RESIDENT’S RIGHTS, REFUSAL OF TREATMENT, AND RELATED LEGAL PRINCIPLES

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INTRODUCTION

• Thomas J. Mortell – Chair of Health Law Group and member of governing board at Hawley Troxell Ennis & Hawley LLP
• HT Health Law Group covers everything health care providers may need e.g. health law, employment, real estate, medical malpractice and other litigation, employee benefits, affirmative action compliance
• Actively involved in issues related to healthcare reform including the establishment and operation of Idaho’s Health Insurance Exchange and the Medicaid expansion debate in Idaho.
WHAT WE WILL COVER

• Resident’s Rights
• Consent
• Advance Directives
• Living Wills and Durable Powers of Attorneys
• Guardians and Conservators
• Policies and Procedures
• Grievances
RESIDENTS’ RIGHTS

- Common law – law made by judges
  - Contract
  - Tort
- Statutes and regulations – legislation
  - Civil and criminal statutes
  - Licensing statutes and regulations
  - Medicare conditions of participation
RESIDENTS’ RIGHTS: CONTRACT

• Must comply with enforceable contract.
• Party may sue for breach of contract.
  – Admission contracts or forms
  – Promises regarding care
  – Published policies
• Penalty: damages, specific performance
RESIDENTS’ RIGHTS: COMMON LAW

- An injured person may sue for damages caused by wrongful conduct (i.e., civil torts).
  - Negligence
  - Malpractice
  - Assault and battery
  - Lack of informed consent
  - False imprisonment
  - Conversion
  - Invasion of privacy
  - Negligent or intentional infliction of emotional distress
- Penalty: damages.
RESIDENTS’ RIGHTS: CIVIL AND CRIMINAL STATUTES

- Civil and criminal laws prohibit certain conduct.
  - Abuse and neglect
  - Assault
  - Battery
  - Kidnapping
  - Theft
  - False claims
  - Breach of disclosure
  - Nursing misconduct
- Penalties: jail, fines, damages, loss of license, etc.
RESIDENTS’ RIGHTS: CONDITIONS OF PARTICIPATION

- 42 USC 1395I-3(c), 1396r(c) et seq.
  - Federal statute
- 42 CFR 483.10, .12, .13, and .15
  - Federal regulations
- State Operations Manual
  - Appendix PP: Interpretive Guidelines for Long Term Care Facilities Tags F150 et seq.
- IDAPA 16.03.22.550 et seq.
  - State licensing regulations
RESIDENTS’ RIGHTS: CONDITIONS OF PARTICIPATION

• Must comply with conditions to participate in Medicare/Medicaid.
• Idaho Bureau of Facility Standards surveys for licensure and investigates compliance.
  – Citations bases on Interpretive Guidelines.
  – Tags F150 et seq.
• Penalties: loss of facility licensure, possible civil, criminal or administrative liability.
RESIDENT’S RIGHTS: GENERAL

- Access to / visited by others outside facility.
- Mail and telephone.
- Access records and survey results.
- Retain personal possessions.
- Refuse treatment.
- Manage their own financial affairs.
- Have facility hold and account for money.
- Share room with spouse.
- Refuse transfer or discharge subject to limits.
- Hold bed and/or readmission.
- Be informed about rights.
- Exercise rights as resident and US citizen.
- Voice grievances.
RESIDENT’S RIGHTS:
NOTICES TO RESIDENTS OR REPS

• Resident rights, rules and regulations.
• Advance directives.
• Physician responsible for care.
• Refusal of treatment.
• Medicare/Medicaid eligibility and benefits.
• Way to protect personal funds.
• Accidents resulting in injury.
• Significant change in health status.
• Need to alter treatment.
RESIDENT’S RIGHTS: NOTICES TO RESIDENTS OR REPS

- Decision to transfer or discharge resident.
- Bed-held policy.
- Names, addresses, phone numbers of resident advocacy agencies.
- Right to file complaint.
Federal law – 42 CFR 483.10(b)

(3) The resident has the right to be fully informed in language that he or she can understand of his or her total health status, including but not limited to, his or her medical condition;

(4) The resident has the right to refuse treatment, to refuse to participate in experimental research and to formulate an advance directive . . .
Idaho Law – IDAPA 16.03.22.550.12
Each resident must have the right to control his receipt of health care services, including:

(d) The right to refuse medical services based on informed decision making.

(i) The facility must document the resident and his legal guardian have been informed of the consequences of the refusal;
(ii) The facility must document that the resident’s physician or authorized provider has been notified of the resident’s refusal.

• Diet Liberalization – “Sometimes, a resident or resident’s representative decides to decline medically relevant dietary restrictions. In such circumstances, the resident, facility and practitioner collaborate to identify pertinent alternatives.”
RESIDENT’S RIGHTS – REFUSAL TO FOLLOW DIETARY ORDER

- Document that the resident and representative have been informed.
- Document that physician has been informed of the refusal.
- Document effort to collaborate to explore alternatives.
CONSENT
PATERNALISM V. PATIENT RIGHTS

Provider knows best so provider decides what happens to the patient.

Provider may know best, but competent patient still has the right to decide what happens to his or her own body.
PATIENT RIGHTS

• Competent patient has the right to consent to or refuse treatment.
• Patient has right to sufficient info to make their consent “informed.”
INFORMED CONSENT V. CONSENT FORM

Informed Consent = Communication
• Practitioner communicates info about treatment.
• Patient gives or refuses consent to treatment.

Consent Form = Documentation
• Supplements info given by practitioner.
• Documents that the process of “informed consent” took place, i.e., practitioner gave info and patient gave consent.
VIOLATION OF PATIENT’S RIGHTS

• Battery: harmful or offensive touching without consent.
• False imprisonment: preventing person from leaving without consent.
• Lack of informed consent
  * Good intentions or good result is no defense.
• Informed consent is a defense. (See, e.g., Neal v. Neal, 125 Idaho 617).
VIOLATION OF PATIENT’S RIGHTS

- Practitioner treats without valid consent.
- Practitioner ignores the patient’s directives.
- Practitioner continues treatment even though the patient has objected.
- Practitioner exceeds the scope of consent.
- Practitioner fails to inform patient of material info, thereby negating informed consent.
IDAHO CONSENT STATUTE
I.C. 39-4501 ET SEQ.

- Who may give consent
- Standards for valid consent
Any person who comprehends the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental, surgical or other health care, treatment or procedure is competent to consent thereto on his or her own behalf. (IC 39-4503)
CAPACITY

- Lack of capacity is:
  - Unconsciousness
  - Incompetence
  - Intoxication
  - Immaturity

- Lack of capacity not:
  - Stupidity
  - Poor judgment
  - Desire to die rather than receive treatment
  - Decision contrary to provider’s wishes
If patient lacks capacity, consent or refusal may be given by competent person in following priority:

- Legal guardian
- Living will or durable power of attorney
- Spouse
- Parent
- Appropriate relative
- Other person responsible for health care
- Attending physician in emergency

(IC 39-4504(1))
PERSONAL REPRESENTATIVES

• Must yield to surrogates with priority.
• Surrogate consent may not override prior direction of competent patient, e.g.,
  • Patient refused treatment before losing capacity.
  • Patient has issued advance directives. (IC 39-4504(1)).
INFORMED CONSENT

• Consent, or refusal to consent, for the furnishing of health care, treatment or procedures shall be valid in all respects if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting the need for, the nature of, and the significant risks ordinarily attendant upon such a person receiving such care, as to permit the giving or withholding of such consent to be a reasonably informed decision. (IC 39-4506)
INFORMED CONSENT

• Provider should inform patient of:
  • Need for treatment.
  • Nature of treatment.
  • Risks and benefits of treatment.
  • Alternatives.
  • Risks and benefits of alternatives.
  • Providers to perform treatment.
• Consent may be written, oral, or implied. (IC 39-4507)
• Written consent signed by person giving consent is presumed to be valid and sufficient absent convincing evidence of fraud or malice. (IC 39-4507).
• Oral and implied consent should be documented in the patient’s medical chart.
CONSENT:
SCOPE AND DURATION

Consent is limited to:

• Specific treatment or procedure identified in consent and incidental or related procedures.
• Specific providers identified in the consent.
• Reasonable time period.
CONSENT:
SCOPE AND DURATION

• New consent or reaffirmation of prior consent should be obtained if:
  • Change in procedure or treatment, e.g., additional, non-emergency procedures.
  • Change in providers.
  • Significant lapse in time.
  • Patient questions or objects to treatment.
PROPER CONSENT: REVOCATION

• A competent patient may withdraw the consent at anytime and in any manner.
• If patient expresses reservations, questions, or objections, the physician should immediately address the concerns to ensure that consent remains in effect.
REFUSAL OF CONSENT

• Consent corollary: competent individual has the right to refuse consent.
• Violation of patient’s decision = battery.
REFUSAL OF CONSENT:
AGAINST MEDICAL ADVICE

• Patient may refuse treatment, but protect yourself:
  – Inform patient of adverse consequences.
  – Document in chart:
    • Patient’s competency.
    • Explanation of risks and benefits.
    • Physician’s attempt to obtain consent.
    • Patient’s signature confirming voluntary decision.
  • Witnesses
• See 42 CFR 483.10(b); IDAPA 16.03.22.550.12
REFUSAL OF CONSENT: ADVANCE DIRECTIVES

• Living wills (IC 39-4510)
  • Allows patient to decline life-saving treatment if they become incompetent and have terminal condition.

• Durable power of attorneys (IC 39-4510)
  • Allows another to make health care decisions if person becomes incompetent.
ADVANCE DIRECTIVES
ADVANCE DIRECTIVES

- Living wills
- Durable power of attorney
- Physician’s order re scope of treatment?
GENERAL PRINCIPLES

• Competent adult persons “have the fundamental right to control the decisions relating to the rendering of their medical care, including the decision to have life-sustaining procedures withheld or withdrawn.” (IC 39-4509).
• May give direction through:
  − Direct instructions by competent patient, i.e., “any authentic expression of a person’s wishes with respect to health care should be honored.” (IC 39-4509)
  − Advance directives executed in case the patient becomes incompetent or unable to communicate. (IC 39-4509)
GENERAL PRINCIPLES


• Provider generally may decline to participate in withholding treatment due to conscience.
  – Cannot override competent patient’s instructions.
  – Cannot abandon patient.
STATUTES AND REGULATIONS

• Patient Self-Determination Act
• Medicare Conditions of Participation
  – 42 CFR 482.13
  – 42 CFR 489.100 et seq.
• Idaho licensing regulations
• Idaho Natural Death Act
  – Living wills
  – Durable powers of attorneys
• “The patient has the right to formulate advance directives and to have hospital staff and practitioners who provide care in the hospital comply with these directives….” (42 CFR 482.13(b)(3)).
PATIENT SELF DETERMINATION ACT

- Requires certain institutional providers to:
  - Provide to patients written info re state law rights to consent or refuse care.
  - Inquire whether patients have executed advance directives and document responses in prominent place in current records.
  - Educate staff and community.
  - Ensure compliance with state law applicable to advance directives.
  - Maintain written policies and procedures implementing these items.

- (42 USC 1395cc(f))
• Hospitals, nursing facilities, HHAs, FQHCs, RHCs, hospices, and personal care nursing supervisors must:
  – Provide patients written and oral info re right to make health decisions, including advance directives.
    • See DHW form notice.
    • See content required by 42 CFR 489.102.
  – Document in patient’s record any advance directives.
    (IDAPA 16.03.09.021.01; see 42 CFR 489.102)
ADVANCE DIRECTIVES
FED AND STATE REGULATIONS

• Hospitals, nursing facilities, etc.:
  – Cannot condition treatment or discriminate based on provision of advance directive.
  – If provider cannot comply with advance directive as matter of conscience:
    • Notify patient of limits on compliance due to conscience; and
    • Assist recipient in transferring to another facility.
  – Educate staff and community on advance directives. (IDAPA 16.03.09.021.01; see 42 CFR 489.102).
• Generally provide information:
  – Upon admission.
  – In case of incompetent patient,
    • May provide to family at time of admission.
    • Must provide to patient when competent.
    (IDAPA 16.03.09.021.02)
• If law changes, must update notice within 90 days from effective date of change. (42 CFR 489.102).
LIVING WILLS AND DURABLE POWER OF ATTORNEYS
IDAHO NATURAL DEATH ACT

• IC 39-4510 et seq.
  – Combines living wills and durable powers of attorneys into one document.
  – Relaxes requirements for execution.
LIVING WILL AND DURABLE POWER OF ATTORNEY

- Executed by patient.
- **Living will** allows patient to direct whether and what type of artificial life-sustaining measures the patient should receive if the patient is incompetent.
- **Durable power of attorney** allows patient to appoint someone to make health care decisions for the patient if the patient is unable to communicate rationally.

(IC 39-4510)
LIVING WILL

• Applies only if patient:
  – Unable to communicate instructions.
  – Either:
    • Has incurable injury, disease, illness or condition and two medical doctors certify:
      – Condition is terminal, and
      – Artificial life-sustaining procedures would only artificially prolong patient’s life, and
      – Death is imminent whether or not life-sustaining procedures utilized.
    • Is in persistent vegetative state.
      – Is not pregnant. (IC 39-4510).
LIVING WILL

• Limited to decisions re artificial life-sustaining procedures, e.g.,
  – Provide procedures.
  – Withhold or withdraw all or certain life-sustaining procedures.
  – Hydration and nutrition (IC 39-4510)
• Must be supported by physician order.
DURABLE POWER OF ATTORNEY

• Applies only if
  – Patient unable to communicate rationally.
  – Patient need NOT be terminal.

• Authority
  – Limited to authority granted in POA; broad authority granted unless POA states limits.
  – Decisions must be consistent with patient’s known desires, including living will.

(IC 39-4510)
DURABLE POWER OF ATTORNEY

• Cannot serve as agents:
  – Treating provider
  – Nonrelative employee of treating provider
  – Operator of community care facility
  – Nonrelative employee of community care facility

• Designation of spouse revoked by divorce.
  (IC 39-4510)
LIVING WILL AND DURABLE POWER OF ATTORNEY

• Requirements
  – Executed by competent person who is of sound mind and either over age 18 or emancipated.
  – Contain the required elements, i.e.,
    • Contain the general elements in IC 39-4510 as amended.
    • Contain the elements required by the Idaho Code at the time it was executed.
    • If executed in another state, “substantially complies” with elements in the Idaho Code. (IC 39-4510).
LIVING WILL AND DURABLE POWER OF ATTORNEY

• Maker may execute by
  – Completing statutory form; or
  – Completing form that contains the required elements.

• As amended:
  – Do not need notarization.
  – Do not need witnesses.

(IC 39-4510)
LIVING WILL AND DURABLE POWER OF ATTORNEY

• Maker may revoke at anytime regardless of mental state by:
  – Canceling, defacing, obliterating, burning, tearing, or otherwise destroying the document.
  – Written revocation signed by maker.
  – Oral revocation by maker.
  
  (IC 39-4511)
• Immune from liability if:
  – Provider relies in good faith on facially valid living will or durable power of attorney.
  – If provider cannot assist due to conscience, provider makes good faith effort to help patient obtain services of another provider.

(IC 39-4513)
PHYSICIAN ORDER FOR SCOPE OF TREATMENT (POST)
• Order signed by physician, PA or APPN and the patient after discussion with patient
• Or by personal rep if not contrary to patient’s last know wishes
• Provider must review form every seven days if hospitalized, upon transfer, substantial change in health or if patient’s preferences change (IC 39-4512A)
POST

• Providers and EMS shall comply with POST instruction or when wearing POST ID device
• Equivalent of DNR orders at facilities
• Facilities and providers cannot require completion of other forms
• If DNR in place, POST form will take precedence (IC 39-4512B)
POST

- Provider will make reasonable efforts to inquire about existence of POST form when faced with need for artificial life-sustaining treatment not caused by severe trauma or involving mass casualties, murder or suicide (IC 39-4512C)
GUARDIANS AND CONSERVATORS
APPOINTMENT OF GUARDIAN OR CONSERVATOR

• Court may appoint guardian or conservator for “impaired” person.
• Impaired = mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent that person lacks sufficient understanding or capacity to make or communicate responsible decisions.
GUARDIAN

• Appointed by court to make decisions and provide for personal care and maintenance of incapacitated person.
• Generally not authorized to handle person’s finances.
• Not personally liable for expenses.
CONSERVATOR

- Appointed by court to care for incapacitated person’s finances.
- Acts as trustee of incapacitated person’s estate.
POWER OF ATTORNEY

• Written instrument executed by person delegating authority to make certain decisions.

• Limited to express scope of authority stated in the document, e.g.,
  – General power of attorney
  – Durable power of attorney
PERSONS WHO CAN MAKE HEALTH CARE DECISIONS

- Guardian
- Person with durable power of attorney (if triggered)
- Spouse
- Parent
- Other appropriate relative
- Other person responsible for care of person
LIMITATIONS

• Guardians and conservators are appointed by court.
• Power of attorney is limited by scope of written instrument.
• Guardian, conservator, or surrogate generally may not trump expressed wishes of competent person.
POLICIES AND PROCEDURES
POLICIES AND PROCEDURES

• Must have written policies and procedures to ensure compliance, e.g.,
  – Patient rights
  – Abuse

• Use regulations as a guide
POLICIES AND PROCEDURES: MISTREATMENT

Regulations require process to—

• Screen employees
• Train employees
• Prevent abuse
• Identify possible abuse
• Investigate incidents
• Protect residents during investigation
• Reporting incidents
GRIEVANCES
GRIEVANCES AND COMPLAINTS

• Resident and personal reps have right to complain.
• Must have effective process for responding.
  – Promotes quality.
  – Mitigates liability.
  – The right thing to do.
SAMPLE PROCESS

- Immediately address situation, including action to protect patient.
- Notify supervisor and/or administration.
- Prepare written complaint describing concerns, including who, what, when, where, and protections.
- Notify family and physicians.
- Administrator notify Bureau in timely manner, if required.
SAMPLE PROCESS

• Investigate allegations by appropriate person.
  – Interviews
  – Review records
  – Determine cause
  – Corrective action plan
  – Sanctions
QUESTIONS?

THANK YOU

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