



Minors Health Care:
The Basics of Consent,
Privacy and More

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CHA Webinar



CALIFORNIA
HOSPITAL
ASSOCIATION



Welcome

Liz Mekjavich
California Hospital Association



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Continuing Education Requirements

Full attendance, completion of online survey, and attestation of attendance is required to receive CEs for this webinar. CEs are complimentary for registrant. If additional participants under the same registration would like to be awarded CEs, a fee of \$20 per person, will apply. Post-event survey will be sent to registrant and provide information on how to apply online for additional CEs.

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Faculty: Jacquelyn Garman, Esq.

Jacquelyn Garman, JD, is vice president, legal counsel for California Hospital Association. Ms. Garman oversees and coordinates the association's legal representation on litigation critical to the hospital industry and assists with the legal impact of legislation and regulations on hospitals. Prior to joining CHA, Ms. Garman served as general counsel for Children's Hospital & Research Center Oakland (now UCSF Benioff Children's Hospital Oakland) from 2006-2014, where her responsibilities also included serving as the organization's risk manager. In addition, she was a partner in the Hanson Bridgett law firm, specializing in civil litigation with an emphasis in medical staff credentialing and peer review disputes.

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Consent for Minors

Jacquelyn Garman, Esq.
California Hospital Association



Overview

- General rules
- Consent when parents are unavailable
- When parents refuse treatment for a minor
- When parents disagree about care
- Who besides parents can consent for a minor?
- When can a minor consent?
- “Sensitive services”
- Wards and dependents of Juvenile Court
- When parent(s) and minor disagree

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Basic Principles of Consent

- Every competent adult has a fundamental right of self-determination that includes the right to consent, or refuse to consent, to medical treatment
 - Others (not competent/not adult) must ordinarily have their treatment decisions made by a person legally authorized to act on their behalf who will protect their interests and preserve their basic rights

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Basic Principles (cont.)

- Minors must ordinarily have a responsible adult, acting in the minor's best interest, make health care decisions for them
- But California law specifically grants to minors the right to make certain health care decisions for themselves

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"Simple" vs. "Informed" Consent

- All medical treatment procedures require consent
 - No consent = battery
- "Simple consent" may be given for hospitalization, routine services (blood tests, X-rays), simple and common procedures with remote risks
 - Commonly provided through Conditions of Admission (COA)

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“Simple” vs. “Informed” Consent

- If the treatment/procedure is involved or complicated, physician must obtain “informed consent,” advising patient of:
 - Nature of the procedure
 - Risks, complications, and expected benefits or effects of procedure
 - Any alternatives to the treatment and their risks and benefits
 - Any potentially conflicting interest(s) the physician may have (research, financial)

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“Simple” vs. “Informed” Consent

- Case law, The Joint Commission (TJC), CMS, all address the required elements for informed consent
- Medical staff must determine which procedures require informed consent
- Documentation of process is required

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“Simple” vs. “Informed” Consent

- The patient’s consent must be meaningful (adequate explanation of risks and benefits; alternatives to proposed treatment/procedure and their risks and benefits)
- Exception to consent requirement for emergency treatment: consent is **implied**

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Helicopter Parent?

- 14-year-old patient admitted for chronic medical issue — repeat patient
- Mother is concerned that her child is developing drug addiction
- Mother wants to oversee dispensing of pain medication to child and wants to be called at home every time medical team is considering giving pain meds so she can approve or disapprove? What do you do?

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How Long is Consent Valid?

- No expiration date — common sense and situation should be analyzed
- Consent effective until:
 - Revoked by patient or legal representative or
 - Circumstances change so as to materially affect the nature of, or the risks of, the procedure or the alternatives to the procedure

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Consent by Telephone

- Case-by-case evaluation of appropriateness of obtaining consent by telephone: only if the person(s) having the legal ability to consent for patient not otherwise available
 - The more complicated the medical treatment, the less likely it is appropriate to consent by phone
- Telephone call should be witnessed by two hospital employees and documentation should so note
- Remember e-mail and fax as a bridge to document telephone consent

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Refusal of Treatment

- Parents have the right to refuse treatment, but must be advised of possible risks and complications (informed refusal)
 - May not impose their beliefs re: blood transfusion — court orders
- When is refusal of treatment abuse?
 - Generally, the parents must act in patient's best interest, but both the physician and the parents think they are acting in best interest

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Refusal of Treatment

- Strategies to gain agreement
 - Discuss best interest analysis and long term nature of decisions
 - Consider ethics consult and meeting with parents to resolve anxiety about provider's motives
 - Offer a second opinion

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Other Considerations

A physician may elect to not treat a person as the patient's personal representative if the physician has a reasonable belief that:

- The patient has been subjected to domestic violence, abuse or neglect by that person, or
- Treating that person as the personal representative could endanger the patient, and
- In the exercise of professional judgment, the physician decides it is not in the patient's best interest to treat the person as the patient's personal representative (45 C.F.R Section 164.502 (g)(5))

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Refusal to Vaccinate

Parents firmly believe that children have been over-vaccinated and they decline vaccination. What do you do?

- Attempt to educate on risks (informed refusal) – use federal Vaccine Information Statements
- CHA form 5-1: Refusal to Permit Medical Treatment
- American Academy of Pediatrics has a form specific to vaccination:
<http://www2.aap.org/immunization/pediatricians/pdf/RefusaltoVaccinate.pdf>
- NOTE: AB 2109 (effective 1-1-14) makes refusal more difficult: more rigorous requirements for parent/guardian to claim “personal belief” exemption from school vaccination requirements

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Refusal to Consent to Mandated Testing

- There are several tests hospitals must offer to parents:
 - Preventable heritable or congenital disorders
 - Rhesus
 - Newborn and infant hearing
 - Eye treatment
 - Immune globulin
- If parents refuse, see CHA manual for forms to document refusal

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Consent for Minors: Yours, Mine and Ours — What Are the Rules?



Minors and their Decision-Making Adults

- Minor = person under the age of 18
- Parents have a legal obligation to provide the necessities of life for their minor children, including health care (Penal Code section 270)
- The rights of minors have been expanded over the years — in California this has occurred through legislation and court interpretation

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Minors and their Adults (cont.)

- Some states have adopted the “mature minor” doctrine:
 - Minor at the age (usually 14) to appreciate risks and benefits
 - Minor evidences actual understanding
 - Treatment will benefit the minor
- California has not adopted this doctrine, but has used it as a rationale to legislate minors’ rights in some areas

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Minors and their Adults (cont.)

- Married parents
- Divorced parents
- Stepparents
- Registered domestic partner parents
- Non-biological parents
- Multiple parents
- Guardians
- Third parties

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Minors with Married Parents

- If no evidence of disagreement between parents, either parent has the legal authority to consent
- However, if there is disagreement, treatment should not be provided until the conflict is resolved
- What if harm to patient will result?

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Minors with Divorced Parents

- If both agree: no problem
- If disagreement: who has the legal right to decide?
 - Parent with “sole legal custody” has the right to consent to medical treatment (Family Code section 3006 and 6903)
 - Sole legal custody is the exception; joint legal custody is most common

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Minors with Divorced Parents

- If parents share legal custody (joint legal custody): either parent can consent unless court order provides otherwise
- Physical custody is irrelevant in determining whether a parent has the right to make health care decisions
 - That the minor lives with one parent does not mean that the non-custodial parent cannot consent

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Minors with Divorced Parents

- Focus on the LEGAL rights of the parents — get a copy of the relevant court order(s)
 - Court orders may be modified or superseded, so give the other parent the opportunity to present more current order

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Minors with Divorced Parents

What if divorced parents with joint legal custody disagree?

- Educate, mediate, negotiate
- Communicate equally with both parents
- Avoid becoming a “pawn” for one parent to “win”
 - Danger of becoming an advocate for one parent or the other
- If all else fails, court orders or CPS

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Minors with Divorced Parents

Tips for avoiding the problem in the first place

- For elective treatment, determine in advance if parents are in general agreement before agreeing to the physician-patient relationship
- If you have notice of parental break-up, request that decision-making regarding minor's medical needs be clearly and specifically addressed in legal documents — focus on child

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Stepparents

Can a stepparent give consent for a minor?

- A stepparent does **not** have the authority to give legal consent to medical treatment for a minor stepchild unless the stepparent:
 - Has legally adopted the child, or
 - Has written authorization from the natural parent, or
 - Provides a valid Caregiver's Authorization Affidavit

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Adopted Minors

- Adoptive parents have the same right to consent as birth parents (Family Code section 8616)
- After adoption, birth parents have no rights or responsibilities for the child and thus have no role in the consent process

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Adoption Pending

- If rights not yet formally relinquished, obtain a “continuing consent” from birth parents
- Use “Health Facility Minor Release Report”: birth parent gives the prospective adoptive parent the right to make health care decision pending finalization of adoption

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Minors Born out of Wedlock

- Mother has legal authority to consent
- Father also has legal authority to consent, but if there is reason to doubt his status as biological father, request court order establishing parental right

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Registered Domestic Partners (RDP)

- RDPs have the same rights as married spouses
- But an RDP has no right to make health care decisions for the child of their partner unless:
 - The RDP has adopted the child,
 - The RDP provides a signed third-party authorization from a parent of the child, or
 - The RDP provides a Caregiver's Authorization affidavit

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Non-Biological Parents

- This area is evolving. Two California cases demonstrate this:
 - *Elisa B. v Sup Ct.*: Former partner of biological parent held to have obligation to support child
 - *K.M. v E.G.*: Woman ovum donor who helped raise children has parental rights post-separation
- Solution: Parental Agreements or Adoption

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Minors Who are Parents: Hypothetical

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Minors Who are Parents: Hypothetical

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Minors Who are Parents

- The law regarding the need for parental consent to treat minors makes no distinction based on the age of the parent (Family Code § 7600 *et seq.*)
- Even though a minor parent CANNOT make health care decisions for herself, she can make them for her child, so long as:
 - The minor parent demonstrates the ability to give informed consent (understand nature of treatment, any alternatives, and the risks and benefits of both the treatment and alternatives)

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Minors Who are Parents

- 17-year-old mother has newborn with complicated medical issues
- Mother does not want to consent to her baby being trached because she does not like how it will look later. What do you do?
 - Further discussions with mother?
 - Engage (with mother's consent) another adult in the discussion?
 - Ethics consult on Mother's capacity?
 - Discussion of CPS?

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Does a Minor Parent have Capacity to Make Medical Decisions for Her Child?

- Start with the presumption of capacity
 - Physical and mental disorders alone are not a sufficient basis for finding lack of capacity
- Explain risks, benefits and alternatives in terms the minor can understand
 - May require more than one attempt
- Believing that the minor is making an unwise or "wrong" medical decision is not a basis for concluding lack of capacity
- Look at the situation

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Minors Who are Parents

- Pregnant 16-year-old arrives for delivery of baby
- Due to condition of fetus, C-section recommended
- 16-year-old will not consent, wants to wait for her mother to get to the hospital
- What do you do?

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Minors Who are Parents

- If provider believes minor lacks capacity, suggest that the minor involve the grandparent — have grandparent sign Conditions of Admission for consent and financial responsibility

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Guardians

- “Guardian” = person formally appointed by a court
- The rights of guardians are determined by the court, so always obtain the certified letters of guardianship to determine the scope of guardian’s authority
- Absent court order otherwise, guardian may consent to non-surgical medical treatment for minor. (Probate Code section 2353(a))

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Guardians — Surgical Treatment

- Absent court order otherwise, guardian may consent to surgical treatment for minor under 14 years of age
- For a minor 14 years of age or older, surgery requires:
 - Consent of **both** the guardian and minor, **or**
 - A court order obtained by the guardian, **or**
 - Guardian determines, based on medical advice, that the case involves an emergency: minor faces loss of life or serious bodily injury
 - Probate Code section 2353 (b), (c)

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Guardian Consent — Limitations

- Guardians cannot consent to:
 - Experimental drugs
 - Convulsive treatment
 - Sterilization
 - Psychosurgery
 - Placing minor in mental health treatment facility placement unless application is made under Welfare and Institution Code, in which case the treatment is considered voluntary and minor is so advised

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Caregiver Authorization Affidavit — Signed by Caregiver

- A nonparent adult relative with whom a minor lives may complete a “Caregiver Authorization Affidavit” to give consent for minor’s care
- Caregiver has the same rights to authorize medical care as does a guardian
 - Same limits on right to consent to surgery for minor 14 or older
 - Cannot consent to experimental drugs, convulsive treatment, sterilization, psychosurgery, or involuntary placement in in mental health treatment facility

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Requirements for Valid Caregiver's Authorization

- Adult must be “**qualified relative**”
 - Spouse, parent, stepparent, brother, sister, stepbrother/sister, stepsister, half-brother/sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by prefix “grand” or “great,” or the spouse of any of the persons specified, even after the marriage has been terminated by death or dissolution
 - Broad category; membership survives death or dissolution
 - Includes blood relatives as well as relatives by marriage; also “greats” and “grands”

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Requirements for Valid Caregiver's Authorization (cont.)

- Minor must be “living with” that adult
 - Not defined, but presumably does not include temporary visit
- Adult must:
 - Advise the parent(s) of the proposed medical treatment and have received no objection **or**
 - Be unable to contact the parents
- Adult must complete “Caregiver’s Authorization Affidavit attesting that all of these elements are true and correct (CHA Form 2-2 or equivalent)

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Caregiver's Authorization Affidavit

- No criminal or civil liability or professional discipline for treating minor in reliance on signed, completed affidavit
- Providers have no obligation to make further inquiry or investigation into facts stated
 - But can't ignore inconsistent evidence they do have

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Third-Party Consent — Signed by Authorized Adult

- A parent, guardian or caregiver (adult entitled to consent for the minor) may authorize an adult into whose care a minor has been entrusted to consent to medical or dental care, except:
 - If minor is 14 or older — then guardian limitations apply (Family Code section 6901)
- See CHA form 2-3: “Authorization for Third Party to Consent to Treatment of Minor Lacking Capacity to Consent”
- Allows hospital to release child to the third party

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Authorization Form


- Use of CHA form is optimal but not required
- Form completion does not need to be witnessed by hospital staff
- Does not need to be dated
- Specific name of third party not necessary — title is sufficient (“Athletic Coach”)
- Recommend trying to reach parent(s)/caregiver, but not required

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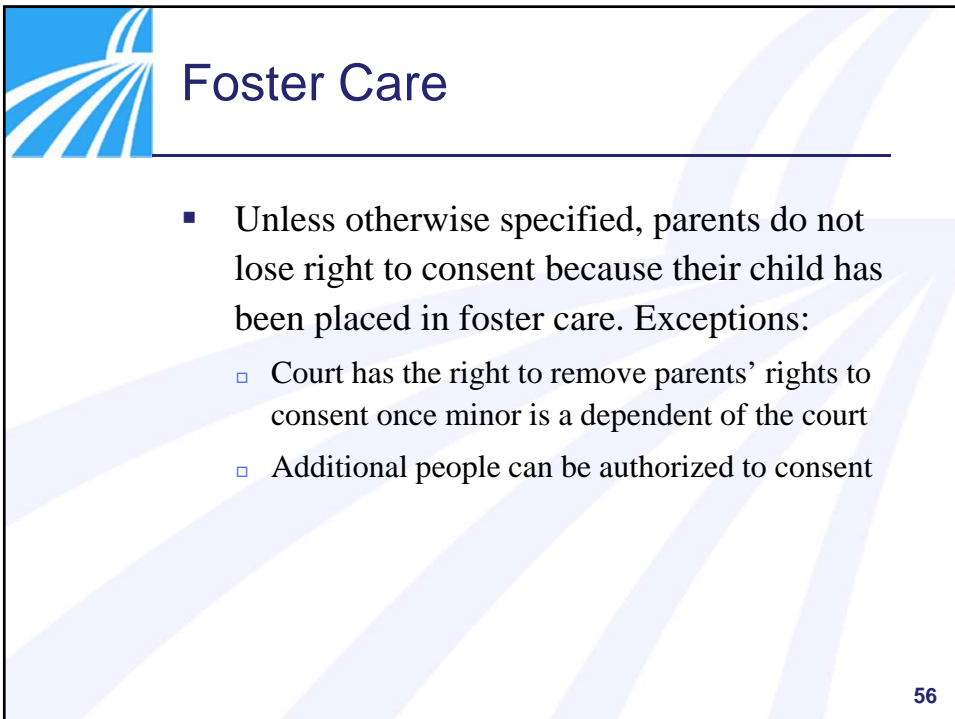
Jail Time

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Jail Time

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Foster Care

- Unless otherwise specified, parents do not lose right to consent because their child has been placed in foster care. Exceptions:
 - Court has the right to remove parents' rights to consent once minor is a dependent of the court
 - Additional people can be authorized to consent

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Foster Parents

- So if child is in foster care, determine whether or not parental rights have been terminated
- Can foster parents consent to minor's care?
 - If child has been placed on a temporary basis before a detention hearing has been held: **NO**
 - If child has been placed per court order or with voluntary consent of the person(s) having legal custody of the minor: Foster parents can consent to “ordinary” medical and dental treatment

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Minors Whose Parents are Unavailable

- If the minor is 16 years or older, but consent by his parent is required:
 - Minor may petition the court for order allowing the treatment (Family Code section 6911)
- If minor has been abandoned, involve juvenile court
- Abandoned newborns under “safe surrender” may be treated without parental consent
 - Health & Safety Code section 1255.7

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Suspected Child Abuse

- Health care providers have the right to examine and x-ray minors without the consent of the parent when child abuse is suspected
 - X-rays only for purpose of diagnosing possible child abuse/neglect and its extent
- Provider does not have to prove that abuse has occurred
- Immunity applies

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If the Minor Wants to Refuse Treatment

- Case-by-case analysis — assess the minor's capacity
- Discuss care with minor
- Mediate with family using social work, spiritual services
- Consider ethics consult

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Minors in Custody/Juvenile System

- If a minor is taken into custody, the State must provide for health care needs — Court may issue orders for care
- As a general rule, the same consent rules will apply, however:
 - A court may remove the parents' right to consent
 - A court may grant other people the right to make decisions without taking away parents' rights

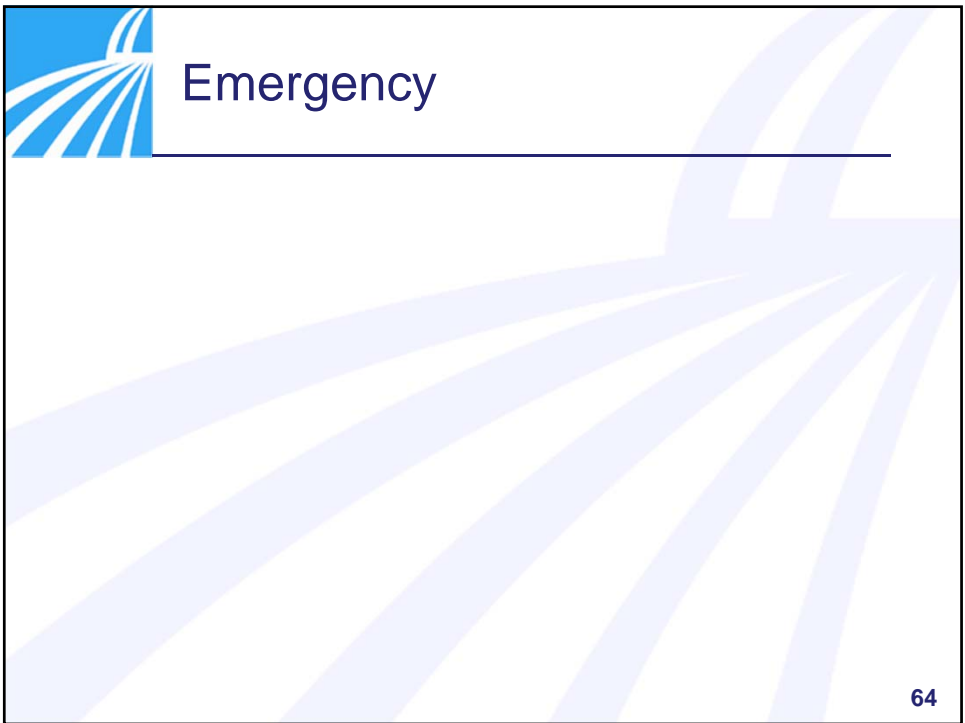
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Minors in Custody/Juvenile System (cont.)

- For minors in temporary custody, Social Worker/Probation officer:
 - May consent, but must inform parents, and if objection, must get court order
 - Emergency care: may consent, but make reasonable efforts to contact parents and obtain consent — if no consent, treatment may be given without court order
 - Court authorization may be given to make decisions with notice to parents
- Some courts issue “standing orders” specifying scope of their consent

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When Minors Can Consent Based on Age or Status

Handy Chart

Consent Requirements for MEDICAL TREATMENT OF MINORS				
If MINOR IS:	Is parental consent required?	Are parents responsible for costs?	Is minor's consent sufficient?	May M.D. inform parents of treatment without minor's consent?
Unmarried, no special circumstances	Yes	Yes	No	Yes
Unmarried, emergency care and parents not available (Business and Professions Code § 2397)	No	Yes	Yes, if capable	Yes
Married or previously married (Family Code § 7602)	No	No	Yes	No
Emancipated (declaration by court, identification card from DMV) (Family Code §§ 7602, 7606, 7101)	No	Probably Not ¹	Yes	No
Self-sufficient (17 or older, not living at home, manages own financial affairs) (Family Code § 6902)	No	No	Yes	-
Not married, care related to prevention or treatment of pregnancy, except sterilization (Family Code § 6902)	No	No	Yes	No
Not married, seeking abortion	No	No	Yes	No
Not married, pregnant, care not related to prevention or treatment of pregnancy and no other special circumstances	Yes	Yes	No	Yes
On active duty with Armed Forces (Family Code § 7602)	No	No	Yes	No
12 or older, care related to diagnosis or treatment of a communicable reportable disease or to prevention of an STD (Family Code § 6904)	No	No	Yes	Probably not
12 or older, care for rape (Family Code § 6902)	No	No	Yes	Yes, usually
Care for sexual assault (Family Code § 6903)	No	No	Yes	Yes, usually
12 or older, care for alcohol or drug abuse (Family Code § 6909)	No ²	Only if parents are participating in counseling	Yes	Yes, usually
12 or older, care for mental health treatment, outpatient only (Family Code § 6904, Health and Safety Code Section 124200)	No	Only if parents are participating in counseling	Yes	Yes, usually
17 or older, blood donation only (Health and Safety Code § 1607.5)	No	No	Yes	Yes, usually

¹Special requirements or exceptions may apply. See Chapter 2 of the Consent Manual or Chapter 2 of Minors & Health Care Law.
²Parental consent is required for a minor's participation in replacement transfusion above treatment such as transfusion, LASIK or hypermyopia procedure in a program licensed pursuant to Health and Safety Code § 118757 or see (Family Code § 6909)(d).
³Reference: Welfare and Institutions Code § 14000.
 Minors are defined as all persons under 18 years of age.



Minors' Rights to Consent for Themselves

Authorization for particular classes of minors to consent to own care:

- Because of their quasi-adult status (emancipated, self-sufficient, on active military duty, married/previously married)
- Because of the type of treatment they are seeking (“sensitive services”: pregnancy or contraceptive care, communicable reportable disease, rape or sexual assault treatment)

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Minors of a Certain Age

- Magic Numbers:
 - Any age: reproductive health services
 - Age 12+: outpatient mental health, communicable reportable diseases, HIV testing, drug and alcohol
 - Emancipated or self sufficient at age 15+: all care
 - Age 16+: may apply for court order
 - Note: Providers may consider actual capacity of patient

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General Rule on Financial Responsibility

If the minor may legally consent to care, the parents are not financially responsible for the service (W & I Code section 14010)

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Emancipated Minors

- A minor is emancipated if:
 - The minor is or has been validly married
 - Is on active duty in U.S. military
 - Or has received a “declaration of emancipation” by a court (Family Code section 7002)
- **Parenthood is NOT an emancipating event!**

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Emancipation Declarations

- Minor 14+ years may petition the court for emancipation
- DMV will issue an ID card reflecting emancipated status
- Emancipated minors may consent to treatment without parental consent, knowledge, or liability

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Emancipated Minors

But parents may have financial responsibility for services for which the emancipated minor consents if the emancipated minor lives with them — basically, all health care except for that listed on the following slide (W & I code section 14010)

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Under Family Code, Parents Free of Financial Responsibility for:

- Outpatient mental health care (Fam. 6924/H&S 124260)
- Prevention or treatment of pregnancy (Fam. 6925)
- STD prevention (HPV vaccine) (Fam. 6926)
- Diagnosis, treatment of reportable communicable disease (Fam. 6926)
- Care related to rape (Fam. 6927)
- Care related to sexual assault (Fam. 6928)
- Alcohol and drug abuse treatment (Fam. 6929)

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Minors Living Separate and Apart from Parents

- A minor may be deemed “self-sufficient” and able to consent for own health care if:
 - Age 15+
 - Minor is living separate and apart from parents, regardless of their consent or the duration of the separation
 - Minor is managing his or her own financial affairs (Family Code section 6922)
 - Source of income irrelevant

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Self-Sufficient — How to Verify?

- The law does not provide rules on how, or if, a health care provider must, verify the minor's claim of self-sufficiency
- Look at ID and make good faith effort
- Have them fill out the Self-Sufficient Minor form (CHA Form 2-1)
- In the absence of evidence to the contrary, you may rely on form

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Minors on Active Duty

- Minors on active duty in the U.S. military are emancipated and can consent to all care
- Obtain a copy of their military ID card
- No responsibility to inform parents, and parents are not financially responsible

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Married or Previously Married Minors

- Minor who has entered into a valid marriage, even if later terminated, is emancipated and can consent to own care
 - California does not recognize “common law” marriage
- No responsibility to inform parents, and parents are not financially responsible
- Advisable to get a copy of the marriage certificate, but not required

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When Minors Can Consent Based on the Type of Treatment



Pregnancy or Contraception

- Minor may consent to all types of care in this category, regardless of age. Treatment includes:
 - Contraceptive care, including emergency
 - Abortion
 - Pelvic exams
 - Pregnancy testing
 - Prenatal care
- Does not include sterilization

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No Parental Notification for Abortion

- Minors have a constitutional right to consent to abortion
- In the 1980s, a statute was passed that would have required parental notification: Supreme Court struck down that law
- No mandatory waiting period for abortion in California
- Use good judgment (as with any patient) as to minor's capacity to consent

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Communicable Diseases

- Threshold age for consent is 12 years
- May consent to care related to diagnosis or treatment of a communicable, reportable disease or to prevention of an STD
 - Diseases include those that must be reported to the State (See chapter 20 of *Consent Manual*)
 - Includes HIV testing and HPV vaccine
- Minor may consent for all necessary treatment

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Rape or Sexual Assault Victims

- Minor 12+ can consent to all necessary treatment, including emergency contraception, related to rape
- Minor of any age may consent to all treatment related to sexual assault (so that would cover rape?)
- Minor may also consent to the collection of evidence by police

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Drug/Alcohol Treatment

- Minor 12+ may consent to medical care and counseling related to a drug/alcohol problem (Family Code section 6929)
- However, minor may not consent to replacement narcotic abuse treatment (Methadone, etc.)
- State law also allows a parent or guardian to consent to care for these conditions if the minor does not consent

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Drug/Alcohol Treatment

- Parents will not be financially liable unless they participate in counseling
- Parents must be given the opportunity to participate in counseling unless provider does not think it is appropriate
- Parents can't veto minor's treatment

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Minors Consenting to Mental Health Services

- Minor 12+ may consent to mental health treatment or counseling services on an **outpatient** basis if, in opinion of the attending professional, minor is sufficiently mature to participate intelligently
- Additional requirement for minor's consent to residential shelter services: minor must present a danger of serious physical or mental harm to self or others without the residential shelter services

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Minors and Mental Health Consent (cont.)

- Parents must be given the opportunity to participate in counseling unless provider does not think it is appropriate
 - Provider must consult with minor before concluding that it is inappropriate to give parents the opportunity to participate
 - Document in the record whether and when provider attempted to contact parents and whether they were contacted *or* the reasons why it wouldn't be appropriate to contact them

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Minors and Mental Health Consent (cont.)

- Parents can't veto minor's treatment
- Because a minor has a privacy right in health information resulting from services to which the minor is **authorized** to consent, minor controls disclosure of information resulting from mental health treatment even if parent(s) consented to, or even arranged for, such treatment, and even if the parents are paying for it

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Minor Mental Health Payment

- Existing law: provides the parents are not liable for payment (and should not be billed) if the minor consented to the services
 - Medi-Cal has a "minor consent" or "sensitive services" program, that enrolls minors for benefits without income qualification or parental notification for services: (includes: pregnancy, family planning, abortion, sexual assault, sexually transmitted diseases, mental health outpatient treatment (some limits) and substance abuse treatment)

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Minors and Mental Health Consent (cont.)

- Minors cannot consent to any of the following:
 - Inpatient mental health
 - Psychotropic drugs
 - Convulsive therapy
 - Psychosurgery

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Minor Mental Health Payment

- Medi-Cal program will not cover care provided when minors consent for outpatient mental health care unless the minor required counseling because he/she was danger to self or others, or victim of alleged incest or abuse

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Thank You

Jacquelyn Garman, Esq.

(916) 552-7636

jgarman@calhospital.org


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Faculty: Lois Richardson


Lois Richardson, Esq., is vice president of privacy and legal publications/education at the California Hospital Association (CHA). Ms. Richardson is responsible for all privacy related issues at CHA and for the development, writing and editing of CHA's legal publications. Her noteworthy publications include the highly-regarded *Consent Manual* and the *California Health Information Privacy Manual*, which addresses both state and federal laws regarding the use and disclosure of health information. Additionally, she is the executive director for the California Society for Healthcare Attorneys.

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Privacy for Minors

Lois Richardson, Esq.
California Hospital Association



Right to Privacy

**All patients have a right to privacy –
sounds simple, right?**

Then why is it so complicated???

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Relevant Laws

- State and federal constitutions
- State and federal statutes
 - CMIA: Confidentiality of Medical Information Act
 - LPS: Lanterman-Petris-Short Act
 - HIV: Human Immunodeficiency Virus
 - PAHRA: Patient Access to Health Record Act
 - HIPAA: Health Insurance Portability and Accountability Act
 - HITECH: Health Information Technology for Economic and Clinical Health Act

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But Wait – There's More!

- State and federal regulations
 - Title 22
 - Conditions of Participation
 - HIPAA
 - Substance abuse
- Subregulatory guidance
 - Interpretive Guidelines
 - Office of Civil Rights (OCR) guidances

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Your Government at Work

- Key issue: balancing the patient's right to privacy against other competing interests (facility operations, public health, research, protection of others, etc.)
- Congress, the Legislature, HHS, SAMHSA have done this balancing
 - Different people at different times leads to
 - Different terminology and different exceptions

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Big Picture Structure of Privacy Laws

- These laws have the same basic structure: a health care provider cannot disclose health information about a patient unless:
 1. The law explicitly contains an exception that requires or allows the disclosure, or
 2. The patient authorizes the disclosure
- In addition, the patient/legal rep. has the right to see his/her own information

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What About Minors?

- Privacy law is the same for minors as adults
 - Required disclosures
 - Permissible disclosures without patient authorization
- But what if patient authorization is needed?
- And what if parent/minor wants access to, or a copy of, the health information?

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Minors' Privacy Rights



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Minors' Privacy Rights

- Who exercises the minor's right to health information privacy?
 - The minor
 - A responsible adult on behalf of the minor ("parent" — but could be guardian, other legal rep, as Jackie has discussed)

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Good News...

Good news: you already know the basics!

- General rule: Who may access minor's information = who makes minor's treatment decisions
- Of course, every rule has some exceptions!

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More Good News...

HIPAA defers to state law to define the rights of parents and minors with respect to access/disclosure of health information

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Minors' Privacy Rights

State law:

- If the minor has the authority to consent to treatment, then the minor is the person who can see the information/records, have copies of the records, authorize the release of records to third parties
- Even if, as a practical matter, the parent makes the appointment, fills out the forms, is involved in the care, pays for the care, etc.

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Minors' Authority

Remember Jackie's list:

- Demonstrated independence — minor's status (emancipated, married/previously married, active duty U.S. military, self-sufficient)
- Type of health care minor is seeking, age
 - Reproductive health, sexual assault
 - 12 y/o: outpatient mental health, reportable communicable disease, substance abuse
- See handy chart: Appendix 2-B

Consent Requirements for

MEDICAL TREATMENT OF MINORS

IF MINOR IS:	Is parental consent required?	Are parents responsible for costs? †	Is minor's consent sufficient?	May M.D. inform parents of treatment without minor's consent?
Unmarried, no special circumstances	Yes	Yes	No	Yes
Unmarried, emergency care and parents not available [Business and Professions Code § 2397]	No	Yes	Yes, if capable	Yes
Married or previously married [Family Code § 7002]	No	No	Yes	No
Emancipated (declaration by court, identification card from DMV) [Family Code §§ 7002, 7050, 7140]	No	Probably Not ¹	Yes	No
Self-sufficient (15 or older, not living at home, manages own financial affairs) [Family Code § 6922]	No	No	Yes	†
Not married, care related to prevention or treatment of pregnancy, except sterilization [Family Code § 6925]	No	No	Yes	No
Not married, seeking abortion	No	No	Yes	No
Not married, pregnant, care not related to prevention or treatment of pregnancy and no other special circumstances	Yes	Yes	No	Yes
On active duty with Armed Forces [Family Code § 7002]	No	No	Yes	No
12 or older, care related to diagnosis or treatment of a communicable reportable disease or to prevention of an STD [Family Code § 6926]	No	No	Yes	Probably not
12 or older, care for rape [Family Code § 6927]	No	No	Yes	Yes, usually
Care for sexual assault ² [Family Code § 6928]	No	No	Yes	Yes, usually
12 or older, care for alcohol or drug abuse ² [Family Code § 6929]	No ³	Only if parents are participating in counseling	Yes	Yes, usually
12 or older, care for mental health treatment, outpatient only ³ [Family Code § 6924; Health and Safety Code Section 124260]	No	Only if parents are participating in counseling	Yes	Yes, usually
17 or older, blood donation only [Health and Safety Code § 1607.5]	No	No	Yes	Yes, usually

¹ Special requirements or exceptions may apply. See Chapter 2 of the Consent Manual or Chapter 3 of Minors & Health Care Law.

² Parental consent is required for a minor's participation in replacement narcotic abuse treatment (such as methadone, LAAM or buprenorphine products) in a program licensed pursuant to Health and Safety Code § 11875 et seq. [Family Code § 6929(c)].

³ Reference: Welfare and Institutions Code § 14030.



Really?

So ... Hepatitis, mumps, measles, tuberculosis, etc. are communicable reportable diseases. Does that mean I can't disclose information to the parents of my 12-year-old patient with one of these diseases?

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Relax!

- Both CMIA and HIPAA permit disclosure of limited information to a family member, close personal friend, or any other person identified by the patient – follow procedure (next slide)
- Information is limited to the information directly relevant to such person's involvement with the patient's care or payment related to the patient's care

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Relax!

- If the patient is available and has decision-making capacity, the provider must:
 - Obtain the patient's verbal agreement;
 - Provide the patient the opportunity to object to the disclosure, and the patient does not do so; or
 - Reasonably infer from the circumstances, based on the exercise of professional judgment, that the patient does not object to the disclosure (Under California law, this does not apply if the provider is a psychotherapist)

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Relax!

If the patient is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the patient's incapacity or an emergency circumstance, the provider may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the patient and, if so, disclose only the medical information that is directly relevant to the person's involvement with the patient's health care.

Civil Code section 56.1007; 45 C.F.R. section 164.510(b)

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Minor May Designate Parent

- The minor may request that the parent be treated as the minor's personal representative to exercise the minor's privacy rights

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Special Situations

Two types:

- Parent has authority to consent to care, but not to access information
- Parent does not have authority to consent to care, but does have access to (some) information

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Giving Parent Info Would Be Detrimental

Parent has the authority to consent to treatment, but the provider determines that access to info would have a detrimental effect on:

- The provider's professional relationship with the minor, or
- The minor's physical safety or psychological well-being

Don't share info. No liability for this decision unless the provider acts in bad faith

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HIPAA

Notwithstanding state law, a provider has the ability to not treat a person as the patient's personal representative if the provider has a reasonable belief that:

- The patient has been subject to domestic violence, abuse or neglect by that person, or
- Treating that person as the personal representative could endanger the patient;

AND

- In the exercise of professional judgment, the provider decides it is not in the patient's best interest to treat the person as the patient's personal representative

[45 C.F.R section 164.502(g)(5)]

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Minor Can Consent, But Parent Entitled to Information

- Self-Sufficient Minors — may inform the parent of the treatment given or needed without the minor's consent if the minor has told the provider where the parents may be contacted
- Minor Victim of Sexual Assault — provider must attempt to contact the parent, unless the provider reasonably believes the parent is the perpetrator

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Minor Can Consent, But Parent Entitled to Information

- Outpatient Mental Health Patient — provider must give parent the opportunity to participate in counseling, unless provider deems this inappropriate, after consulting with the minor
- Substance Abuse Patient — provider must give parent the opportunity to participate in counseling, unless provider deems this inappropriate

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Divorced Parents

- Access to health information concerning a minor may not be denied to a parent solely because that parent is not the minor's custodial parent (Family Code section 3025)
- However, some other reason may apply to deny access

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Dependent Child of the Juvenile Court

- Child removed from parental custody due to abuse or neglect = “dependent child of the juvenile court”
- Legal counsel appointed to represent the minor in a detention hearing must be given access to medical records



Dependent Child of the Juvenile Court

- Effective Jan. 1, 2013, a psychotherapist who knows that a minor has been removed from the physical custody of parent in a dependency proceeding may not disclose any mental health information (CMIA/LPS/PAHRA) about the minor to the parent
 - Unless court order to the contrary
 - No duty to investigate — actual knowledge is required



Immunization Information

- Providers may disclose immunization information and TB screening results to county databases and California Department of Public Health
- Patient/parent must be given specified info prior to disclosure
- Patient or parent can object; however, can still disclose
- Meant to help foster kids, dependent children/wards of the juvenile court

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Child Abuse

- Must report suspected child abuse/neglect — this includes releasing information without patient or parent authorization
- OK to provide information to investigator after the initial report, but:
 - May only disclose information that is relevant to the incident of abuse/neglect
 - If law enforcement wants other information, they need to obtain a court order or search warrant
- Immunity (also for providing access to the victim, photographing victim, providing photos with report)

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Final Thoughts

- Medical records often contain “mixed” information
- Billing
- Breach
- Common sense
- OK to share with other providers for purpose of diagnosis/treatment – so if you’re not sure if a particular person can have info, offer to give to another health care provider
- Beware of federal advice (HHS, OCR) – information and advice provided doesn’t factor in stricter state law, so following federal guidances may break California law!

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Resources



*Consent Manual —
A Reference for Consent and
Related Health Care Law*



*Principles of Consent and
Advance Directives*


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Thank you

Lois Richardson, Esq.
(916) 552-7611
lrichardson@calhospital.org

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Questions

Online questions:
Type your question in the Q & A box, hit enter

Phone questions:
To ask a question hit 14
To remove a question hit 13



Upcoming Programs

- **Labor and Employment Law Seminars**
November 5, Glendale; November 13, Sacramento
- **Advanced Decision Making for EMTALA Webinar**
November 14, Sacramento
- **Behavioral Health Care Symposium**
December 8 – 9, Redondo Beach
- **Hospital Compliance Seminars**
February 2015, two programs

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Thank You and Evaluation

Thank you for participating in today's program.
An online evaluation will be sent to you shortly.

For education questions, contact
Liz Mekjavich at (916) 552-7500 or
lmekjavich@calhospital.org.