

# LEGAL PRESCRIPTION FOR DOCTORS

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## THERAPEUTIC PRIVILEGE

There are recognized exceptions to the informed consent requirement:

1. Public health emergency
2. Medical emergency
3. Incompetent patient
4. patient waiver
5. Common knowledge
6. Patient knowledge
7. Therapeutic privilege

Public health emergencies are crisis situations in which the health of an identified population may be dependent on the adoption of a mass health program. Interventions by public health officials are authorized by law. Typical examples of justified governmental disregard of informed consent include the restriction of individual movement by quarantine in order to prevent the spread of infectious disease and the imposition of fines and other penalties to assure mass vaccination to control epidemics.<sup>1</sup> The individual right of full disclosure must necessarily give way to the police power of the State for the collective benefit of the population.

Medical emergencies, by contrast, refer to crises in which an individual patient is at imminent risk of significant injury, decline, or death if treatment is withheld or postponed. If a delay in time required to obtain consent might result in substantial harm to the patient, and no evidence exists to indicate that the person would refuse the treatment or would reject the benefits provided, the courts have ruled that a physician is relieved of the duty to obtain informed consent.<sup>2</sup> However, physicians must be reminded that a therapeutic intervention is sometimes not synonymous with emergency treatment where there is no duty to obtain informed consent. Of course, consent is often implied in emergency medical cases.

Strictly speaking, informed consent applies only to a legally and mentally competent individual. If the person is legally and mentally incompetent, then *informed permission* of a surrogate decision maker will suffice.

The exercise of a waiver allows patients to relinquish their right to an informed consent. The patient may delegate decision making authority to the physician or request not to be informed, thus freeing the physician from the disclosure duty. In effect, the patient may make an informed decision not to make another informed consent.<sup>3</sup>

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Common knowledge simply means that there is no duty to disclose risks "of which persons of average sophistication are aware."<sup>4</sup> Patient knowledge on the other hand, states that the patient cannot recover for the physician's failure to disclose a risk already known by the patient.<sup>5</sup>

Therapeutic Privilege (or therapeutic exception) refers to an uncommon situation whereby a doctor may be excused from revealing information to a patient when there is sufficient evidence that the patient is not psychiatrically or emotionally stable to handle that particular information. The disclosure of information itself should pose serious and immediate harm to the patient, such as prompting suicidal behaviour.<sup>6</sup> Therapeutic privilege is also a defense that excuses a medical practitioner or other health professional from complying with the requirements of full disclosure to a patient in circumstances where it is reasonably considered that such disclosure would be harmful to that patient's health or welfare.<sup>7</sup>

A significant number of physicians have unknowingly invoked this privilege but have correctly defined the legal concept. As a word of caution, "the privilege does not accept the paternalistic notion that the physician may remain silent simply because divulgence might prompt the patient to forego therapy the physician feels the patient really needs. That attitude presumes instability or perversity for even the normal patient, and runs counter to the foundation principle that the patient should and ordinarily can make the choice for himself. Nor does the privilege contemplate operation save where the patient's reaction to risks information, as reasonably foreseen by the physician, is menacing. And even in a situation of that kind, disclosure to a close relative with a view to securing consent to the proposed treatment may be the only alternative open to the physician."<sup>8</sup>

In practice, physicians must always remember that this privilege is the exception to the rule of full disclosure and its application must be used sparingly, bearing in mind the critical duty of a physician to balance respect for patient's right to an informed consent and care "to avoid scaring a patient away from a needed procedure."

## REFERENCES

1. A History and Theory of Informed Consent; Faden and Beauchamp, p. 35, 1986, Oxford.
2. Id., P. 36
3. Id., p. 38
4. Health Care Law and Ethics; Hall Bobinski and Orentlicher, p. 207, 2003, Aspen.
5. Id.
6. [http://en.wikipedia.org/wiki/therapeutic\\_privilege](http://en.wikipedia.org/wiki/therapeutic_privilege).
7. J Law Med. 2003 Nov; 11 (2):201-13
8. Canterbury v. Spence, 464 F.2d 772