



BME REPORT

SUMMER/FALL 2000

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INFORMED CONSENT AS A NON-DELEGABLE DUTY

by Paul Frisch
Director, Department of Medical-Legal Affairs
Oregon Medical Association

I am often asked about the legality of having a non-physician obtain informed consent to treatment.

Oregon law is clear: ORS 677.097 states that the "physician or podiatric physician and surgeon" (no mention of support personnel) must obtain patient informed consent. Improperly obtained informed consent carries significant potential consequences:

1. It is a violation of the Medical Practice Act, and could subject the physician to disciplinary action.
2. A physician who begins a medical treatment or procedure without properly obtaining informed consent can be liable for the result even without violating the standards of practice.

Every Oregon physician needs to understand this law (printed on this page) and its applications.

Test Yourself

Is informed consent (Procedure-Alternatives-Risks-Questions) properly obtained in the following scenarios?

1. **The patient views a videotape about the procedure and can ask a nurse or medical assistant questions. The patient then sees the physician to sign the informed consent form.**

Informed consent is not just a form to be completed; it is a process. In *Zacher v. Petty*, an Oregon gynecologist was charged with negligence for failing to ask the patient if she desired a more detailed explanation of the alternatives

ORS 677.097 PROCEDURE TO OBTAIN INFORMED CONSENT OF PATIENT

(1) In order to obtain the informed consent of a patient, a physician or podiatric physician and surgeon shall explain the following:

- (a) In general terms the procedure or treatment to be undertaken;
- (b) That there may be alternative procedures or methods of treatment, if any; and
- (c) That there are risks, if any, to the procedure or treatment.

(2) After giving the explanation specified in subsection (1) of this section, the physician or podiatric physician and surgeon shall ask the patient if the patient wants a more detailed explanation. If the patient requests further explanation, the physician or podiatric physician and surgeon shall disclose in substantial detail the procedure, the viable alternatives and the material risks unless to do so would be materially detrimental to the patient. In determining that further explanation would be materially detrimental the physician or podiatric physician and surgeon shall give due consideration to the standards of practice of reasonable medical or podiatric practitioners in the same or a similar community under the same or similar circumstances.

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From the Executive Director

ACCENTUATING THE POSITIVE

As I went over the list of articles for this issue, the emphasis seemed to be on the negative—social security numbers required for Division of Child Support and Department of Revenue enforcement purposes; fax “broadcasting” of disciplinary actions to hospitals and nursing homes; and, for the first time, recent disciplinary actions taken by the Board.



As explained in our spring 2000 issue, the OBME has decided that it must join the majority of American medical boards that publish disciplinary actions in their newsletters. This public information is already available in other formats, and with the *BME Report*

now on the Web, the Board feels obligated to make it accessible via this increasingly common means of communication.

When the Board discussed the pros and cons of printing disciplinary actions in the *Report*, someone remarked ruefully that if we did, people would read them the way they do newspaper obituaries—to be sure their own names aren't there.

This was meant as a joke, but there was an element of grim truth in it. The Board is required to investigate complaints and take action where necessary. By law, such actions are public information, and can attract a lot of attention—which makes all of us uncomfortable. The whole issue can be pretty depressing unless we remind ourselves how few of Oregon's practitioners are actually involved.

The vast majority of the 12,356 individuals now licensed by the Board will never come under investigation or disciplinary action. This is not because the Board is lax, but because most of Oregon's medical practitioners are very capable, conscientious professionals deeply concerned about the people they serve. They simply don't come to the Board's attention.

Of the small percentage against whom action is taken, few deliberately cause harm; most are well-intentioned people who for one reason or another have developed problems that need to be corrected. Taking disciplinary action allows the Board to prescribe corrective measures and monitor progress while protecting the public. (Most practitioners against whom action is taken are fully rehabilitated.)

So as you read about disciplinary and enforcement issues, please remember that while the negative makes news, it is only a very small part of a very big picture. Oregon's medical profession as a whole should be a source of pride and confidence for this state.

The Board plays a part in keeping it so by taking appropriate action when problems arise.

But always, most of the credit for the high level of medical care available to Oregonians goes to the practitioners themselves—the great majority we never hear about, and whose names will never appear in these pages.

Kathleen Daley

**BME
REPORT**

Statement of Purpose

The *BME Report* is published to help promote medical excellence by providing current information about laws and issues affecting medical licensure and practice in Oregon.

Informed Consent as a Non-Delegable Duty *(continued from page 1)*

to a hysterectomy. As the Oregon Supreme Court's majority opinion states:

[T]here is evidence—and the jury could have found—that defendant failed to ask the plaintiff if she wanted a more detailed explanation and that defendant, therefore, was required to make the detailed disclosures listed in the second sentence of ORS 677.097(2). The next question is whether there is evidence that defendant failed to disclose “in substantial detail the procedure, the viable alternatives and the material risks” ORS 677.097(2). There was evidence that there were available nonsurgical methods of treatment other than those discussed by Dr. Petty. Three physicians testified that defendant's failure to tell plaintiff about these alternative treatments was below the standard of care. The jury could have found that defendant failed to “disclose in substantial detail . . . the viable alternatives and the material risks.” There also was evidence from which the jury could have found that plaintiff would not have consented to the surgery, had she been advised of the alternative methods of treatment. Considering all the evidence in the light most favorable to the party in whose favor the verdict was returned (plaintiff), there was sufficient evidence to go to the jury on the informed consent claim.”

Informed consent has been properly obtained *only* when the physician complies with *each* of the statute's requirements. It is inappropriate for a nurse or medical assistant to answer the patient's questions. By law, that is the physician's job.

2. The patient views a videotape and then meets with the physician to sign the informed consent form. Would this violate the statute?

If the physician followed the statutory procedure outlined above, this would not violate the statute. But remember that the goal is not the patient's signature on a consent form; it is the patient's obtaining a clear understanding of the procedure, risks, and alternatives through a process of questions and answers prior to giving informed consent.

Regarding videotapes: Although useful, tapes cannot possibly address all the risk, alternative, and benefit permutations of the procedure or treatment. To the extent a tape lacks what turns out to be key information, the plaintiff attorney will try to convince the jury that it was the tape, and not the

discussion with the physician, that swayed the patient. Plaintiff attorneys may also use the tape to insinuate that the physician was in too much of a hurry or too busy (read greedy) to spend the necessary time with the patient on this crucial decision. Finally, tapes raise concerns about the ability of patients to see, hear and understand what may be complex explanations, and their reluctance to admit this to the physician.

3. The physician and the patient complete the PARQ conference. While the physician is out of the room, the patient tells the nurse or medical assistant that they really are not sure whether to go through with the procedure or treatment. What should the physician do?

The physician should go over the elements of the conference that confused the patient until both are satisfied that the patient has reached a clear understanding on which to base either refusal or informed consent. Ignoring the patient's uncertainty or rushing through a conversation is not appropriate.

This brings up the additional point that employees should be instructed to alert physicians when a patient expresses confusion about the medical procedures and the informed consent process. It is then up to the physician to follow through.

More Than Law

Informed consent is a non-delegable duty both because it is the law and because it is good patient care. Properly obtained informed consent protects both the patient and the physician.

ABOUT PAUL FRISCH

Paul Frisch joined the Oregon Medical Association in 1985 as Director of their Department of Medical-Legal Affairs, following several years as an attorney specializing in malpractice defense. He is well known for his work in risk assessment and management, including research on factors that predispose physicians to multiple malpractice claims, and for his efforts to promote quality and safety in patient care.

Mr. Frisch received his bachelor's degree from Raymond College and his law degree from the University of Oregon. In 1991 he earned his Certified Association Executive designation from the American Society of Association Executives.

Mr. Frisch's father was a physician, as are his brother and uncle. He lives in Portland with his wife, daughter, and son.

BOARD ACTIONS

Following is a summary of actions taken by the Oregon Board of Medical Examiners between April 1, 2000 and July 21, 2000. A glossary of terms appears at right.

CAESAR, Richard I., MD12921, Portland, OR

A stipulated order was entered on April 20, 2000. The licensee agreed to withdraw from the practice of medicine for at least one year and enter into a substance abuse treatment program satisfactory to the Board.

CLAPPISON, Valerie J., MD11307, Portland, OR

A stipulated order was entered on July 21, 2000. Licensee agreed to have her license placed on inactive status while under investigation.

ELLISON, Melanie A., MD19066, Albany, OR

A corrective action order was entered on June 28, 2000. The licensee agreed to follow FDA guidelines and pertinent Oregon Administrative Rules when prescribing controlled substances for purposes of weight reduction.

GOMBART, Augustin K., MD08874, Roseburg, OR

A stipulated order was entered on April 4, 2000. The licensee agreed to withdraw from practice pending completion of the Board's investigation of his competence to practice medicine. The investigation was completed, and the licensee was returned to practice on May 22, 2000, with the condition that licensee obtain consults when he treats cardiac patients.

GOVE, Jon D., MD09349, Grants Pass, OR

A voluntary limitation was entered on June 28, 2000. The licensee agreed to limit his practice by stipulating that he would not read cerebral MRIs or CTs of the temporal bone.

HEWITT, Joseph I., MD06041, Oregon City, OR

A final order concluding a contested case was entered April 21, 2000. The terms of the order were as follows: licensee's right to practice medicine is suspended for two years, a reprimand is imposed, and the licensee is required to pay the costs of the hearing.

LYTLE, Gregory R., DO15017, Heppner, OR

A stipulated order was entered on July 21, 2000. The major terms of the order were as follows: licensee was suspended for 90 days; having served 45 days, the remainder was stayed in lieu of 500 hours of community service; licensee was placed on probation for ten years; licensee was fined \$1,000; licensee was reprimanded; licensee will utilize a chaperone when examining female patients; and licensee will engage in therapy with a doctorate level therapist.

MORGAN, Charles, MD14095, Portland, OR

The licensee has been practicing under the terms of a voluntary limitation and had requested that the Board release him from the terms of the limitation. On April 20, 2000, a stipulated order was entered which released licensee from the terms of the limitation on the condition that he retire from the practice of medicine.

NEWHALL, James F., MD14113, Portland, OR

On April 21, 2000, the Board reaffirmed a final order concluding a contested case, which had been entered January 27, 2000. This order imposed a term of probation for five years.

NISHIOKA, Gary J., MD20787, Salem, OR

A stipulated order was entered on July 20, 2000. Licensee was reprimanded.

PEDEN, Joseph C., MD10194, Enterprise, OR

A stipulated order was entered on July 20, 2000. Licensee agreed to surrender his license to practice medicine while under investigation.

SALMON, Peter A., MD18639, Eugene, OR

A final order concluding a contested case was entered April 17, 2000. The final order revoked licensee's right to practice medicine.

WENDLANDT, H. Kay, DO21503, Portland, OR

On May 26, 2000, the Board entered an order of emergency suspension based on concerns about licensee's competence to practice medicine. This order suspended the licensee's right to practice medicine until further notice.

GLOSSARY OF TERMS

Corrective Action Order: An agreement between the Board and a licensee that concludes an investigation into the licensee's conduct. There is no admission or finding of a violation of the Medical Practice Act; therefore these orders are not disciplinary. The orders do impose actions the Board and licensee agree are appropriate.

Disciplinary Action: An action taken under ORS Chapter 677.205. The Board takes disciplinary action in response to a violation of the Medical Practice Act.

Final Order: An order imposed by the Board after a contested case hearing has been held. These orders conclude a Board disciplinary action and typically contain a legal finding of fact, an analysis of applicable law, and an order of action. Final orders resulting in a finding of a law violation are disciplinary.

Medical Practice Act: ORS Chapter 677. This chapter of Oregon law, which is administered by the Board, gives the Board authority to regulate the practice of medicine in Oregon, including authority to investigate and discipline licensee conduct.

Stipulated Order: An agreement between the Board and a licensee which concludes a disciplinary investigation. The licensee admits to a violation of the Medical Practice Act and the order imposes actions the Board and licensee agree are appropriate. Stipulated orders are disciplinary actions.

Voluntary Limitation: An agreement between the Board and a licensee which imposes a limitation on the licensee's right to practice medicine. These orders are utilized in a variety of circumstances such as concluding an investigation of licensee conduct, finalizing a request for licensure or resolving an administrative request. These orders may or may not be disciplinary, depending on how they are constructed and the circumstances in which they are used.

NEW ON THE WEB SITE

Every week, hundreds of PC users take advantage of the quick access to information offered by the Board's Web site. New features added since the last article about the site appeared in the *BME Report* are:

Forms

The Board has begun putting its forms online. While application and registration forms are not yet available electronically, address change forms, data request forms, and certain others are. The Board hopes eventually to make all its forms available online.

Newsletters

The current and several past issues of the *BME Report* are now on the Web site, with a list of articles for each. They are in Portable Document Format, and the site includes assistance with obtaining Adobe Acrobat Reader for those who need to install this free software in order to view or download the newsletters.

Topics of Interest

This section contains philosophy statements and administrative rules addressing issues of special interest to licensees and the public, such as pain management, bariatrics practice, and patient medical records. Information changes periodically as new issues come to the fore and old ones fade.

The Board's Web address is www.bme.state.or.us. The Board constantly strives to improve its Web site service to licensees and the public, and appreciates hearing from users about the features they would like to see added or improved. Not every idea can be incorporated immediately, but all suggestions are taken into consideration in planning future development.

SPECIAL REPORTS TO HOSPITALS AND NURSING HOMES

Hospitals and nursing homes may receive reports of serious disciplinary actions soon after the Board takes them by subscribing to a special fax service. (A "serious" action is one that significantly impacts a licensee's ability to practice, such as a suspension or a practice limitation.) The Board started this service in April, 2000.

In the past, hospitals and nursing homes received information about disciplinary actions on a quarterly basis, in the Board's *Licensing Action Report*. (The Board will continue to publish this report.) Now, serious actions are summarized and faxed to subscribers within a few days of being taken.

Hospitals and nursing homes may subscribe to the *Fax Disciplinary Reporting Service* at no charge by writing to Michael Sherman, Manager of the Board's Investigations and Compliance Department. This letter must include the subscriber's fax number and the name of the person to whose attention the fax should be sent. For more information, please contact Mr. Sherman at (503) 229-5770.

ONE-YEAR LICENSE RENEWALS

If you are an MD or DO registered for only one year instead of the customary two—for instance, if you are on emeritus status or in an approved training program—your license will expire December 31, 2000.

The Board sent out renewal notices the last week of September. If you are registered for one year and have not received your notice, please call us immediately at 503/229-5873 ext. 233 or 226. This is also the number to call if you have questions about your renewal.

*It's the law!
You must notify the
BME within 30 days of
changing your practice
address or mailing
address. To help ensure
that you receive your
license renewals and
other important infor-
mation on time, call
the BME for an address
change form, or print
the form from
[www.bme.state.or.us/
forms.html](http://www.bme.state.or.us/forms.html).*

Privacy Act Notification

Concerning Your Social Security Number

The Board of Medical Examiners is now required by law to obtain social security numbers from applicants for new licensure and those renewing their license registrations for all professions under its jurisdiction. (Providing this number to the Board for identification purposes was formerly voluntary.) The authority for this requirement is ORS 25.785, ORS 305.385, 42 USC § 666(a)(13). Failure to provide your social security number will be a basis to deny the license or registration you seek.

Although a number other than your social security number appears on the face of the licenses and registration certificates issued by the BME, your social security number will remain on file with the

Board. This record of your social security number will be used for child support enforcement by the Adult and Family Services Division, for tax enforcement by the Department of Revenue, and by the Board for identification and investigative purposes only, unless you authorize other uses of the number.

Application and registration forms will be updated to include this information. Until then, this is the Board's notice to licensees that we will release social security numbers to the Adult and Family Services Division's program for child support enforcement, and to the Department of Revenue.

If you have any questions, please contact Bruce Johnson, Assistant Director of the Board, at 503-229-5770.