obtain the informed consent from a legally authorized substitute decision maker. Only a court can declare a person incompetent. If a patient has not legally been declared incompetent, but lacks the capacity to provide informed consent, it is wise to discuss this with your risk management or legal professional. It may

be problematic to use incompetency as a basis for not having obtained informed consent from the patient.

- **Waiver.** You may not need to disclose the risks of treatment if a patient has specifically requested that she not be told. Since waivers of legal rights are required to be both "knowing" and "voluntary," it must be documented that the patient realized she had a right to the information and willingly surrendered that right.

METHOD AND FORM OF CONSENT

Although it is generally not required that a written consent form be used, a signed form may be very valuable for several reasons including:

1. The formality of the procedure may force the patient to focus on what he is consenting to and make it less likely that he'll later assert that he wasn't adequately informed.
2. The signed form is evidence that the consent process took place and establishes what was disclosed.

Remember, however, that the signed form is not a substitute for a meaningful consent procedure. It is only evidence of consent (see Appendix EE for a sample treatment consent form).

If only oral consent is obtained, you must be sure to make an entry in the record as to what the patient was told, document objectively the patient's understanding of the disclosure, and that the patient consented.

DRUG TREATMENT AND INFORMED CONSENT

As with any treatment, when you prescribe medication you must be sure to get the patient's informed consent. This means the patient must be told the diagnosis, the benefits and risks of the drug therapy, what alternative forms of treatment are available, and the likely results of receiving or not receiving treatment (see Appendix R for a model form).

When treating patients with antipsychotic medications, you must be prepared to reveal the existence of the risk of serious side effects inherent in their use.
Since most litigation raising the issue of informed consent for treatment with an antipsychotic medication has involved tardive dyskinesia and related side effects, it is particularly important to disclose these risks whenever they exist. Patients should be advised to inform you whenever they experience any side effects or physical symptoms after beginning drug treatment. This may stop a minor side

effect from becoming a serious one and will also allow you to reassess the choice of medication on the basis of the patient's reactions.

CONSENT TO TREATMENT OF MINORS

As a general rule, you should not treat a minor patient without the consent of the custodial parent or another adult legally authorized in a custody decree. However, there are many statutory and judicial exceptions to this rule, and the age of consent varies greatly from state to state. The general exceptions are:

- Emergencies;
- Children who have been defined by the courts as emancipated minors;
- Mature minors – legally, minors who are capable of appreciating the nature, extent, and consequences of medical treatment; and
- Specific consent statutes – some states have enacted legislation that grants unemancipated minors of a certain age the right to consent to certain types of treatment (this may include mental health and substance abuse treatment).

You'll need to become familiar with the laws of the state where you practice, especially as they pertain to older minors.