

Emergency Medical Care in the Hospital ED: Patients Unable to Give Informed Consent

The fundamental rule: patients have a right to informed consent. Informed consent is legally required for medical care. Whenever possible, consent should be obtained from the patient. The following addresses exceptions to this rule, but these exceptions cease immediately if the patient regains decision-making capacity. ***Special Note:*** These guidelines apply only to treatment of physical health issues. Different requirements apply to emergency mental health care. (Note: clinicians' limited use of psychotropic medication to enable or facilitate emergency medical care of a physical condition is not considered mental health care.)

When there's no time: the emergency exception. The doctor can provide treatment, even if the patient objects, if the doctor finds that (1) treatment is needed immediately to prevent death or serious injury, (2) the patient lacks capacity to make informed decisions, and (3) there is no reasonably-available decision-maker. While it is not set forth in statute, the VA Supreme Court has recognized the emergency exception (although it has not provided guidance on its scope and limits). Documentation should include the basis of the need for immediate care, the finding of incapacity, and the lack of time or ability to find a substitute decision-maker.

When time and circumstances allow: "substitute" informed consent. VA statutes recognize several forms of "substitute" informed consent. Consistent with the fundamental rule (above), substitute informed consent must only be sought upon a finding of incapacity. Specifically, the finding of incapacity must be made by the attending physician *and* a second physician or clinical psychologist, unless the patient has a "profound impairment of consciousness due to trauma, stroke, or other acute physiological condition." ([VA Code §54.1-2983.2](#)) (Note: the doctor should also investigate whether a patient has a DDNR, Alternate DNR Jewelry, or a POST, which in most cases directs the withholding, withdrawal or limitation of treatment. [[VA Code §54.1-2987.1](#), [12VAC5-66-50](#), [12VAC5-66-60](#), and [Virginia POST website](#)]) Any such orders must be honored. Furthermore, special rules apply to treatment over patient objection. [[VA Code §54.1-2986.2](#)]). All decisions in these categories must be based on any applicable known wishes of the patient and, otherwise, in the patient's best interests.

- 1. The health care agent appointed in the patient's signed advance directive (witnessed by two adults).** The agent's authority is activated upon a determination that the patient lacks capacity to give informed consent.
- 2. Statutory agent.** If the patient does not have an agent identified in an advance directive, the Virginia Code establishes the following hierarchy: court-appointed guardian, spouse, adult child(ren), parent(s), adult sibling(s), any other blood relative(s), an unrelated person under special circumstances. In the event of disagreement, a majority of those reasonably available in the highest class controls. ([VA Code §54.1-2986](#))
- 3. Court order: "medical temporary detention order" (TDO).** The VA Code authorizes a local judge or (if a judge is not available) a magistrate to authorize the observation, testing, and treatment of a patient for up to 24 hours if, "with the advice" of the treating physician, the judge or magistrate finds (i) "probable cause" exists to believe that the patient is incapable of making an informed decision about this treatment, and (ii) "the medical standard of care" calls for the treatment requested to "prevent injury, disability, death, or other harm" to the patient. ([VA Code §37.2-1104](#)) (Note: a "medical emergency custody order" (ECO) can authorize a person's transport to the hospital. See [VA Code § 37.2-1103](#).)
- 4. Court order: judicial authorization of treatment.** Any person can petition the local court for an order authorizing medically-indicated treatment, both emergency and non-emergency. Following an "expedited" hearing, treatment may be ordered upon "clear and convincing evidence" that (i) the patient is incapable of making an informed decision about such treatment and (ii) the treatment is in the best interest of the patient. Petitions may be presented orally or electronically, and testimony/evidence may be obtained by telephone. (VA Code §§[37.2-1101](#) , [37.2-1109](#)).

Limits of this guidance: This document, approved by the Virginia Hospital and Healthcare Association (VHHA) and Virginia College of Emergency Physicians (VACEP) in collaboration with University of Virginia Institute of Law, Psychiatry and Public Policy (ILPPP), provides general information and should not be considered legal advice on which providers can rely in specific situations. Consult your attorney.