

## CONSENT – MUST BE INFORMED

### LAW

“**Subject** to the **rights** of patients provided under this chapter, the department, county departments under s. 51.42 or 51.437, and any agency providing services under an agreement with the department or those county departments have the right to use **customary** and **usual treatment techniques** and **procedures** in a **reasonable** and **appropriate** manner in the treatment of patients who are receiving services under the mental health system, for the purpose of ameliorating the conditions for which the patients were admitted to the system. The **written, informed consent** of any patient shall first be **obtained**, unless the person has been **found not competent** to refuse medication and treatment under s. 51.61 (1) (g) or the person is a **minor 14 years** of age or older who is receiving services for **alcoholism or drug abuse** or a **minor under 14 years** of age who is receiving services for **mental illness, developmental disability, alcoholism, or drug abuse**. In the case of such a minor, the written, informed consent of the parent or guardian is required, except as provided under an order issued under s. 51.13 (1) (c) or 51.14 (3) (h) or (4) (g), or as provided in s. 51.138 or 51.47. Except as provided in s. 51.138, if the **minor is 14 years** of age or **older** and is receiving services for mental illness or developmental disability, the **written, informed consent** of the **minor and** the minor's parent or **guardian** is required, except that a refusal of either such a minor 14 year of age or older or the minor's parent or guardian to provide written informed consent for admission or transfer to an approved inpatient treatment facility is reviewable under s. 51.13(1)(c), (3), or (4) or 51.35(3)(b), and a **refusal** of either a minor 14 years of age or older or the minor's parent or guardian to provide written, informed consent for outpatient mental health treatment is reviewable under s. 51.14.”

§ 51.61(6), Wis. Stats. [Emphasis added.]

“Any **informed consent** which is required under sub.(1)(a) to (i) may be **exercised** by the patient's **legal guardian** if the patient has been adjudicated incompetent and the guardian is so empowered, or by the parent of the patient if the patient is a minor.”

§ 51.61(8), Wis. Stats. [Emphasis added.]

“**Informed consent**’ or ‘consent’ means **written** consent **voluntarily** signed by a patient who is **competent** and who **understands** the **terms** of the consent, or by the patient's **legal guardian** or the **parent** of a minor, as permitted under s. 51.61(6) and (8), Stats., **without** any form of **coercion**, or **temporary oral consent** obtained by telephone in accordance with s. DHS 94.03 (2m).”

DHS 94.02(22), Wis. Admin. Code [Emphasis added.]

“INFORMED CONSENT. (1) Any informed consent document required under this chapter shall declare that the patient or the person acting on the patient's behalf

has been **provided** with **specific, complete and accurate information** and **time to study** the information or to seek additional information concerning the proposed treatment or services made necessary by and directly related to the person's mental illness, developmental disability, alcoholism or drug dependency, including:

- (a) The **benefits** of the proposed treatment and services;
- (b) The **way** the treatment is to be **administered** and the services are to be provided;
- (c) The **expected treatment side effects** or risks of side effects which are a reasonable possibility, including side effects or risk of side effects from medications;
- (d) **Alternative** treatment modes and services;
- (e) The **probable consequences** of **not receiving** the proposed treatment and services;
- (f) The **time period** for which the informed consent is **effective**, which shall be no longer than 15 months from the time the consent is given; and
- (g) The **right to withdraw** informed consent at any time, in writing.

(2) An informed consent document is **not valid unless** the subject patient who has signed it is **competent**, that is, is **substantially able** to understand all significant information which has been explained in easily **understandable language**, or the consent form has been signed by the legal guardian of an incompetent patient or the parent of a minor, except that the **patient's informed consent is always required** for the patient's participation in **experimental research**, subjection to **drastic treatment procedures** or receipt of **electroconvulsive therapy**."

(2m) In **emergency situations** or where time and distance requirements preclude obtaining written consent before beginning treatment and a determination is made that harm will come to the patient if treatment is not initiated before written consent is obtained, **informed consent** for treatment may be **temporarily obtained by telephone** from the parent of a minor patient or the guardian of a patient. Oral consent shall be **documented** in the patient's record, along with details of the information verbally explained to the parent or guardian about the proposed treatment. Verbal consent shall be **valid** for a period of **10 days**, during which time informed consent shall be obtained in writing."

(3) The **patient**, or the person acting on the patient's behalf, shall be **given a copy** of the completed informed consent form, **upon request**."

(4) When informed consent is **refused** or **withdrawn**, **no retaliation** may be **threatened** or **carried out**."

DHS 94.03, Wis. Admin. Code [Emphasis added.]

"Except in an emergency when it is necessary to prevent serious physical harm to self or others, **no medication** may be given to any patient **or treatment**

performed on any patient **without the prior informed consent of the patient**, unless the patient has been found not competent to refuse medication and treatment under s. 51.61(1)(g), Stats., and the court orders medication or treatment. In the case of a patient found incompetent under ch. 54, Stats., the informed consent of the guardian is required. In the case of a minor, the informed consent of the parent or guardian is required. Except as provided under an order issued under s.51.14(3)(h) or (4)(g), Stats., if a minor is 14 years of age or older, the informed consent of the minor and the minor's parent or guardian is required. Informed consent for treatment from a patient's parent or guardian may be temporarily obtained by telephone in accordance with s. DHS 94.03(2m).

DHS 94.09(4), Wis. Admin. Code [Emphasis added.]

"The informed consent **document** [for filming or taping] shall specify that the subject patient may **view** the **photograph** or **film** or **hear** the **recording** prior to any **release** and that the patient **may withdraw** informed **consent** after viewing or hearing the material."

DHS 94.18(3), Wis. Admin. Code [Emphasis added.]

[NOTE: For summaries of cases on consent, see the following topics in this digest: **Guardian; Research; Treatment – Refusing; Filmed and Taped;** and, **Drastic Treatment.**]

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## DECISIONS

1. A patient wanted to **continue the individual therapy** she had received for 9 years, but the service provider shifted to only doing group therapy with her. She had been made aware months in advance of the upcoming change in services. But her **interim plan for transitioning** to group therapy **was not** documented or **consented to** by the patient. Thus, her right to treatment and her **right to informed consent** were **violated**. It was recommended that the service provider create a space on its treatment plans for the patient's signature and that they fully document all services received by the patient. (Level III decision in Case No. 01-SGE-09 on 3/27/02.)
2. A therapist did not present his written assessment and treatment plan to the patient prior to beginning treatment. The **treatment plan** was developed after the first session but **not signed** by the patient **until after the third session**. The plan should have been provided to the patient prior to his second session. This **was a violation** of the patient's rights to participate in his treatment planning and **to provide informed consent** for treatment. (Level

IV decision in Case No. 01-SGE-07 on 3/29/02, reversing the Level III decision.)

3. Where a **doctor knew or should have known** that his patient was **seeing other professionals** involved in her care, the **doctor has a duty** to at least **attempt to inform** the other therapist involved of a change in medication. **If the patient's consent is required**, the **doctor should ask for it**. Where no such attempt was made here, the doctor violated the patient's rights. (Level IV decision in Case No. 02-SGE-04 on 9/19/03.)
4. An ex-patient complained about a **lack of billing information** about the cost of his stay at a psychiatric hospital. At the time of admission to the hospital, the patient and his wife spoke with staff in the Business Office about the cost of care. The couple expressed concerns that their insurance would only cover psychiatric care for a limited time. They requested to be informed by the Business Office when he had reached the limit the insurance would pay, and the hospital assured them that they would do so. Later, during his stay, a facility representative informed the patient that he was close to exhausting his insurance benefits. At that time, **he signed a form** called the "Beneficiary Notification of Noncovered Care: Disclosure and Acknowledgement statement of Noncovered Services." The signed form acknowledged that he wished to stay at the hospital to receive services and that he was solely liable for payment of the services that would not be covered by his insurance benefits. The ex-patient said that he did not recall seeing or signing this form but his signature on it appears to be on it. One important question is **whether or not** the form is **legally valid as an informed consent document**. Since he was a **legally competent adult**, the hospital presented this form to him in good faith, as he requested. However, **his inability to recall signing the form** begs the question of "**capacity**" rather than competence during his hospitalization. Certain diagnostic factors indicated that he may not have had a reliable functional capacity to understand the implications of the form he signed, and may account for his inability to recall signing it. The hospital should have gotten his consent on admission to share his billing information with his wife so that they could inform her, too, when the insurance funds were running out. (Level III Decision in Case No. 03-SGE-07 on 4/22/04.)
5. Where a client **participated in a mental health assessment**, her right to provide **informed consent to treatment** was **not violated** because she was not yet in treatment. By her cooperation, she gave her **implied consent** to participate in the evaluation and assessment. This was adequate to begin that assessment process. (Level III Decision in Case No. 05-SGE-003 on 6/8/06)
6. An **informed consent** document for treatment planning should **clearly set forth the information necessary** for the patient/guardian **to make a clear and informed decision** regarding the services they consent to receive. This should **include a clear indication of the types and specific costs for**

**those services.** Here, the provider did not specifically document or clarify the types of services recommended and the billing codes that would apply. The consent to treatment listed two conditions and two treatment modalities, but did not explicitly link either of them to one another, making the quality of the information provided by the consent ambiguous. This did not provide a clear expectation for the family, and thus the consent was not truly informed. (Level III decision in Case No. 07-SGE-02 on 4/2/08)

7. At the time of a client's admission to an inpatient substance abuse facility, the agency **presented her with a treatment schedule** and had her sign a consent to the treatment program. From the schedule, it appeared that each day would offer a full day's worth of treatment programming to clients. However, **because of the timing of her stay** during the late-December holiday season, **much of the activities and treatment programming on the schedule did not take place.** It was concluded that **the client's right to meaningful informed consent to treatment was violated** due to the **inadequate information** provided to her on admission. (Level III decision in Case No. 09-SGE-03 on 8/05/09)
8. A grievant claimed that a strip search conducted upon her admission was improperly performed by staff at an inpatient psychiatric hospital. The grievant claimed that she never would have signed a statement agreeing to voluntary admission if she had been warned that the strip search would be required. **Patients must voluntarily agree to treatment at a time when they are competent and able to understand the terms of the consent in order for consent to be valid.** The search was not technically part of the patient's treatment as treatment is defined in applicable statutes. The search was most likely done to meet safety and management needs. **If a person were able to enter into an inpatient psychiatric hospital with weapons or drugs the safety of all patients would be compromised. Therefore the right to informed consent was not violated because informed consent relates to treatment, not policy.** (Level III decision in Case No. 15-SGE-0008 on 6/16/2016)
9. A patient claimed that her right to be treated with dignity and respect was violated when a strip search was conducted without warning upon her admission to an inpatient psychiatric hospital. The grievant alleged that at an informal grievance meeting **staff told her that she would not want to know what would have happened if she had refused the strip search. Actual or threatened retaliation is not allowed when a patient refuses to give or withdraws informed consent.** All staff persons present at the meeting denied that the statement was made. The grievant offered only her own testimony as proof of wrongdoing. The grievant had the burden to show that it was more likely than not that staff violated her rights. Further, the grievant's credibility was compromised because of the inconsistency arising when she initially characterized the search as a rectal cavity search and then

characterized it as a visual search. Therefore, there was no violation to the patient's right to be treated with dignity and respect as a result. **However, if the patient had been able to offer more evidence that the statements were made it would have been a violation of her right to be treated with dignity and respect.** (Level III decision in Case No. 15-SGE-0008 on 6/16/2016)

10. A Patient was taken to the provider's ER. The patient was voluntarily admitted to the behavioral health unit after considerable indecision. The patient was discharged after approximately one and one-half days. The patient claimed that she was not voluntarily admitted because she was **acting under duress** from her husband (who wanted her to be admitted). The patient claimed that the duress consisted of her husband being verbally abusive towards her prior to her arriving at the facility. **In order for consent to be informed (and therefore valid) it must be (i) voluntarily signed by a patient (ii) signed by a patient who is competent, (iii) the patient must understand the terms of the consent and (iv) the signature must be obtained without any form of coercion. The burden of proof is on the grievant to show some substantiated evidence (other than hearsay or opinion evidence) of the claimed coercion.** No violation was found because no such evidence was provided. (Level III decision in Case No. 16-SGE-08 on 5/26/2017)

[See: "Introduction to Digest-Date Last Updated" page.]