

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date July 3, 1968

To Allan L. Robbins, Warden Dept. Maine State Prison

From Courtland D. Perry, Asst. Atty. Gen'l. Dept. Mental Health and Corrections

Subject Inmate Consent to Medical and Surgical Procedures.

## FACTS:

It becomes necessary from time to time in the administration of the Maine State Prison to have inmates treated medically and sometimes surgically, some procedures being administered within the prison hospital and other procedures; mainly, surgical, sometimes in emergency situations being administered at the Knox County General Hospital at Rockland, Maine

## QUESTION #1:

Must written consent to the performance of routine medical procedures be obtained from an inmate?

## ANSWER #1:

No.

## OPINION #1:

An inmate's consent to routine medical procedures, such as physical examinations, administration of common medication, taking of blood samples for testing, and the like, is implied from the fact that he submits to such procedures. Consent to more serious procedures may also be implied from the inmate's submission to those procedures, if he had been fully informed by the physician as to what is to take place. For the more serious medical procedures and for major operations, however, it is preferable for the physician to have the inmate's consent in writing to facilitate proof of the consent, in the event of a dispute or litigation.

## QUESTION #2:

Can the Warden or his representative consent on behalf of an inmate to the performance of a medical or surgical procedure?

- a. When the inmate is able to give written consent?
- b. When the inmate is unconscious or seriously mentally retarded?

ANSWER #2 a. No.

#2 b. Yes. (qualified)

## OPINION #2 (a) (b):

An inmate at the Maine State Prison despite the Warden's custody of his person, retains the right to determine whether medical and surgical procedures will be

performed upon him and, therefore, if able to consent is the only person who may consent to such procedures, the only exceptions to this which appear operative as to an inmate are found, in the situation wherein a diseased inmate by virtue of his disease threatens the health and wellbeing of other inmates, in which case the Warden would have the duty to cause treatment to be administered, protestations of the inmate, notwithstanding; and in the situation wherein the violence of an inmate threatens the safety and wellbeing of other inmates requiring the administration of drugs. (See Opinion of the Attorney General April 28, 1967).

If surgery upon an inmate is required in order to save life or limb, i.e., in an emergency and the inmate is unconscious or due to mental incapacity is incapable of giving informed written consent, it is the general rule that such surgery may be performed absent consent without risk of incurring liability, subject to the following provisos:

".....(a) The injured person must be unconscious (or otherwise unable to give a valid consent, e.g., a child of tender years or a person of unsound mind).

"(b) The situation must be such as makes it actually or apparently necessary to act before there is an opportunity to obtain consent.

"(c) The surgeon in the exercise of his best judgment must believe that the injured person will die, or lose a member, or be seriously impaired in health, unless an operation is performed at once.

"(d) Though this is a counsel of caution, not a legal requirement, the surgeon ought to hold a consultation with one or more medical colleagues, if time permits, and obtain their supporting opinions to the effect that the essential conditions for emergency action do exist, (i.e., a, b, and c above). Such opinions will be most important, should any later legal complications arise....."

Shartel and Plant, THE LAW OF MEDICAL PRACTICE, 14, 15 (1959)

As to the inmate patient incapable of giving informed consent due to mental retardation where the existence of an emergency is subject to question the following language of the Court in Steel vs. Woods, 327 SW 2d 187 (Mo. 1959) appears pertinent:

"Depending on the circumstances, seriousness of the need, and urgency, and perhaps time or interval of the patient's mental incapacity, circumstances may require and make it the duty of the physician to communicate with and advise the spouse or other family members who are available and competent to advise with or speak for the patient or take other steps to bring understanding of the need home to the patient."

In such case the Warden or his representative, of course, if practicable would assist the physician or surgeon in locating the spouse or near relative.

Absent emergency, but when the inmate patient is for any reason incapable of giving informed consent to surgery and the spouse or close relatives are non-existent, or their whereabouts are unknown, the Warden or his delegate might consent to the surgical procedures on behalf of the inmate patient, such consent as a last resort would probably withstand attack by the affected inmate, since granted in the best interest of the inmate

and all usual means for obtaining consent have been exhausted.

QUESTION #3:

Must written consent be obtained for major medical or any surgical treatment inside the Maine State Prisons?

ANSWER #3:

Yes.

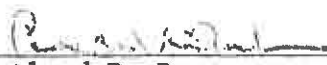
OPINION #3:

A major medical procedure or surgical procedure to be performed upon an inmate patient requires his written informed consent as discussed in this Memorandum, whether to be performed within the prison or within an outside hospital.

Along with your request for our opinion re the above questions you forwarded a consent form used at the prison when an inmate is in need of surgery. This form is sadly lacking in language considered necessary today for the protection of the surgeon; we urge the discontinuance of its use. (The form is attached for the file).

Attached is a consent form which is considered to provide necessary protection for the surgeon. Forms of this type have not been readily accepted by surgeons, except those who have been involved in litigation with the benefit of protection of such form; the major objection is its detail. Also attached is an explanation sheet relating to the use of this consent form.

We urge that the prison physician/surgeon appointed under Title 34, M.R.S.A., 1964, §631, use the last mentioned form prior to the performance of major medical procedures (including diagnostic) and surgical procedures upon a State Prison inmate, whether to be performed in the prison hospital or at an outside hospital, when such procedures are to be performed by the prison physician/surgeon (it is beyond the authority of this office to impose its advice as to the nature and content of consent forms upon physicians and surgeons other than the prison physician/surgeon performing medical or surgical procedures upon prison inmates).

  
Courtland D. Perry  
Assistant Attorney General

[Opinion of this office dated June 9, 1959, sanctioning general consent to surgical procedures without specification of condition, remedy or risk or scope of surgery and Opinion of this office dated November 18, 1960, sanctioning general consent to surgery spanning period of commitment and encompassing any procedures performed within that period, subject to the continuing life of the person signing the consent on behalf of the patient are considered obsolete and are supplanted by this Opinion approving specific and separate consents relating to each instance of need for surgical procedures.]



STATE OF MAINE  
Maine State Prison  
THOMASTON, MAINE 04861  
354-2535

*MSP release sheet.*

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*TO WHOM IT MAY CONCERN:*

Upon recommendation of Doctor

I hereby give permission to have the following operation performed:

Signed:

*Inmate sign*

Witness:

Witness: .....

## CONSENT TO OPERATION OR OTHER PROCEDURE

Patient: \_\_\_\_\_ Case No. \_\_\_\_\_ Date: \_\_\_\_\_  
a.m.  
Time: \_\_\_\_\_ p.m.

1. I hereby authorize Dr. \_\_\_\_\_ and/or such assistants as may be selected by him, to remedy the condition or conditions which appear indicated by the diagnostic studies already performed.

\_\_\_\_\_  
(Explain the nature of the condition and the need to remedy such condition)  
\_\_\_\_\_  
\_\_\_\_\_

2. The procedure(s) necessary to remedy my condition (has, have) been explained to me by Dr. \_\_\_\_\_ and I understand the nature of the procedure to be: \_\_\_\_\_

\_\_\_\_\_  
(A description of the procedure(s) in the language of laymen)  
\_\_\_\_\_  
\_\_\_\_\_

3. It has been explained to me that during the course of the operation, unforeseen conditions may be revealed that necessitate an extension of the original procedure(s) than those set forth in Paragraph 2. I therefore authorize and request that the above named surgeon, his assistants, or his designees perform such surgical procedures as are necessary and desirable in the exercise of professional judgment. The authority granted under this Paragraph 3 shall extend to remedying all conditions that require treatment and are not known to Dr. \_\_\_\_\_ at the time the operation is commenced.

4. I have been made aware of certain risk(s) and consequences that are associated with the procedure(s) described in Paragraph 2. These are: \_\_\_\_\_

\_\_\_\_\_  
(A description of the risks and consequences  
\_\_\_\_\_

\_\_\_\_\_  
that are involved in this particular procedure)  
\_\_\_\_\_

5. I have also been informed there are other risks, attendant to the performance of any surgical procedure. I am aware that the practice of medicine and surgery is not an exact science and I acknowledge that no guarantees have been made to me concerning the results of the operation or procedure.

EXPLANATION OF CONSENT FORM  
The consent form should be completed at the time the physician explains to the patient the diagnostic or therapeutic procedure he plans to have performed.

*Time of the consent.* The exact time that the consent is procured is important. It provides evidence that the consent was procured at a time when the patient was competent to sign the consent and not under preoperative sedation. The time is particularly important when the form is signed on the same day that the procedure is carried out, because in such instances there may be an inference that the patient may not have been competent to consent at the time the form was completed.

*Paragraph 1.* A space is provided so that the condition that is to be remedied can be explained, and the need to remedy the condition stated. The reason for placing the emphasis on the condition is grounded upon the fact that courts have found it easier to imply that a patient has consented to all reasonable steps to remedy his condition, though the method used may differ from the one explained to him.<sup>47</sup>

When the form is used for a diagnostic procedure, the nature of the condition disclosed by the tentative diagnosis should be stated in the space provided.

*Paragraph 2.* Naming the physician who explained the contemplated procedure to the person signing the form reinforces the statement that an explanation took place. Placing the burden of explanation upon the patient's physician is consonant with the physician-patient relationship and guarantees that the procedure will be explained by one competent to do so. The description on the consent form should be written in simple language understandable to the layman, rather than in technical terminology. This kind of explanation of the procedure will help support the position that the patient received an explanation of the procedure that he could understand. Absent such an understanding a patient's consent may be deemed ineffective.

If another procedure to remedy the same or another condition becomes necessary at some later date during the patient's hospitalization, a second consent form should be procured. If it is known at the time consent is being initially procured that a series of procedures is indicated over a period of time, then the series can be described and consent to the entire course of treatment procured.

When the form is used for a diagnostic procedure, a description of the procedure to be used to form a more definitive diagnosis should be stated in the space provided. It is also suggested that the physician explain to the patient

<sup>47</sup> *McGuire v. Rix*, 118 Neb. 434, 225 N.W. 120 (1929); see *Knowles v. Blue*, 209 Ala. 27, 95 So. 481 (1923); *State to the Use of Tanney v. Housekeeper*, 70 Md. and note on the form the most likely remedial procedures that would be called for if the tentative diagnosis is confirmed.

*Paragraph 3.* This paragraph is included