Patients Cannot Consent to Medical Malpractice: Keep Consent Forms Out of Evidence

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Medical malpractice cases are hard enough to win. Statistics show that in California, over 80% of med-mal cases are tried end up in defense verdicts. This is true even though only the strongest cases make it to trial given the draconian 45-year-old MICRA cap and the limitless resources of the insurance companies. With the recent COVID-19 pandemic, medical malpractice cases are only becoming more difficult. More than ever, juries will have a pre-conceived notion that all medical providers are heroes, regardless of the facts or the egregiousness of wrongdoing.

What makes winning even more difficult is that defense will purposely attempt to introduce improper and highly prejudicial evidence, particularly against unsuspecting plaintiff-side firms who do not specialize in medical malpractice. Particularly in surgical cases, one of the most common defense tactics is to introduce consent forms. These consent forms often broadly cover every possible complication or risk of the procedure, from brain damage, paralysis, nerve injury, seizures, coma, adverse reaction, allergic reaction, bad result, pain, and death. Often, a patient will sign a separate anesthesia consent form repeating the same risks.

If allowed, the defense will parade the consent form in front of the jury and use it early and often. The defense lawyer will aggressively cross-examine the plaintiff with the consent form, having her admit in front of a jury that the plaintiff either knew of the substantial risks of surgery or was too careless to read forms she signed. After confirming the plaintiff's signature, the defense will point out that the plaintiff's exact complaints and post-surgical symptomatology are addressed on the consent form. The defense lawyer will end with: "You knew that even death was a recognized risk of the procedure!"

The defense attorneys are trained to use the consent forms in closing in conjunction with the extremely de fense-friendly jury instruction CACI 505, titled "Success Not Required." The defense will argue that the consent form proves that medicine is not guaranteed, and that complications and mistakes will happen absent negligence or wrongdoing.

In essence, the defense will use the content of the consent form as an additional expert opinion. However, unlike the defense's retained hired gun, the consent form cannot be effectively cross-examined or discredited. It is critical that a plaintiff move to exclude these consent forms at trial. Two challenges are useful and can help keep it out.

Challenge No. 1: Consent Forms are Irrelevant and Unduly Prejudicial

When challenged, defense will make a convoluted, yet often effective, argu-ment that somehow the consent forms are admissible because the plaintiff admitted that her signature appears on the consent form. The defense will argue that there is proper authentication through the plaintiff:s signature as well as a custodian of records declaration from the hospital/ surgical center under Evidence Code section 1271.

Defense will also argue that the facts and circumstances leading up to the surgery, the discussions regarding the risks and benefits of surgery, and the patient's state of mind are relevant to the general issues underlying the case. The defense will then argue that the informed consent discussions and the consent forms themselves are pertinent to whether the defendant doctor met the standard of care. Without any California case directly on point, these arguments are often enough to sway an uninformed judge.

Preferably by way of motion in limine, the plaintiff's attorney should establish that the consent forms are completely irrelevant and unduly prejudicial. The plain-tiff's attorney should point out that there is no allegation or contention by plaintiffs of an inadequate explanation of the potential risk and complications of surgery. As such, what the plaintiff did or did not consent to is completely irrelevant and not admissible at trial. Simply put, whether the plain-tiff knew of any risks or was advised of any risks of surgery, anesthesia, or other procedure has no bearing on whether the injury was caused by negligent care versus non-negligent care.

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In medical malpractice cases, "[t]he standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts." (*Landeros v. Flood* (1976) 17 Cal.3d 399.) Similarly, "medical causation can only be determined by expert medical testimony." (*Salasguevara v. TTyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385.) In short, "[o)pinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims." *(Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310.)

Indeed, jury instruction CACI 502 specifically states: "You must determine the level of skill, knowledge, and care that other reasonably careful [medical specialists] would use in similar circumstances based only on the testimony of the expert witnesses who have testified in this case." As such, what the plaintiff believed to be the risks of procedure are simply not relevant. Only experts, and not laypersons like the plaintiff, can comment on standard of care and causation. Moreover, jury instructions do not refer to an informed consent defense as an "affirmative defense." (Compare CACI 532-533 (informed consent) with CACI 550-556 (affirmative defenses).)

California Caselaw re Relevance of Consent Forms

The California Supreme Court, in the case of *Knight v. Jewett* (1992) 3 Cal.4th 296, 311-312, discussing implied consent in the context of assumption of risk, used a "familiar example" to explain its ruling.

"Although every driver of an automobile is aware that driving is a potentially hazardous activity and that inherent in the act of driving is the risk that he or she will be injured by the negligent driving of another, a person who voluntarily choos-es to drive does not thereby "impliedly consent" to being injured by the negligence of another, nor has such a person 'impliedly excused' others from performing their duty to use due care for the driver's safety." *(Id.)*

Drivers reasonably expect that if they are injured by another's negligence they can seek compensation for their injuries. Patients injured in a medical procedure are no different, says the Knight court. "[A]lthough a patient who undergoes elective surgery is aware that inherent in such an operation is the risk of injury in the event the surgeon is negligent, the patient, by voluntarily encountering such a risk, does not 'impliedly consent' to negligently inflicted injury or 'impliedly agree' to excuse the surgeon from a normal duty of care, but rather justifiably expects that the surgeon will be liable in the event of medical malpractice." *(Id.)*

Defense will usually argue that the Knight case is not controlling, because it did not involve a medical malpractice action, or that this comes from dicta, or both. But dicta from the California Supreme Court should still followed absent a compelling reason not to. (See *Lopez v. Ledesma*, (2020) 46 Cal.App.5th 980, 992, fn. 11; and Hubbard v. Superior Court (1997) 66 Cal.App.4th 1163, 1169)

Similarly, a healthcare provider's warning of a potential bad result does not insulate the healthcare provider from liability "in the event of malpractice." Thus, whatever risks were communicated to the plaintiff and whatever non-negligent risks were set forth in defendant's informed consent form are irrelevant to the issue of whether Defendants did - or did not - violate the standard of care and negligently cause the injury/death. A patient cannot consent to negligence. (*Tunkl v. Regents of Univ. of Cal. (1963) 60 Cal. 2d 92.)*

Of course, the plaintiff should also make a Section 352 argument that the introduction of consent forms and discussions is also highly and unduly prejudicial, not to mention confusing when compared to the lack of any probative value. Explain that you will not be able to cross-examine (or even identify) the author of the consent forms. Moreover, point out that the consent forms and discussions will likely confuse the jury, leading to a defense verdict because they believe that the Decedent consented to a poor outcome (or that the consent amounted to a waiver) even though lack of informed consent is not an issue in the action.

Out-of-State Case Law re Relevance of Consent Forms

One of the primary challenges for a plaintiff in trying to exclude the consent form is that there is no California authority directly on point. Notably, there is not a single case in any jurisdiction which has held that consent forms or discussions of risk were appropriate, relevant, and admissible in cases involving medical malpractice where there is no cause of action for lack of informed consent.

Moreover, ample out-of-state authorities support the notion that consent forms are irrelevant and inadmissible because a patient

cannot consent to negligence.

Reviewing the case law across the country reveals a pattern wherein states have found that consent forms are irrelevant, unduly prejudicial and consequently inadmissible. In addition to the cases cited below, there are cases in Missouri, Louisiana, Texas, and Tennessee with similar findings. I will often attach copies of the following decisions to my motion in limine, consistent with California Rule of Court, rule 3 .1113:

OHIO - *Waller v. Aggarval* (1996) 116 Ohio App.3d 355

The Ohio appellate court long ago reversed a trial's court decision to allow informed consent into evidence. Waller involved a defense verdict involving a surgery where the surgeon perforated the patient's bladder during laporoscopic surgery. (*Waller v. Aggarwal* (Ohio Ct. App. 1996) 116 Ohio App.3d 355, 357.) The action was for negligence, not lack of informed consent. *(Ibid.)*

First, the court noted that the consent issues were completely irrelevant to the underlying malpractice claims. *(Ibid.)* The fact that the doctor informed the patient that her injury "was a possible risk of the procedure could not be a defense to the claim of negligence brought by appellant." *(Ibid.)*

Moreover, the Ohio Court found that "appellant was substantially prejudiced by the references to informed consent." *(Ibid.)* Consequently, allowing evidence of informed consent "carried great potential for the confusion of the jury." *(Ibid.)* As such, the jury verdict was vacated, and the judgment was reversed. *(Id.* at p. 258.)

VIRGINIA- *Wright v. Kaye* (2004) 267 VA 510 and *Fiorucci v. Chinn* (2014) 764 S.E.2d 85

In *Wright v. Kaye,* the trial court allowed consent forms into evidence in a case involving a diagnostic laparoscopic surgery. The Supreme Court of Virginia reversed, holding that the admission of the consent forms was error. (*Wright v. Kaye* (2004) 267 Va. 510, 515) In doing so, the Virginia high court explained: "[I]t is a particularly salient fact that [Plaintiff] does not plead or otherwise place in issue any failure on the part of the defendant to obtain her informed consent. Her claim is simply that Dr. Kaye was negligent by deviating from the standard of care in performing the medical procedure at issue." *(Ibid.)*

The *Wright* court went on to say that "evidence of information conveyed to [Plaintiff] concerning the risks of surgery in obtaining her consent is neither relevant nor material to the issue of the standard of care. Further, the pre-operative discussion ofrisk is not probative upon the issue of causation." *(Ibid.*).

The *Wright* court emphasized that the patient's "awareness of the general risks of surgery is not a defense" against malpractice and does not prove or disprove negligence. *(Ibid.)* Patients who consent to surgical risks do "not consent to negligence." *(Ibid.)* Admitting informed consent evidence "could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery." Such a result, in the court's view, would be "plainly wrong." *(Ibid.)*

In *Fiorucci v. Chinn*, the Virginia Supreme Court extended the Wright finding to include "claims premised on pre-operative negligent treatment, specifically including negligent diagnosis." (*Fiorucci v. Chinn* (2014) 764 S.E.2d 85.)

In *Fiorucci*, the plaintiff sustained neuropathic and other injuries after wisdom tooth extractions. The plaintiff contended (among other things) that defendant "was negligent in failing to properly diagnose the condition of his wisdom teeth and in recommending and performing the extractions." (Id. at p. 86-87.) The plaintiff did not allege that defendant failed to inform him of the risks of the extractions. (Id. at p. 86 fu 2]. Thus, the *Fiorucci* trial court properly excluded infonned consent forms and risk of surgery discussions. (Id. at pp. 86-87.)

CONNECTICUT

The Connecticut Supreme Court also held that an informed consent form in a medical negligence case is irrelevant, prejudicial, and potentially misleading. (*Hayes v. Camel* (2007) 283 Conn. 475, 480.)

In *Hayes*, the patient underwent a back surgery where the surgeon inadvertently cut into the dura of the spin, resulting in the leak of cerebral spinal fluid and nerve damage. (*Id*. at p. 480.)

The trial court denied plaintiff's motion to exclude evidence of consent forms and a defense verdict followed. *(Ibid.*) The sole issue in the appeal was whether "in a medical malpractice action without a claim of lack of informed consent, the trial court properly admitted testimonial and documentary evidence that the

defendant surgeon had informed his patient of the risks of the medical procedure in question." (*Id*. at p. 476.)

The Court of Appeal found that the admission was error, explaining, "[k]nowledge by the trier of fact of informed consent to risk, where lack of informed consent is not an issue, does not help the plaintiff prove negligence. Nor does it help the defendant show he was not negligent. In such a case, the admission of evidence concerning a plaintiff's consent could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that con-sent to the surgery was tantamount to consent to the injury which resulted from that surgery. In effect, the jury could conclude that consent amounted to a waiver, which is plainly wrong." *(Id.* at p. 890.)

MARYLAND

In 2012, a Maryland appellate court issued a detailed and lengthy opinion ad- dressing this issue in the case of *Schwartz v. Johnson* (Md. Ct. Spec. App. 2012) 206 Md.App. 458.) The trial court granted the plaintiff's motion in limine to keep out the infonned consent form and any mention of it. (Id. at 474) The appellate court affirmed, finding evidence of informed consent "irrelevant" because the plaintiff did not claim lack of consent. *(Ibid.)*

The court emphasized that "[b] reach of informed consent and medical malpractice claims both sound in negligence, but are separate, disparate theories of liability." (*Id.* at p. 373.) The court went on to note that consent evidence would still have to be excluded "even ifrelevant." (Id. at p. 375.) More importantly, as Schwartz and other courts recognized, such evidence is highly "prejudicial to the patient." (*Id*. at pp. 373-74.)

OREGON

The Oregon appellate court likewise upheld a trial court's ruling excluding "informed consent documents, informational brochures addressing the procedure and its effects, and presurgical discussions related to the risks and potential results." (*Warren v. Imperia* (Or. Ct. App. 2012) 252 Or.App.

In *Warren*, the patient brought a medical malpractice case following a poor result after an ophthalmologic surgery. (*Id.* at p. 277.) The trial court in *Warren* held that evidence of consent forms is inadmissible: "Oregon law clearly distinguishes between claims for negligence and claims for failure to obtain informed consent....Because the informed consent claim is no longer a part of this action, evidence relating to warnings given to Plaintiff by Defendant is not admissible." *(Ibid.)*

The appellate court affirmed, recognizing the inherent risk of such evidence: "Here, the potential prejudicial effect of the evidence is readily apparent. Evidence that plaintiff was told about the risks of surgery raised the possibility that the jury might consider whether plaintiff assumed the risks of the surgery or consented to defendant's negligence. In other words, the evidence had a significant potential to confuse the jury or lead it to decide the case on an improper basis. The probative value of the evidence, on the other hand, was marginal at best. Thus, the trial court did not abuse its discretion in excluding the evidence on that ground." *(Ibid.)*

DELAWARE

The *Baird* case involved the development of a vision-threatening corneal disease that occurred following LASIK surgery. At trial, the patient filed a motion in limine to preclude consent forms. *(Baird v. Owczarek* (2013) 93 A.3d 1222, 1231) The trial judge denied the motion, "finding that the informed consent forms were relevant as part of 'the work-up done by the defendant' in the context of an elective procedure." *(Ibid.)*

The Supreme Court of Delaware reversed. (Id.at p. 1233). The court noted that it was significant that the patient "dismissed his claim for lack of informed consent prior to trial." *(Ibid.)* Accordingly, "once [the patient's] claim for lack of informed consent was removed from the suit, the consent forms Baird signed presurgery became irrelevant, because assumption of the risk is not a valid defense to a claim of medical negligence, and because evidence of informed consent is neither material nor probative of whether [the doctor] met the standard care in concluding that Baird was an eligible candidate for the surgery. Therefore, the evidence should have been excluded." *(Ibid.)*

Not only was the evidence irrelevant, but it was found to be unduly prejudicial. The court noted that" evidence of informed consent in a medical malpractice action could confuse the jury by creating the impression that consent to the surgery was consent to the injury." *(Ibid.)*

PENNSYLVANIA

In *Brady v. Urbas,* the trial court permitted the jury to hear evidence

pertaining to the informed consent form describing the risks of a medical foot procedure. The appellate court found this to be error as the patient's "consent to the procedures and her knowledge of the risks did not make the existence of any fact of consequence more or less probable." (*Brady v. Urbas* (2015) 111 A.3e. 1155, 1159.)

The physician in *Brady* argued "that consent-related communications between himself and [the patient] regarding the purpose, nature, and risks of surgery were relevant in that they helped establish the applicable standard of care." *(Ibid.)* Moreover, the physician argued that the consent issues "lent credence to his position at trial that he met the standard of care, as the injuries occurred from the procedures' known complications rather than negligence." (*Id.* at pp. 1159-1160.)

In a unanimous decision, the Pennsylvania Supreme Court disagreed with the physician, explaining "the fact that a patient may have agreed to a procedure in light of the known risks does not make it more or less probable that the physician was negligent in either considering the patient an appropriate candidate for the operation or in performing it in the post-consent timeframe." (*Id.* at p. 1162.) In other words, "there is no assumption-of-the-risk defense available to a defendant physician which would vitiate his duty to provide treatment according to the ordinary standard of care. The patient's actual, affirmative consent, therefore, is irrelevant to the question of negligence." *(Ibid.)*

NEBRASKA

In the recent decision of *Hillyer v. Midwest Gastrointestinal Associates, PC.* (Neb. Ct. App. 2016) 24 Neb. App. 75, 90, the patient's colon was perforated in relation to a colonoscopy procedure. After the trial court allowed evidence of consent discussions, the jury returned a unanimous verdict in favor of the physician. *(Ibid.)* The Nebraska Court of Appeals found that this was error. (*Id.* at p. 87.)

The Court noted that "evidence of risk-of-procedure or risk-of-surgery discussions with the patient is generally irrelevant and unfairly prejudicial where the plaintiff alleges only negligence, and not lack of informed consent." *(Ibid.)* In other words, "When evidence of the risks corn es in the form of their disclosure to the patient (i.e., that a patient was informed of the risks), such evidence goes toward the patient's consent to the procedure, not negligence. In cases where consent is not at issue, evidence of what a patient was told raises the potential that the jury might inappropriately consider consent." *(Ibid.)*

NEW JERSEY

In *Ehrlich v. Sorokin,* the patient suffered from a colon perforation following surgery. The patient "moved in limine to exclude evidence regarding her consent to the colonoscopy procedures." The trial judge denied the motion, finding "the forms and any information provided to the patient was part of the standard of care, and therefore relevant." *(Ehrlich v. Sorokin* (2017) 451 NJ.Super. 119, 125.)As such, at trial, the defense attorneys asked the plaintiff about the risks and complications on the consent form. (Id. at p. 126.)

Following a defense verdict, the Appellate Division in New Jersey found the admission of the consent forms was error. *(Id.* at p. 128.) The court explained that "Informed consent is generally unrelated to the standard of care for performing medical treatment." (*Id.* at p. 129.) Not only was the evidence irrelevant, it was also found to be unduly prejudicial. (*Id.* p.132.) The court explained that "the jury might reason that the patient's consent to the procedure implies consent to the resultant injury." (*Ibid.)* Importantly, the Court noted that the risk of undue prejudice was "especially true here, where the jury received the consent forms as part of their deliberations, immediately after hearing defense counsel's summation referencing this issue." *(Ibid.)*

As such, the court found that "the admission of the informed consent evidence in this matter, where plaintiff asserted only a claim of negligent treatment, constituted reversible error." (*Id.* at p. 131).

Challenge No. 2: Consent Forms are Inadmissible Hearsay

In addition to objections based on relevance and prejudice, a plaintiff can challenge written consent forms on the basis that they are hearsay.

The first step is to challenge the form itself. Establish that the doctor did not author the consent form and does not know the identity of the person who authored them. Remember that in attempting to introduce the consent forms the defendant wants to use them as an additional expert against the plaintiff. In other words, they will attempt to prove the truth of the matter asserted on the consent forms: that poor results, complications, and even death are recognized risks of the procedure at issue.

There is a strong argument that the consent forms constitute inadmissible hearsay for which no exception applies (*California Evidence Code* § 1200). If the plaintiff cannot cross-examine the unidentified author of the consent form on what and what does not constitute expected complications and risks, then it is inadmissible.

In fact, not only are the forms hearsay, they are also likely double hearsay. The pre-printed portions of the consent form cannot meet the business records exception (Evidence Code§§ 1270-1272), because it was not "made at or near the time of the act" and their "sources of information and method and time of preparation (do not) indicate (their) trustworthiness." (*See Evid. Code*§ 1272(a), (d); see also *Hutton v. Brookside Hospital* (1963) 213 Cal.App.2d 350, 355.)

Additionally, conclusions and opinions (such as the recognized risks of surgery) are not made admissible by section 1271 merely because they appear in a business record. (*People v. Reyes* (1974) 12 Cal.3d 486, 503). The business records exception to the hearsay rule "does not change the rules of competency or relevancy with respect to recorded facts .... [The business-records exception] provides a method of proof of an admissible act, condition or event. It does not make the ecord admissible when oral testimony of the same facts would be inadmissible." (*McGowan v. City of Los Angeles* (1950) 100 Cal.App.2d 386, 392). Statements in a consent forms do not constitute an act, condition, or event.

Conclusion

When there is a consent form, there are ways to avoid its introduction into evidence at trial. First, do not allege lack of informed consent. This will make the form irrelevant, and you can use the persuasive caselaw above to support your motion in limine arguments. Second, attack the validity of the document itself, and argue that it is hearsay.

Consent forms are irrelevant to the question of negligence, and they are confusing and prejudicial to the jury. Do not open the door to their inclusion in evidence.

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