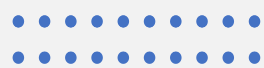


Competency v. Capacity

Differentiating *Competency* and *Capacity* in the context of medical decision-making.

Indiana Society for Healthcare Risk Management
April 29, 2022

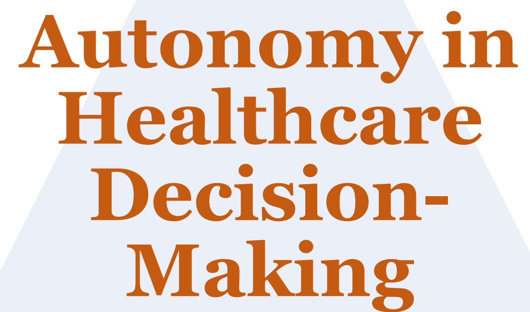
Barb Killian, Of Counsel
Katz Korin Cunningham

katz.korin.cunningham.

The Emelie Building • 334 N. Senate Avenue, Indianapolis, Indiana 46234 • 317.464.1100 • kkclegal.com

1. Autonomy in Healthcare Decision-Making
2. Differentiating Competency & Capacity
3. Competency
4. Capacity
5. Assessing Capacity
6. Documenting Capacity Assessment Questions
7. The Gray Areas of Consent & Capacity
8. Statutory Immunity for Acting in Good Faith
9. Q & A

Issue No. 1



Autonomy means:

The ability to make your own decisions without being controlled by anyone else.

Fundamental Role of Autonomy in Healthcare

- Autonomy is at the **core of all medical decision-making** and is fundamental to the informed consent process.
- **We must begin with autonomy and deviate only where capacity and/or competence are questioned.**
- **Clinicians have an ethical and legal obligation to ensure that patients are informed about and allowed to participate in choices** regarding their own healthcare.
- Patient autonomy is **legally protected**.

Fundamental Right to Autonomy in Healthcare

- The right to autonomy is deeply rooted in the principles of **respect, dignity, and freedom**.
- The common-law principle of self-determination guarantees our right to privacy and protection against actions that may threaten bodily integrity. (2)
- **The concept of autonomy is clearly stated in legal constructs throughout history and is recognized as a fundamental right to this day.**

Autonomy in Early Case Law

***Pratt v. Davis*, 79 N.E. 562 (Ill. 1906)**

The Appellate Court stated, "…under a free government at least, the **citizen's first and greatest right, which underlies all others—the fight to the inviolability of his person, in other words, his right to himself is the subject of universal acquiescence**, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least the necessary first steps in treatment and care) to violate without permission the bodily integrity of his patient."

***Schloendorff v. Society of N.Y. Hospital*, 105 N.E. 92 (N.Y. 1914)**

Justice Benjamin Cardozo wrote, "**Every human being of adult years and sound mind has a right to determine what shall be done with his body**, and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."

Autonomy in **Current Indiana Law**

IC 16-36-1-3 Consent for own health care (in relevant part)

Sec. 3. (a) **An individual may consent to the individual's own health care** if the individual is:

(1) an adult; or

(2) a minor and:

(A) is emancipated;

(B) is:

(i) at least fourteen (14) years of age;

(ii) not dependent on a parent or guardian for support;

(iii) living apart from the minor's parents or from an individual in loco parentis; and

(iv) managing the minor's own affairs;

(C) is or has been married;

(D) is in the military service of the United States;

(E) meets the requirements of section 3.5 of this chapter; or

(F) is authorized to consent to the health care by any other statute.

Autonomy in Current Indiana Law

IC 16-36-1-4 Incapacity to consent; invalid consent (in relevant part)

Sec. 4 (a) An individual **may consent to health care unless, in the good faith opinion of the attending physician, the individual is incapable of making a decision regarding the proposed health care.**

(b) A **consent to health care is not valid if**:

(1) the health care **provider has knowledge that the individual has indicated contrary instructions** in regard to the proposed health care; and

(2) the individual **has not been determined to be incapable** of consenting to health care by:

(A) an order of a probate court under section 8 of this chapter; or

(B) the individual's attending physician under subsection (a).

Autonomy in Current Indiana Law

IC 16-36-1-5 Persons authorized to consent for incapable parties (in relevant part)

Consent to health care may be given **in the following order of priority** (but **only if incapable and no healthcare representative has been appointed**):

(1) A judicially appointed guardian of the person or a representative appointed under section 8 of this chapter.

(2) A spouse.

(3) An adult child.

(4) A parent.

(5) An adult sibling.

(6) A grandparent.

(7) An adult grandchild.

(8) The nearest other adult relative in the next degree of kinship who is not listed in subdivisions (2) through (7).

(9) A friend who:

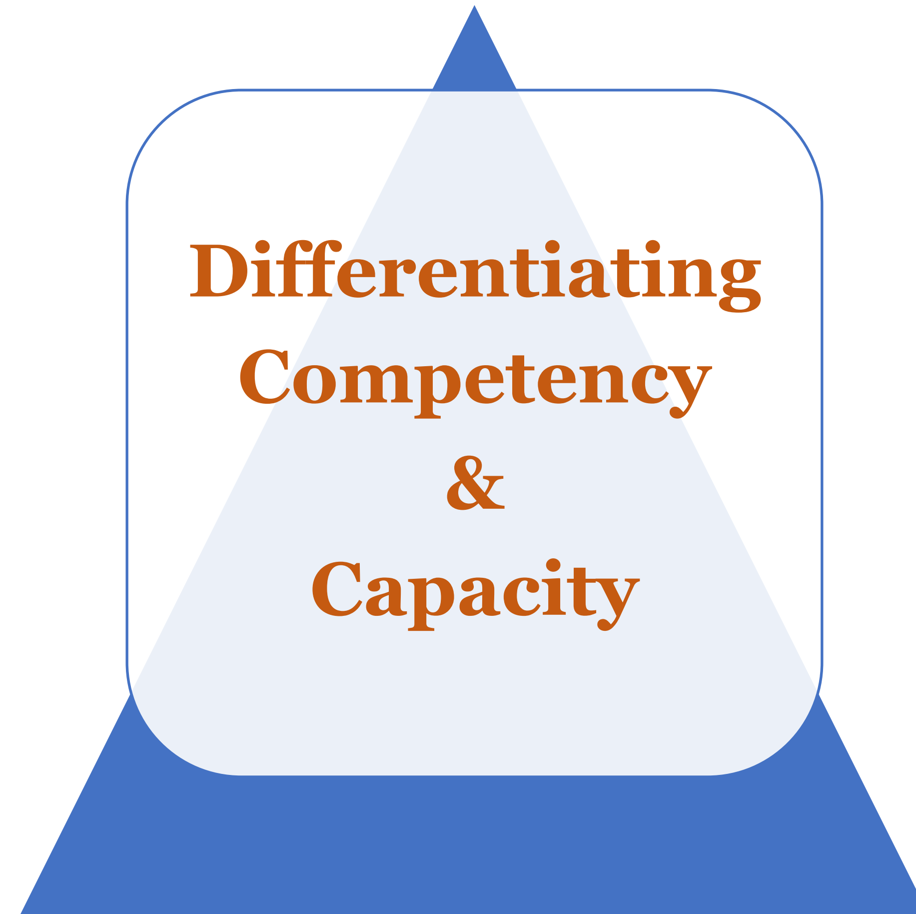
(A) is an adult;

(B) has maintained regular contact with the individual; and

(C) is familiar with the individual's activities, health, and religious or moral beliefs.

(10) The individual's religious superior, if the individual is a member of a religious order.

Issue No. 2



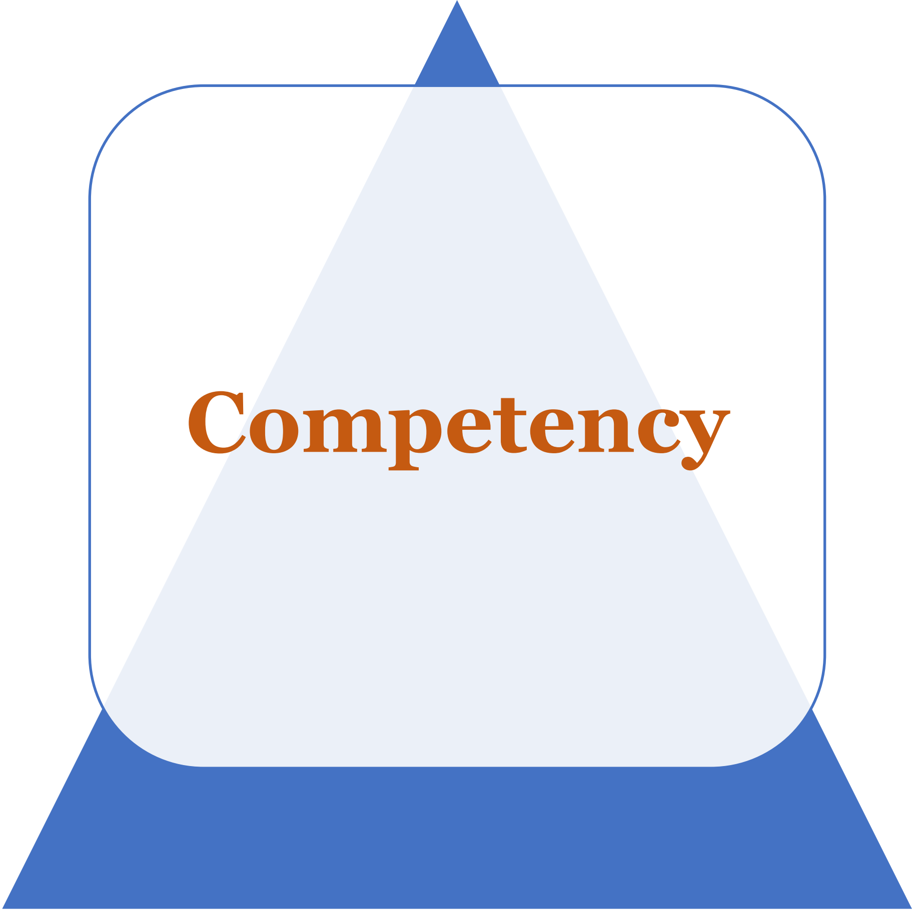
Competency vs. Capacity

The term capacity is frequently mistaken for competency, and vice versa.

Competency is a legal term. Competency refers to individuals "having sufficient ability [and] possessing the requisite natural or legal qualifications" to engage in a given endeavor. (3)

Capacity is a medical term. Capacity is **determined by a physician**, often (although not exclusively) by a psychiatrist, and not the judiciary.

Issue No. 3



Autonomy in Decision-Making: The Law First Presumes Competence

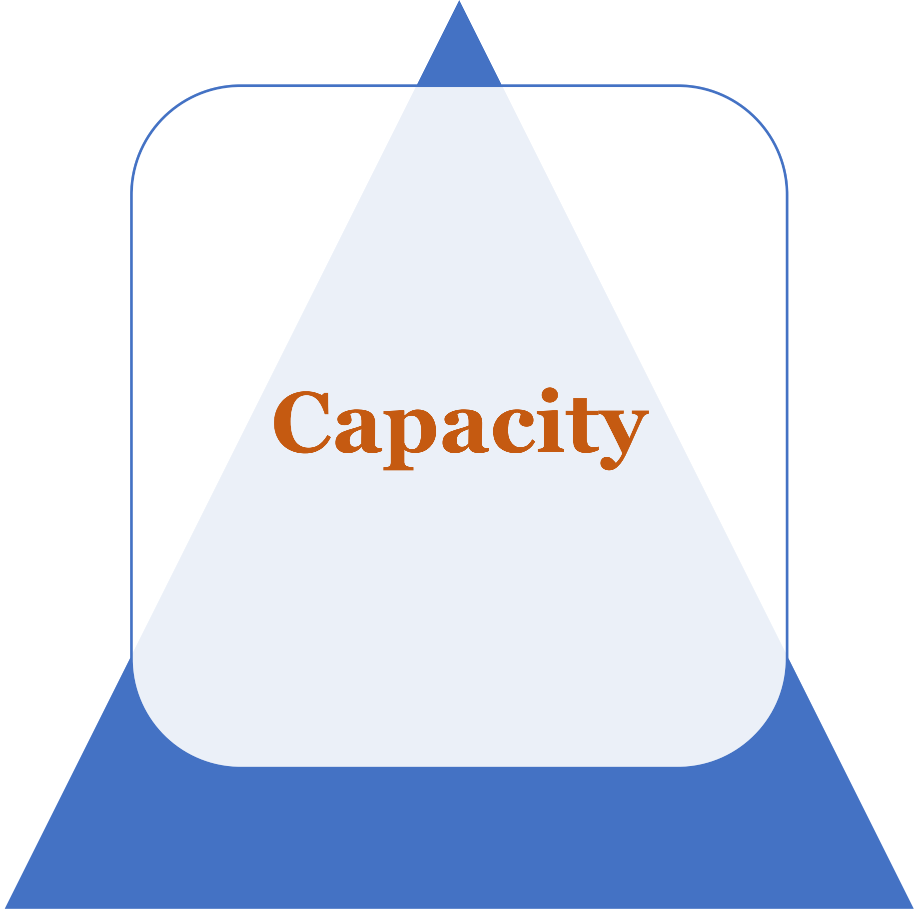
There is a **legal presumption that a patient is fit and competent** to make decisions until a court determines otherwise (or the circumstances clearly indicate incompetence).

Competency

The determination of incompetence is decided by the court.

- Formal processes are outlined by statute and due process afforded to the individual at every step.
- In the context of healthcare decision-making, the legal determination of competence is removed from the physician. That said, physicians are most often called upon as a witnesses in aiding the court's decision.

Issue No. 4



Capacity: The Basis of Informed Consent

- Capacity is the:
  - **ability of a patient to understand**
  - **the benefits, risks of, and alternatives to, a proposed treatment or intervention**. (including no treatment)(1)
  - and to **make and communicate an informed, rational decision**.

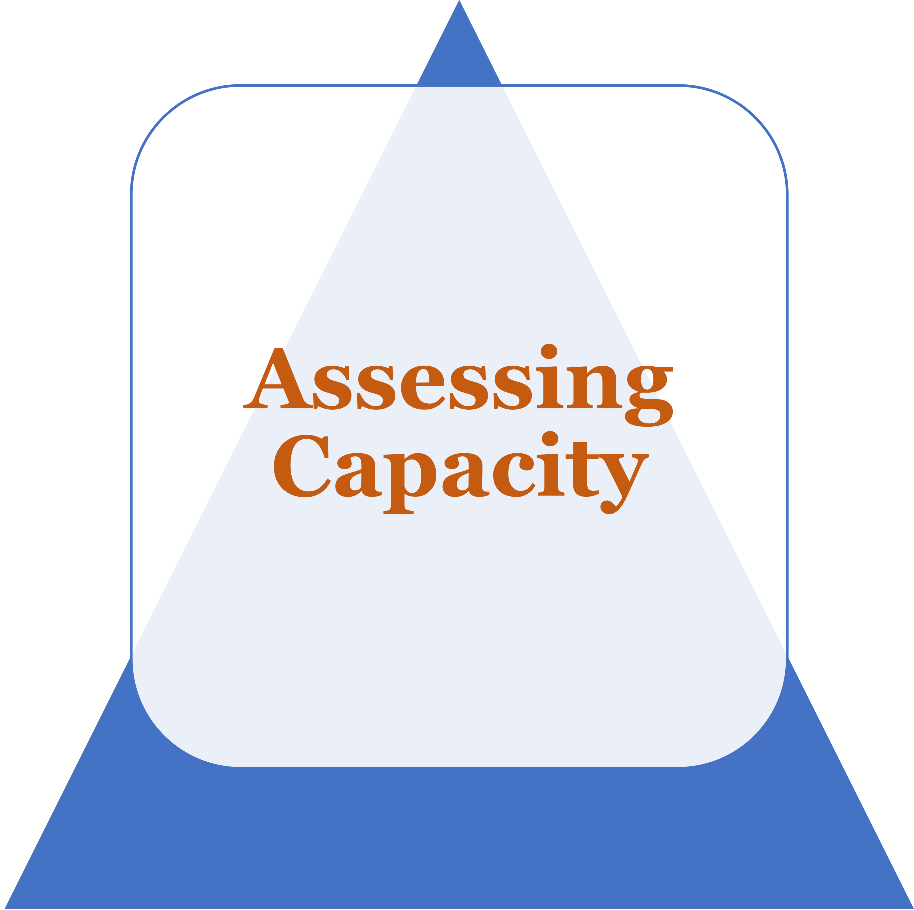
Keep in mind that what is a "rational decision" to the patient may not seem rational to you.

Capacity Determinations are Critically Important

Assessments of decisional capacity determine **whether patients are empowered to make their own health care decisions**, or whether someone else is empowered to make decisions for them.

Fear of medical legal consequences, physician's anxiety, lack of understanding of the rights of patients to refuse treatment, and a misunderstanding of the physician's duty when presented with refusal of medical treatment cause large number of referrals for capacity evaluations.

Issue No. 5



Risk Factors for Impaired Medical Decision-Making Capacity

- Age < 18 years
- Age > 85 years
- Chronic neurologic condition
- Chronic psychiatric condition
- Low education level
- Significant cultural or language barrier

Capacity: Practical Considerations

- Check for **communication barriers** that might impede the patient's understanding of information and/or communications with the physician. Is an interpreter or translator needed? Consider whether the patient is of limited language proficiency (LEP) and that CLAS standards are met. https://thinkculturalhealth.hhs.gov/clas
- Check for **physiological/medical barriers**, such as hearing and vision impairments, dysarthria, or dysphagia. Do other medical reasons exist that may impact the patient's speech or thought processes?
- Ensure the **choice of words and use of complex medical jargon** do not cause confusion. Further inquiry and rewording can improve a patient's understanding and allow them to make informed decisions.

Capacity: When should capacity be assessed?

When decision-making capacity is questionable, and important clinical decisions must be made, the process for assessing decision-making capacity should become more formal and more explicit.

Responsibility for assessing decision-making capacity belongs with the clinician who oversees the patient's care. Because so many things hinge on capacity assessment, all clinicians who are involved in caring for patients have an ethical obligation to understand decision-making capacity and how it is assessed.

A person lacking capacity for one medical decision may have capacity for other decisions. Assessing capacity can be subjective and confusing for clinicians, particularly when patients refuse a recommended treatment, or the treatment involves substantial risk. (7)

Capacity: Four (4) Standards Commonly Recognized to Convey Capacity

1. **Expressing a Choice**. Refers to patients who are seen to lack capacity because they **cannot communicate a treatment choice**, or they vacillate to such an extent that it reflects decisional impairment.

2. **Understanding**. The standard of understanding refers to the ability to **comprehend diagnostic and treatment related information** and has been recognized in many states as fundamental to capacity.

3. **Appreciation**. The standard of appreciation has been interpreted in different ways. It has been described as the **ability to relate treatment information to one's personal situation**. The standard of appreciation especially reflects the **ability to infer the possible benefits of treatment**, as well as **accept or believe the diagnosis**. This standard has been related to the concepts of **insight and foresight**.

4. **Reasoning**. The standard of reasoning involves the **ability to state rational explanations** or to **process information in a logically or rationally consistent manner**.

Case Study

An 88-year-old woman who lives alone presents to the emergency department after a fall. Her sodium level is extremely low, and she is admitted to the hospital. Her outpatient records show that she has not refilled her heart failure medications in more than six months. On day 3 of hospitalization, she states that she is feeling better and wants to go home. Physical examination reveals global muscle weakness and inability to get out of bed without assistance. The inpatient team recommends transfer to a rehabilitation facility, but the patient refuses.

Does this patient appear to lack any of the 4 indicators of capacity? This is an example of a patient who may understand her situation and treatment options but may not appreciate the consequences of her decision. If she is discharged home, where she lives by herself, she will not be able to perform activities of daily living. She does not realize that this will lead to harm.

What can be done? If she continues to insist on hospital discharge, steps can be taken to involve family members or other surrogate decision makers to arrive at a decision that will be acceptable to the patient and is appropriate for her safety.

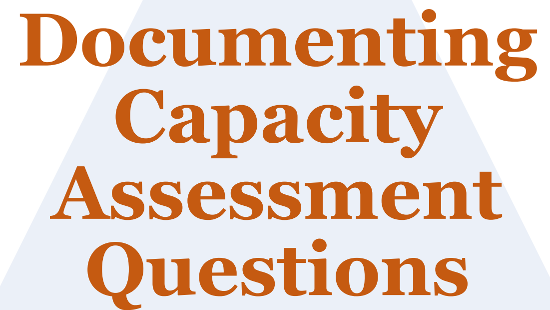
Example taken from the American Academy of Family Physicians Foundation. (6)

Capacity: Surrogates

Once a patient has been evaluated by a physician and **found to lack capacity to make reasoned medical decisions**, the patient cannot exercise the right to choose or refuse treatment and may **require a surrogate to make decisions on their behalf**. (2)

The Emelie Building • 334 N. Senate Avenue, Indianapolis, Indiana 46234 • 317.464.1100 • kkclegal.com

Issue No. 6



Questions to determine the patient's ability to understand treatment and care options

What is your understanding of your condition?

What are the options for your situation?

What is your understanding of the benefits of treatment, and what are the odds that the treatment will work for you?

What are the risks of treatment, and what are the odds that you may have a side effect or bad outcome?

What is your understanding of what will happen if nothing is done?

Tunzi M. Can the patient decide? Evaluating patient capacity in practice. Am Fam Physician. 2001;64(2):301

Questions to determine the patient's ability to appreciate how that information applies to his or her own situation

Tell me what you really believe about your medical condition.

Why do you think your doctor has recommended (specific treatment/test) for you?

Do you think (specific treatment/test) is best for you? Why or why not?

What do you think will actually happen to you if you accept this treatment? If you don't accept it?

Tunzi M. Can the patient decide? Evaluating patient capacity in practice. Am Fam Physician. 2001;64(2):301

Questions to determine the patient's ability to reason with that information in a manner supported by the facts and the patient's own values

What factors/issues are most important to you in deciding about your treatment? What are you thinking about as you consider your decision?

How are you balancing the pluses and minuses of the treatments?

Do you trust your doctor? Why or why not?

What do you think will happen to you now?

Tunzi M. Can the patient decide? Evaluating patient capacity in practice. Am Fam Physician. 2001;64(2):301

Questions to determine the patient's ability to communicate and express a choice clearly

You have been given a lot of information about your condition. Have you decided what medical option is best for you right now?

We have discussed several choices. What do you want to do?

Tunzi M. *Can the patient decide? Evaluating patient capacity in practice.* Am Fam Physician. 2001;64(2):301

Capacity Assessment & Documentation

While the capacity factors and assessment questions herein are examples only, **having written guidelines and procedures will ensure consistency and thoroughness**. The resources you create should be considered flexible and adaptable to the situation at hand.

Issue No. 7

Indiana Case Law: The Gray Areas of Consent & Capacity

State v. Eichhorst, 879 N.E.2d 1144 at 1150 (Ind. Ct. App. 2008)

- Eichhorst was involved in a car accident resulting in a fatality. Hospital nurse drew blood for hospital tests and an additional vial for police.
- Nurse recorded both blood draws in chart.
- Eichhorst's blood alcohol level was over the legal limit.
- In Court, Eichhorst argued that she did not consent to hospital's treatment, and the blood draw was not medically necessary.
- On appeal, the Court held, "Consent to health care treatment is ***not* required in an emergency or when the patient is too intoxicated to give consent**."
- *See* Ind. Code § 34-18-12-9 (providing that consent is not required if the patient is "mentally incapable of understanding the information" regarding the proposed treatment, outcome, and risks and that consent to health care is not required in an emergency)."

Indiana Case Law: The Gray Areas of Consent & Capacity

Est. of Taylor ex rel. Taylor v. Muncie Med. Invs., L.P., 727 N.E.2d 466 (Ind. Ct. App. 2000)

- Patient's 1st stroke left her paralyzed. Living will stated if terminal illness and "no reasonable possibility of recovery," take no "extraordinary means" to prolong life.
- Patient's 2nd stroke left her in a comatose state with no hope of recovery. Patient's family discontinued artificial nutrition and initiated only comfort measures.
- Patient showed signs of discomfort and responsiveness after receiving only sugar water and saline intravenously. After receiving conflicting answers from the patient's family, physician ordered a water-based caloric supplement through a nasogastric tube to prevent her suffering.
- Family chose removal from facility over challenging the physician's decision.
- Patient's Estate sued the facility. The trial court granted summary judgment for facility, and appeal court affirmed holding family could've challenged/enforced the physician's decision, but instead moved patient.

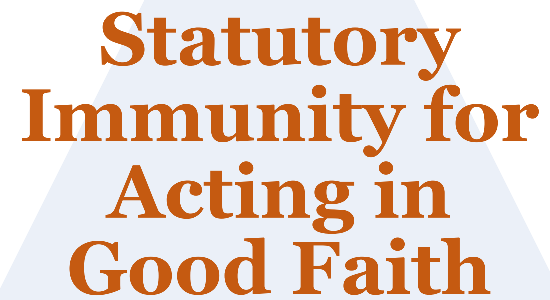
What should the physician have done? What about the parents?

The Gray Areas of Consent and Capacity (cont.)

Generally, decisions of legal surrogates are binding as the patient's own. In the following examples, seeking judicial review may be warranted:

- Provider believes that the family's decision is not what the patient intended or would have wanted.
- Provider believes that the surrogate is not acting in the best interest of the patient. (10)

Issue No. 8



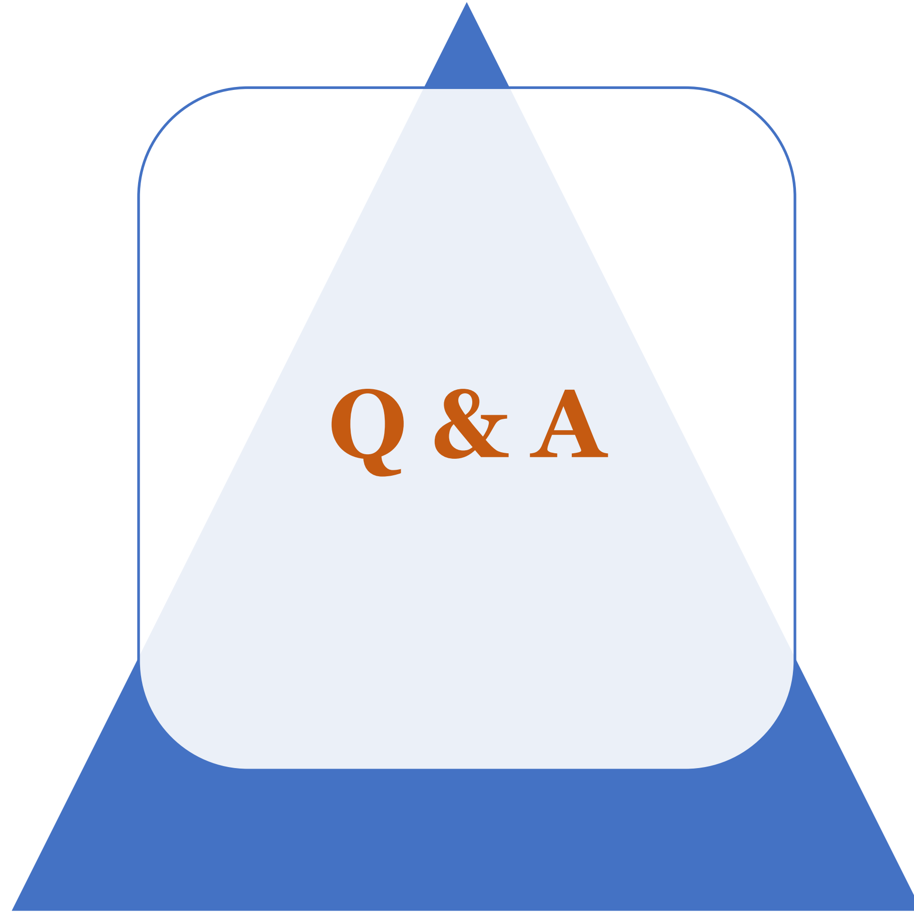
Immunity Examples: Health care providers, consenting persons; good faith requirement

IC 16-36-1-10 Immunity is provided to:

- A provider acting or declining to act in reliance on the consent or refusal of consent of a representative who the provider believes in good faith is authorized to consent.
- A provider who believes in good faith that a representative is incapable of consenting.
- A person who in good faith believes the representative is authorized to consent or refuse to consent to health care for another.

IC 16-36-4-7 Provides that:

- A competent person may consent to or refuse consent for medical treatment, including life prolonging procedures.
- No health care provider is required to provide medical treatment to a patient who has refused medical treatment under this section.
  - No civil or criminal liability is imposed on a health care provider for the failure to provide medical treatment to a patient who has refused the treatment


Q & A

Thank You

Barb Killian, Of Counsel
Katz Korin Cunningham
bkillian@kkclegal.com
317.396.2561

katz.korin.
cunningham.
Attorneys At Law

Works Cited

- (1) Barstow, C., M.D., et al., Evaluating Medical Decision-Making Capacity in Practice, American Family Physician, https://www.aafp.org/afp/2018/0701/p40.html#:~:text=Medical%20decision%2Dmaking%20capacity%20is,the%20basis%20of%20informed%20consent.
- (2) Raphael J. Leo, Competency and the Capacity to Make Treatment Decisions: A Prime for Primary Care Physicians, Prim Care Companion J Clin Psychiatry 131-141 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC181079/ (citing Roth LH, Meisel A, Lidz CW. Tests of competency to consent to treatment. Am J. Psychiatry. 1977; 134:279-284.).
- (3) Raphael J. Leo, Competency and the Capacity to Make Treatment Decisions: A Prime for Primary Care Physicians, Prim Care Companion J Clin Psychiatry 131-141 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC181079/ (citing Black HC. Black's Law Dictionary. 5th ed. St. Paul, Minn: West Publishing Company. 1979 at 257).
- (4) The Hospitalist, https://www.the-hospitalist.org/hospitalist/article/124731/how-do-i-determine-if-my-patient-has-decision-making-capacity.
- (5) Raphael J. Leo, Competency and the Capacity to Make Treatment Decisions: A Prime for Primary Care Physicians, Prim Care Companion J Clin Psychiatry 131-141 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC181079/ (citing Markson LJ, Kern DC, Annas GJ, et al. Physician assessment of patient competence. J Am Geriatr Soc. 1994; 42:1074–1080.).
- (6) American Academy of Family Physicians Foundation, https://www.aafp.org/afp/2018/0701/p40.html#afp20180701p040-b2.
- (7) AMA Journal of Ethics, *Influence Psychiatric Symptoms Decisional Capacity*, https://journalofethics.ama-assn.org/article/influence-psychiatric-symptoms-decisional-capacity-treatment-refusal/2017-05 (May 2017).
- (8) Harvard Medical School, Jennifer Moye, *Assessment of the Capacity to Consent to Treatment (ACCT): Administration and Technical Manual* (2017), https://heartbrain.hms.harvard.edu/files/heartbrain/files/acct_manual.pdf.
- (9) Sabatino, C., Merck Manual, *Default Surrogate Decision Making*, https://www.merckmanuals.com/home/fundamentals/legal-and-ethical-issues/default-surrogate-decision-making (May 2021).
- (10) AMA Journal of Ethics, AMA Code of Medical Ethics' Opinions on Care at the End of Life, https://journalofethics.ama-assn.org/article/ama-code-medical-ethics-opinions-care-end-life/2013-12 (Dec. 2013).

Works Cited

- (11) AMA Journal of Ethics, *Turning Off an Implanted Life-Saving Device, Commentary 2*, https://journalofethics.ama-assn.org/article/turning-implanted-life-saving-device-commentary-2/2007-02.
- (12) AMA Journal of Ethics, *Is Artificial Nutrition and Hydration Extraordinary Care?*, https://journalofethics.ama-assn.org/article/artificial-nutrition-and-hydration-extraordinary-care/2007-05.
- (13) AMA Journal of Ethics, *Faith-Based Decisions: Parents Who Refuse Appropriate Care for Their Children, Commentary 1*, https://journalofethics.ama-assn.org/article/faith-based-decisions-parents-who-refuse-appropriate-care-their-children-commentary-1/2003-08.
- (14) The Guardian, *Letting them die… parents refuse medical help for children in the name of Christ*, https://www.theguardian.com/us-news/2016/apr/13/followers-of-christ-idaho-religious-sect-child-mortality-refusing-medical-help (April 2016).
- (15) Child USA, Indiana Medical Neglect Statutes, https://childusa.org/law/indiana/medical-neglect-statute/.
- (16) *See* Indiana Code § 31-34-1 et seq.
- (17) *See* Indiana Code § 35-45-1 et seq.
- (18) Vatican, *Declaration on Euthanasia*, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html.
- (19) United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, https://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf.
- (20) Gilman & Bedigian, https://www.gilmanbedigian.com/can-consent-be-limited-or-withdrawn/.