

CONSENT TO MEDICAL TREATMENT

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1. Introduction.

a. Generally, consent of any patient is necessary before that individual can receive medical treatment at military medical treatment facilities. Consent can, depending on the circumstances, be express or implied. When consent is express (i.e., a patient gives it by direct words) it must be made with an understanding of what is to be done and of the risks involved. In other words, it must be an informed consent. An implied consent is one that may be inferred from actions of the patient, or other circumstances, even though specific words of consent are not used.

b. Medical care furnished without consent may constitute a battery under state law or Article 128, UCMJ. Aside from any criminal aspects, however, the consent issue can subject the U.S. Government to liability under the Federal Tort Claims Act² or the Military Claims Act.³

2. General Army Policy.

a. Army Regulation 600-20, paragraph 5-4 outlines the command aspects of medical care for active duty and active duty for training, while Army Regulation 40-3 paragraph 2-19 specifies the consent requirements for the nonmilitary patient.

b. "A soldier ... will usually be required to submit to medical care considered necessary to preserve his or her life, alleviate undue suffering, or protect or maintain the health of others. Commanders may order the examination of any soldier in their command when warranted."⁴

c. Express consent or implied consent of a nonmilitary patient is required for all medical and dental procedures.⁵ When express consent is obtained from the

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²28 U.S.C. 2671-2680.

³10 U.S.C. 2733.

⁴Army Regulation 600-20, paragraph 5-4a.

⁵Army Regulation 40-3, paragraph 2-19a.

patient, the patient must be briefed on what would be done and the risks involved. A good consent form will include all specific matters that the physician reviews with the patient that are material. If it is possible, however remote, that the patient will be paralyzed or expire as a result of the procedure, the patient needs to be informed of this fact. As mentioned above, an implied consent is one that may be inferred from actions of the patient, or other circumstances, even though specific words of consent are not used. For example - if an unconscious patient, who is bleeding profusely, presents in an emergency room, then consent to stop the bleeding is implied.

3. Informed Consent.

a. It is critical that military medical treatment facilities adequately cover the informed consent issue in the consent form. What constitutes legally sufficient informed consent will vary from jurisdiction to jurisdiction. Each state's statutes and precedents will prescribe what is to be considered adequate informed consent and what standards will be used to determine whether the burden of properly informing the patient in accordance with the law has been met.

b. Some states have enacted legislation codifying the standard to be used to determine if adequate informed consent has been given to particular medical or dental procedures. Other state law focuses on the informational needs of an average reasonable patient. The patient should be informed of all known material risks of the proposed treatment, any alternative treatments available, and what would happen if no treatment is given.⁶ Still other states use a professional standard to measure whether proper informed consent was given. The crucial question under this standard is "what information would the average physician have provided under the same or similar circumstances?"

c. As a general rule, the patient's consent is limited to those procedures contemplated when consent was given. An additional or modified consent is needed for additional procedures to remedy conditions discovered during the performance of the contemplated procedure.

⁶See generally Army Regulation 40-3, paragraph 2-19g and applicable case law.

However if the consent can clearly be interpreted to indicate that the patient consented to all reasonable procedures to correct the problem or where it is infeasible to consult the patient or someone able to give consent, then an additional or modified consent is not needed.

d. The patient may place express limitations on his or her consent to an operation. If this has been done, consent to anything over and above the limitation cannot be implied unless circumstances change significantly from those anticipated at the time of the prohibition. The usual exception to this general rule is in emergency situations.

4. Who May Consent?

a. The consent of the patient is required and sufficient if the individual has attained majority and is competent to understand the nature and purpose of the operation proposed and the risk involved. The consent of a husband to an operation on his wife is not necessary, and vice versa. The consent of the patient alone is sufficient. Nevertheless, it is advisable to have the spouse join in the consent whenever practical. It is particularly desirable to do so if the operation may endanger the patient's life, destroy or limit sexual function, or result in the death of an unborn child.

b. Minors: "Unless Federal law exists that preempts state law regarding a minor's right to consent to any or all medical examinations or treatment, the state law will prevail."⁷ Medical or dental procedures for unemancipated minors may lawfully be authorized by parents. Some states allow minor seeking birth control counseling, abortions, prescriptions or treatment for venereal disease to consent to such treatment themselves without parental involvement. State laws do not apply overseas. Therefore, the medical practitioner must look to the maturity of the minor in the absence of any other local law or regulation supplement.⁸ "The parents consent will be required only when it is determined that the minor's consent alone is not legally sufficient."⁹

⁷Army Regulation 40-3, paragraph 2-19f(1).

⁸Army Regulation 40-3, paragraph 2-19f(1).

⁹Army Regulation 40-3, paragraph 2-19f(1).

c. Incompetents: Generally, where the patient is of unsound mind and incompetent to understand the nature, purpose, and risks incident to a proposed operation, authority must come

(a) if he is a minor, from one or both of his parents or guardian, or

(b) if he has attained majority, from his spouse, legally appointed guardian, or other next of kin.

State law will dictate specifically who is authorized to provide consent for an incompetent. The situation may occur where a judicial determination of incompetency has been made. In this circumstance, consent must come from the court appointed guardian.¹⁰

d. Emergencies: A medical emergency may eliminate the need for consent. Where immediate treatment is necessary and it is not feasible or impossible to get consent either from the patient or next of kin. At military medical treatment facilities, "consent to treatment is implied in certain emergency situations when patients are incapable of giving or denying consent and their condition represents a serious or imminent threat to life, health, or well-being."¹¹

5. When is written consent required?

a. AR 40-3, 2-19d requires written consent for the following procedures -

(a) All surgery involving entry into the body by an incision or through one of the natural body openings.

(b) Any procedure or course of treatment in which anesthesia is used.

(c) All nonoperative procedures that involve more than a slight risk of harm to the patient or that involve the risk of a change in body structure.

¹⁰Army Regulation 40-3, paragraph 2-19f(6).

¹¹Army Regulation 40-3, paragraph 2-19b.

(d) All procedures in which x-ray, radiation, or other radioactive substance is used in the patient's treatment.

(e) All procedures that involve electroshock therapy.

b. Any question about the necessity or advisability of a written consent should be resolved in favor of obtaining such a consent; i.e., when in doubt, obtain fully informed written consent from the patient.

