Minor, Incompetent and Incapacitated Patients:
How to obtain consent, maintain privacy and get paid when dealing with patients who can’t speak for themselves.

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Overview

- Understanding the Terms
- Consent for Treatment
- Patient Privacy Issues
- Payment for Treatment
Understanding the Terms

Adults of sound mind may execute a “power of attorney for health care,” designating a “health care agent” to make health care decisions for them in the event they have “incapacity.” *Wis. Stat. § 155.05*

- **Power of Attorney (“POA”) for Health Care:** “the designation, by an individual, of another as his or her health care agent for the purpose of making health care decisions on his or her behalf if the individual cannot, due to incapacity.” *Wis. Stat. § 155.01(10)*

- **Health Care Agent:** “an individual designated by a principal to make health care decisions on behalf of the principal or, if that individual is unable or unwilling to make those decisions, an alternate individual designated by the principal to do so.” *Wis. Stat. § 155.01(4)*

- **Incapacity:** “the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions.” *Wis. Stat. § 155.01(8)*

Understanding the Terms

- **Durable Power of Attorney**
  - Generally for financial matters and does not confer ability to make health care decisions unless executed prior to April 28, 1990.
Understanding the Terms

The court may appoint a “guardian of the person” and/or a “guardian of the estate” (who may be the same person) to an adult who has been adjudicated incompetent. *Wis. Stat. § 54.10*

- Ward: “an individual for whom a guardian has been appointed.” *Wis. Stat. § 54.01(37)*
- Guardian of the Person: Generally charged with securing necessary care and services for a ward. *Wis. Stat. § 54.25*
- Guardian of the Estate: Generally charged with management of a ward’s property. *Wis. Stat. § 54.19*

Understanding the Terms

- Minor: a person under 18 years of age.
- Legal Custodian: “a person, other than a parent or guardian, or an agency to whom legal custody of the child has been transferred by a court, but does not include a person who has only physical custody of the child.” *Wis. Stat. § 48.02(11)*
- Guardian: “the person named by the court having the duty and authority of guardianship.” *Wis. Stat. § 48.02(8).*
- Power of Attorney Delegating Parental Power: a document in a form consistent with *Wis. Stat. § 48.979* that delegates parental powers such as the ability to consent to certain health care.
Understanding the Terms

Deceased Patients

- Personal Representative:
  “any individual to whom letters to administer a decedent’s estate have been granted by the court or by the probate registrar …, but does not include a special administrator.” Wis. Stat. § 54.01(23)

- (Contrast with meaning of “personal representative” under HIPAA.)

Consent for Treatment

- What is informed consent for treatment?
- When is informed consent not needed for treatment?
  - In cases of emergency where “failure to provide treatment would be more harmful to the patient than treatment.” Wis. Stat. § 448.30(5)
  - When patient is “incapable of consenting.” Wis. Stat. § 448.30(6)
Consent for Treatment – Adults

When are adults legally unable to provide consent for their own treatment?
- When two physicians (or one physician and one licensed psychologist) personally examine the adult and sign a statement specifying that he or she has “incapacity.” *Wis. Stat. § 155.05(2)*
- Adjudication of incompetence

When an adult is unable, who can give consent for treatment?
- Health care agent acting under POA for health care.
- Guardian appointed by court
- Medical custom allows for consent by family member

Consent for Treatment Under POA for Health Care

No liability for failing to obtain a health care decision from the agent if the facility or provider has made a “reasonable attempt” to contact the agent and obtain a decision but is unable to do so.
Consent for Treatment Under POA for Health Care

Examples of limitations on health care agent’s ability to consent:

- Admission to inpatient mental health treatment. **Wis. Stat. § 155.20(2)**
- Experimental mental health treatment. **Wis. Stat. § 155.20(3)**
- Withholding or withdrawal of feeding tube if attending physician advises it will cause the patient pain or reduce the patient’s comfort. **Wis. Stat. § 155.20(4)**
- Withholding or withdrawal of orally-ingested nutrition or hydration, unless medically contraindicated. **Wis. Stat. § 155.20(4)**

Consent for Treatment Under POA for Health Care

Health care agent may sign or execute any documents, waivers or releases related to the patient’s care or treatment that are necessary to implement health care decisions the agent is authorized to make. **Wis. Stat. § 155.20(7)**
Consent for Treatment Under POA for Health Care

- When receiving a copy of POA for health care:
  - Acknowledge receipt in writing
  - Include the document in the patient’s medical record

- If POA for health care is revoked:
  - Person named as agent must notify provider
  - Provider must record in medical record
  - No liability for good faith compliance with revoked POA for health care

Consent for Treatment Under POA for Health Care

- Cannot require patient to execute a POA for health care as a condition for receipt of health care or admission to health care facility.

- It is a crime to coerce or intimidate an individual into executing a POA for health care.
Consent for Treatment – Adjudication of Incompetence

Who provides consent when an adult is adjudicated incompetent?
- Guardians of the person
- Can’t be delegated to guardian of the estate

What form does this consent take?
- Blanket consent forms not effective consent

Examples of limitations on a guardian’s ability to consent:
- Treatment not in ward’s best interests
- Involuntary administration of psychotropic medications without court order
- Involuntary commitment for treatment without following requirements of Wis. Stat. § 51.20
- Participation in research under certain circumstances.
- Withdrawal or withholding of life-sustaining treatment in certain circumstances

What if the ward does not agree with the guardian?
Consent for Treatment – Adjudication of Incompetence

Discussion point:
- Joe is an adult patient with a developmental disability who been adjudicated incompetent by the court. He lives in a group home and difficult transportation arrangements must be made to get him to his primary care physician’s office. Joe arrives for a scheduled appointment with an assistant from his group home. His guardian of the person is at work and cannot be reached. Should the physician proceed with an examination without the consent of the guardian?
- The physician proceeds with an examination and determines that Joe needs a wart removed. Joe is adamant that the procedure be done right away. Should the physician proceed without consent of the guardian?
- The physician sees in Joe’s chart that in the past, the guardian has stated: “I trust you completely. You have my standing permission to treat Joe in whatever way you see fit.” Should the physician proceed to remove Joe’s wart?

Consent for Treatment – Minors

When is consent not necessary for treatment of a minor?
- Cases of emergency
- Life-sustaining treatment in the absence of a persistent vegetation state
Consent for Treatment – Minors

Who can generally provide consent for treatment of a minor?
- Parent
- Emancipated minor
- Guardian
- Legal custodian
- Agent under POA

Delegating Parental Power

Language must substantially conform to Wis. Stat. §48.979.

Must be signed by all parents with legal custody.

Must be signed by agent to whom powers are delegated.
Consent for Treatment – Minors

What about …
- Parents without legal custody?
- Parents with shared legal custody?
- Parents who disagree?
- Non-emancipated minors?
- Foster parents?
- Step-parents?
- Grandparents and other family members?
- Governmental agencies?
- Courts?

Consent for Treatment – Minors

What about …
- Abortion?
- Contraception?
- Pregnancy-related care?
- Sexual assault or abuse?
- Sexually-transmitted diseases?
- HIV?
- Blood donation?
- Bone marrow donation?
- Mental health treatment?
- Psychotropic medication?
- AODA treatment?
- Involuntary commitment?
Consent for Treatment – Minors

Discussion point:

Kaitlyn, a 15-year-old, arrives at her primary care physician’s office for a routine physical required for participation in her school’s basketball program. She is accompanied by her stepmother. Kaitlyn has seen this physician on numerous occasions in the past. Should the physician perform the physical without express consent from Kaitlyn’s father or mother, who share legal custody?

Consent for Treatment – Minors

Discussion point:

Kaitlyn arrives at her gynecologist’s office, accompanied by her stepmother, and requests a prescription for birth control. Kaitlyn has seen this physician on several occasions in the past. Should the physician provide Kaitlyn with a prescription without express consent from her father or mother, who share legal custody?
Consent for Treatment – Minors

Discussion point:

Kaitlyn arrives in the ER, accompanied by her 17-year-old brother. She complains of severe pain in her abdomen and describes symptoms consistent with a burst appendix. Should the ER physician proceed with diagnostic tests and/or surgery without express consent from Kaitlyn’s father or mother, who share legal custody?

Patient Privacy Rights
Patient Privacy Issues – Incapacitated Patients

Access to and disclosure of PHI for incapacitated patient

- Health care agent with POA for Health Care may have authority to access patient’s medical records and consent to their disclosure, if POA for Health Care specifically allows him or her to do so.
- Authority typically granted under “Inspection and Disclosure of Information Relating to My Physical or Mental Health” section of standard POA for Health Care form.

If health care agent is also incapacitated or not physically available, or if emergency makes it impractical to obtain agreement from agent:

- A portion (not a copy) of patient’s health care record can be released to:
  - A member of the patient’s immediate family
  - Another relative of the patient
  - A close personal friend of the patient
  - Another individual identified by the patient
  - If health care provider determines that release of that portion of record is in best interest of patient
  - If that portion is directly relevant to that person’s involvement in patient’s care
- A portion can also be released to ANY PERSON if it is necessary to identify, locate, or notify a member of patient’s immediate family (or another person who is responsible for the care of the patient) concerning the patient’s location, general condition, or death.
Patient Privacy Issues – Incompetent Patients

- Access to and disclosure of PHI for patients adjudicated incompetent
  - A guardian of the person for an adult ward is considered to be a “person authorized by the patient” for purposes of access and disclosure under Wisconsin’s medical records privacy law.
  - HIPAA refers to state law on who can act as a patient’s personal representative for purposes of accessing PHI.

Patient Privacy Issues – Deceased Patients

- Access to and disclosure of PHI for deceased patients
  - Court-appointed personal representative
  - Spouse
  - If no spouse, adult member of immediate family
Patient Privacy Issues – Minors

Access to and disclosure of PHI for minor patients

Parents

Wisconsin law allows provider to deny access if parent is denied physical placement because of family court’s concerns about a child’s physical, mental or emotional health.

Court-appointed guardian

Court-appointed legal custodian

Agent under POA Delegating Parental Powers

What about …

AODA?

Contraceptives?

HIV test results?

Mental health?

Pregnancy care?

Sexual assault or abuse?

Sexually-transmitted diseases?

Newborns with minor parents?

Minor patients with developmental disabilities?

Records prior to adoption?

Immunization information?
Patient Privacy Issues – HIPAA

- Covered Entity may elect to deny access to a personal representative under HIPAA if:
  - Reasonable belief patient has been abused or neglected by personal representative
  - Disclosure to the personal representative may endanger the patient
- No corresponding Wisconsin law other than for parents denied physical placement of children.

That’s all very interesting. Now…

HOW DO WE GET PAID?
Payment for Treatment – Incapacitated Patients

- Payment for care provided pursuant to instructions given by health care agent acting under POA for Health Care.
  - Health care agent who is not the spouse cannot be held personally liable for cost of care.  
    *Wis. Stat. § 155.50(3)*
  - Insurers may not refuse to pay for goods or services covered under the patient’s policy solely because the decision to use the goods or services was made by health care agent.  
    *Wis. Stat. § 155.70(5)*
  - Payment should be obtained as it would be if patient had not been incapacitated.
  - If incapacity continues, guardian may be appointed for purposes of finances.

Payment for Treatment – Incompetent Patients

- Payment for care provided to adult ward / incompetent patient
  - Guardians of the estate are responsible for ensuring that a ward’s medical bills are paid.
**Payment for Treatment – Deceased Patients**

- Payment for care provided to patient who later dies
  - Personal representative of the estate is generally responsible for ensuring that the estate’s debts are paid.

**Payment for Treatment – Minors**

- Payment for care provided to minor patient
  - Who is responsible for payment for services provided to a minor patient?
  - What about:
    - Divorced parents?
    - Foster children?
    - Juvenile delinquents?
    - Other situations?
How do I safeguard a minor patient’s privacy when passing along a bill to his or her parents?

Discussion point:

Amber is a 16-year-old girl whose parents are divorced. Her mother has been granted full legal custody. Amber is covered under a policy of insurance held by her father, who is required by the court to pay for his daughter’s medical care. Amber and her mother visit Amber’s primary care physician, who diagnoses Amber with Chlamydia. Amber and her mother are concerned about Amber’s father finding out, and they ask the physician’s office to make sure that the bill does not specify Amber’s diagnosis. How should the physician’s office handle this request?
Questions?

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