



# Clark Memorial Hospital

A Norton and LifePoint Partnership

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## Consent to Medical Treatment

### GENERAL STATEMENT OF POLICY:

When treating a patient, the following guidelines should be followed when obtaining consent to provide medical treatment. It should be noted that the duty to obtain informed consent from a patient for medical treatment arises from Indiana's common law. *In the Matter of Lawrance*, 579 N.E.2d 32, 38-39 (Ind. 1991). The medical consent statutes set forth the methods by which physicians are to obtain the consent necessary before treating a patient.

*You should obtain informed consent before proceeding with medical treatment.*

*There is no duty to obtain informed consent for medical services from a patient in an emergency situation. See below Note \*.*

### PROCEDURES FOR OBTAINING INFORMED MEDICAL CONSENT:

- I. **Patient with capacity to consent:** A patient who has "capacity" to consent to medical treatment should sign a written consent. After a written or oral explanation, a signed written consent creates a rebuttable presumption of informed consent. Ind. Code § 34-18-12-2
- II. **A patient has capacity to consent to their own health care if they are:**
  - An adult; or
  - A legally independent minor. Ind. Code §16-36-1-3. See below Note \*\*.
- III. **A patient does not have capacity to consent to their own health care if they are:**
  - Incapable of making a decision regarding health care (as judged by the good faith opinion of the attending physician). Ind. Code §16-36-1-4(a); OR
  - A legally dependant, but otherwise competent minor.
- IV. **If a patient does not have capacity to consent, someone may consent for them. You should follow the steps as set forth below.**

**STEP ONE** – You should ask if the health care provider has knowledge that the patient previously "indicated" instructions with regard to the specific medical treatment. If yes, the healthcare provider must follow those instructions and any decision by someone else which may be contrary to what the healthcare

provider was told is not valid. . Ind. Code §16-36-1-4(b)

**STEP TWO** – You should ask if there is someone designated to make medical decisions, i.e. "power of attorney" or "health care representative designee" or "guardian." If, (1) there is no appointed representative, **or** (2) if the appointed representative fails to act in the best interest of the person or in good faith, **then** proceed to step three. Ind. Code §16-36-1-7

**STEP THREE** – If there is no one designated to make medical decisions, look for a spouse, parent, adult child, or adult sibling, or religious superior (if the person is a member of a "religious order"). Ind. Code §16-36-1-5(a). Any of these people can give consent.<sup>1</sup>

**If the incapable person is a minor, and is only incapable of consent because of her age** – First, look for a guardian appointed by the court to make health care decisions. If there is no guardian or the guardian declines to act, look for a parent or a person acting as a parent (e.g., step-parent). If a parent is not available or declines to act, an adult sibling can give consent. Ind. Code §16-36-1-5(b).

**NOTE DELEGATION** – At Step Three, spouses, parents, children, siblings, and "religious superiors" can delegate their authority to consent to another, but it must be in writing, signed by the delegate, witnessed, and specify the conditions of the delegation. Ind. Code §16-36-1-6.

**STEP FOUR** – If there is no designated representative or other person to make medical decisions, a health care provider can petition the probate court to appoint a person to make a health care decision. Ind. Code § 16-36-1-8.

V. ***If a patient does not have capacity to consent, and no one can/will give consent for them, the chief administrative officer of a community hospital, or his designee, can give consent for treatment if the appropriate procedures are followed***

**STEP ONE** – patient's treating physician and the chief administrative officer, or his designee, determine that (1) the patient is incompetent and (2) the treatment is medically necessary.<sup>2</sup> Ind. Code § 16-36-3-5; see also Ind. Code §§ 12-7-2-82 and 188.

**STEP TWO** – give notice to patient's friends and family, if applicable, allow an appropriate time for them to respond, and consider the family's responses. Ind. Code § 16-36-3-7.

**STEP THREE** – obtain a second opinion that the patient is incompetent and the treatment is medically necessary from an independent physician.<sup>3</sup> Ind. Code § 16-36-3-5. See below Note \*\*\*.

**STEP FOUR** – after the procedure is approved, give the required report to the "director of the division of mental health and addiction" or the "director of the division of disability and rehabilitative services" within one month after the end of the quarter. Ind. Code § 16-36-3-10.

VI. **MISCELLANEOUS:**

**\* PROCEDURES FOR DETERMINING WHETHER AN EMERGENCY ELIMINATES THE NEED FOR INFORMED CONSENT:**

While Indiana does not have a clear definition of "emergency" other courts have ruled that a medical

emergency exists if it becomes necessary for a physician to take immediate action to preserve a patient's life or health and it would be impractical to first obtain consent. In this situation, the patient's consent is implied, and there is no duty to obtain informed consent. *Cunningham v. Yankton Clinic, P.A.*, 262 N.W.2d 508 (S.D. 1978)

Follow the procedure below to determine whether an emergency eliminates the need for a patient to give informed consent for treatment:

**STEP ONE – Ask two questions to determine whether an emergency exists (immediate treatment is necessary):**

1. If the proposed treatment is not performed **immediately**, will the patient die?
2. If the proposed treatment is not performed **immediately**, will the patient suffer permanent harm?

If the answer to either of these two questions is yes, proceed to step two.

**STEP TWO – Ask two questions to determine whether consent is necessary:**

1. Do I have knowledge that the patient, when competent, has indicated instructions contrary to the necessary treatment? **If the answer is YES, do not treat.**
2. Is it practical for me to get the patient/decision-maker's informed consent *before* I must begin this treatment? **If the answer is YES, do not treat.**

If the answer to this question is no, and the patient does not refuse treatment, there is no need to get informed consent.

**\* PROCEDURES FOR DETERMINING WHETHER A PATIENT'S REFUSAL OF TREATMENT SHOULD BE HONORED IN AN EMERGENCY**

A competent patient has a right to refuse treatment in a medical emergency, but only if his refusal is based on the same standards of knowledge and understanding necessary for informed consent. *Estate of Leach v. Shapiro*, 469 N.E.2d 1047 (Ohio Ct. App. 1984). *In other words, the patient can only refuse treatment in an emergency if it is an **informed refusal**.*

Follow the procedure below to determine whether to treat if a patient in an emergency despite the patient's objection.

**STEP ONE – Determine whether the patient has capacity to make health care decisions.**

- If the patient does not have capacity, go ahead with treatment.
- If the patient does have capacity, proceed to step two.

**STEP TWO – Determine whether it is practical to provide the patient with all information necessary to make an informed decision to refuse treatment.**

- If this is not practical, go ahead with treatment.
- If this is practical, provide the patient with the information. Base the treatment decision whether to treat on the patient's informed refusal/consent.

**\*\* DEFINITION OF MINOR**

A patient is legally an adult at the age of 18 years. A patient under the age of 18 years may still consent to their own medical treatment, if:

- A. they are legally emancipated; or
- B. are
  - i. at least fourteen (14) years of age;
  - ii. not dependent on a parent for support;
  - iii. living apart from the minor's parents or from an individual in loco parentis; and
  - iv. managing the minor's own affairs;
- C. is or has been married; or
- D. is in the military service of the United States; or
- E. is authorized to consent to the health care by any other statute.

**\*\*\* SECOND OPINION LIST**

As noted above, if in the appropriate circumstances, the chief administrative officer, or his designee, and the treating physician, are called upon to give informed consent, this is only to be done after an "independent" physician gives a second opinion on two issues: (1) that the patient is incompetent; and (2) that the treatment is medically necessary. Ind. Code § 16-36-3-5. This independent physician is to be chosen from a "second opinion specialist list" "whenever possible." Ind. Code § 16-36-3-6.

The "second opinion specialist list" is a list to be compiled by the hospital administration. The only requirements of the list are that (1) it be organized by specialty; and (2) that the physicians be "independent" of the facility. The second opinion specialist may not perform the procedure for which consent is being obtained "unless an emergency exists." There is not a centralized state-organized list.

In creating the second opinion specialist list, it is recommended that:

1. Employed physicians shall not be on the second opinion specialist list. (second opinion specialists must be "independent")
2. In choosing a name off of the list, the chief administrative officer, or his designee, shall consider whether a physician could stand to financially benefit if the procedure is performed.
3. The most important issue in determining who is selected for the second opinion specialist list is the ability to determine that a treatment is "medically necessary."

1 Unless the person has made a written disqualification which is written, signed, and designates who may not consent to medical treatment on her behalf. Ind. Code § 16-36-1-9.

2 Note that medical necessity does not equate to emergency. In an emergency, there is no need to obtain consent. There are obvious situations where a procedure would be medically necessary, but not urgent.

3 The Chief Administrative Officer must obtain a second opinion only from a "Second Opinion Specialist List," which must be prepared ahead of time. Ind. Code §16-36-3-6.

**Attachments:**

No Attachments