MOUNT SINAI HOSPITAL
Joseph and Wolf Lebovic Health Complex

III-h-5-20

GENERAL MANUAL – POLICY/PROCEDURE

Effective Date: May, 1992
Revised: December, 1996
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Issued By:- Legal Counsel and Corporate Privacy Officer & Ethics Committee
Approved by:- Medical Advisory Council

Title:- **CONSENT TO TREATMENT POLICY**

Health Care Consent Act 1996; Substitute Decisions Act 1992;
Mental Health Act (Ontario)

1. Philosophy

The Consent to Treatment Policy has the following objectives:

a. to ensure the rights of clients to be fully informed about the treatment being proposed, the consequences of having or not having the treatment and alternatives to proposed treatments;

b. to ensure a client's wishes about clinical treatment be followed if the client later becomes mentally incapable of making such decisions;

c. to protect those clients who are mentally incapable and provide for someone else to make decisions for clients who are incapable.

2. Policy

2.1 Consent

An informed consent, either expressed or implied, must be obtained from the capable client or, if incapable, from a Substitute Decision Maker before any treatment is administered except under conditions specified in the Health Care Consent Act 1996 (e.g. emergency) (see Section 2.4 of Consent to Treatment Policy).

Consent is defined as a voluntary agreement to what another person proposes regarding a course of action.

For consent to be valid:

a. it must relate to the treatment;
b. it must be informed;
c. it must be given voluntarily; and,
d. it must not have been obtained through misrepresentation or fraud.

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Consent to Treatment Policy, (Continued)

A consent is informed if, before giving it:

a. the client received the information that a reasonable person in the same circumstance would require in order to make a decision;

b. and the health practitioner responded to the client's requests for other information about the following matters:

i) the treatment;
ii) alternative courses of action;
iii) the material effects, risks, and side effects of the treatment and the alternative courses of action; and,
iv) the consequences of not having the treatment.

2.2 Documentation

Consent is a process. A signed Consent Form by itself does not constitute consent. The explanation given by the health practitioner about the proposed treatment is a key element in the consent process. The consent form is the written confirmation, by the client or Substitute Decision Maker, that explanations were indeed given and that the client or Substitute Decision Maker has agreed to the proposed procedure. If there is a prescribed form that applies to the treatment or to the circumstances, the form shall, if possible, be used. Whenever consent is required, health practitioners are advised to document the fact that informed consent has been obtained. A signed form for consent is not necessary except in designated situations.

If the appropriate consent form is not available when it is required, a note should be made in the Health Record Progress Notes.

A signed consent form shall not extend beyond six (6) months from the date of signature, unless the treatment extends beyond six (6) months (e.g. course or plan of treatment). A freshly signed consent, even if less than six (6) months old, must be obtained when there is a significant change in the expected benefits, material risks or material side effects of the treatment to which the patient has consented. The consent form must be signed by the client or if the client is incapable by a Substitute Decision Maker. (See Appendix 34: Consent - Surgery, Special Procedures, Case Room and Emergency Treatment).

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2.3 Telephone Consent

In certain circumstances, a telephone consent may be acceptable; for example, when the Substitute Decision Maker can only be reached by phone. This consent is obtained by means of a 3-way conversation. The person obtaining the consent and the witness to the conversation co-sign the form.

2.4 Substitute Decision Maker

If a health practitioner proposes a treatment to a client who is, in his or her opinion, incapable with respect to the treatment, consent may be given or refused on the client's behalf by a Substitute Decision Maker who is referred to in one of the following paragraphs and ranked in the following order:

1. Guardian of the Person with authority to give/refuse consent.
2. Attorney for Personal Care with authority to give/refuse consent.
3. The Representative appointed by the Consent and Capacity Board (CCB) with authority to give/refuse consent.
4. Spouse or partner[1]
5. Child or parent, Children's Aid Society (CAS) or other person lawfully entitled to give/refuse consent (does not include access parent).
6. Access Parent (non-custodial parent with right of access only).
7. Brother or sister.

[1] **Spouse:** a person of the opposite sex to whom the person is married, or with whom the person is living in a conjugal relationship outside marriage, if the two persons have cohabited for a least one year, are together parents of a child, or have together entered into a cohabitation agreement under Section 53 of the Family Law Act.

Partners: two persons are "partners" if they have lived together for a least one year and have a close personal relationship that is of primary importance in both persons' lives.

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2.4 Substitute Decision Maker (Continued)

8. Any other relative (by blood, marriage or adoption).

9. The Public Guardian and Trustee (PGT) (last resort).

In order to qualify as a Substitute Decision Maker, the Substitute Decision Maker must meet the following requirements:

a) be capable with respect to the treatment;
b) be at least 16 years of age unless he/she is incapable person's parent;
c) not be prohibited by a court order or separation agreement from having access to the incapable person or giving/refusing consent on his/her behalf;
d) be available (i.e. can be contacted within a reasonable time, in the circumstances to obtain consent/refusal);
e) is willing to assume responsibility of giving/refusing consent;
f) believes the incapable person has no guardian with authority to consent; no attorney for personal care with authority to consent; and, no CCB appointed representative, and that no Substitute Decider at the same or a higher rank would object to him/her making the decision;
g) is either the Guardian, Attorney for Personal Care of CCB appointed representative, and believes no higher ranking Substitute Decider exists.

EXCEPTIONS - Emergency Treatment Without Consent

i) Incapable Person

A treatment may be administered without consent to a person who is incapable with respect to the treatment, if, in the opinion of the health practitioner proposing the treatment,

a) there is an emergency; and

b) the delay required to obtain a consent/refusal on the person's behalf will prolong the suffering that the person is apparently experiencing or will put the person at risk of sustaining serious bodily harm.

ii) Capable Person

A treatment may be administered without consent to a person who is apparently capable with respect to the treatment, if, in the opinion of the health practitioner proposing the treatment,

a) there is an emergency;
b) the communication required in order for the person to give/refuse consent to the treatment cannot take place because of a language barrier or because the person has a disability that prevents the communication from taking place;
c) steps that are reasonable in the circumstances have been taken to find a practical means of enabling the communication to take place, but no such means has been found;

d) the delay required to find a practical means of enabling the communication to take place will prolong the suffering that the person is apparently experiencing or will put the person at risk of sustaining serious bodily harm; and

e) there is no reason to believe that the person does not want the treatment.

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Consent to Treatment Policy, (Continued)

3. Protocol

3.1 Determine capacity to consent to proposed treatment in accordance with the Health Care Consent Act and regulation (See Section 4.1 of Consent to Treatment Policy). A health practitioner shall presume that
a client is capable with respect to a treatment unless the health practitioner has reason to believe that the client may be incapable with respect to the treatment.

3.2 If the client is capable, treat if consent is obtained or implied. Do not treat, if consent is refused. If client is capable, but communication is not possible, treat without consent if grounds exist for emergency treatment (See Section 2.4 of Consent to Treatment Policy).

3.3 If client is incapable, determine if grounds exist for emergency treatment without consent. If so, identify Substitute Decision Maker and determine if Substitute Decision Maker available. If Substitute Decision Maker available, go to Step 3.7. If Substitute Decision Maker not available, treat client without consent, and continue to search for Substitute Decision Maker.

3.4 If no grounds exist for emergency treatment without consent, follow guidelines of professional governing body to inform client in non-psychiatric facility of consequences of incapacity finding. In a psychiatric facility[2], provide written notice of incapacity finding to client and properly notify rights advisor (See Rights Advice Policy III-h-21-22).

3.5 Determine if client requests a review of incapacity finding. If no, go to Step 3.6. If yes, await decision of CCB regarding capacity. If CCB finds client incapable, go to Step 3.6. If CCB finds client capable, obtain consent/refusal from client.

3.6 Identify Substitute Decision Maker.

[2]The patient is considered to be in a psychiatric facility if he/she is being treated for a mental disorder by a psychiatrist. The patient, therefore, may or may not be physically located in the Psychiatry In-Patient Unit.

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3.7 Obtain consent or refusal from Substitute Decision Maker. If Substitute Decision Maker consents, treat client. If Substitute Decision Maker refuses, do not treat client. (See Section 4.6 of Consent to Treatment Policy for exceptions).

3.8 The witnessing of the signature on any signed consent for surgery or other medical treatment, will be performed by a Resident, or Attending Physician.

4. Procedure

4.1 Determine Capacity

Determine if the client is capable of consenting to the proposed treatment by applying the following standards and procedures:

4.1.1 In determining whether a client is capable with respect to a proposed treatment, a health practitioner shall exercise his or her professional judgement.

4.1.2 A health practitioner shall presume that a client is capable with respect to treatment unless the health practitioner has reason to believe that the client may be incapable with respect to treatment.

4.1.3 A health practitioner shall not presume that a client is incapable with respect to a proposed treatment based solely on:

a. the existence of a psychiatric or neurological diagnosis,
b. the existence of a disability, including a speech or hearing impairment,
c. a refusal of a proposed treatment that is contrary to the advice of the health practitioner or of another person,
d. a request for an alternative treatment, or
e. the client's age.

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4.1.4 A health practitioner may have reason to believe that the client may be incapable with respect to a proposed treatment based on the following observations:

a. the client shows evidence of confused or delusional thinking,
b. the client appears unable to make a settled choice about treatment,
c. the client is experiencing severe pain or acute fear or anxiety,
d. the client appears to be severely depressed,
e. the client appears to be impaired by alcohol or drugs, and
f. any observations which give rise to a concern about a client's capacity, including observations about the client's behaviour or communication.

4.1.5 If a health practitioner believes that a client may be incapable with respect to a proposed treatment, he or she shall consider the following criteria in order to determine whether, in his or her opinion, the client is able to understand the information that is relevant to making a decision concerning the treatment:

a. the client must demonstrate an understanding of:

   i) the condition for which the treatment is proposed,
   ii) the nature of the proposed treatment,
   iii) the risks and benefits of the treatment, and
   iv) the alternatives to the treatment presented by the health practitioner, including the alternatives of not having treatment.

b. If the health practitioner is of the opinion that a client is able to understand the information that is relevant to making a decision concerning the treatment, the health practitioner shall consider the following criteria in order to determine whether, in his or her opinion, the client is able to appreciate the reasonably foreseeable consequences of a decision:

   i) the client must be able to acknowledge the fact that the condition for which the treatment is recommended may affect him or her.

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ii) the client must be able to assess how the proposed treatment and alternatives to the treatment presented by the health practitioner, including the alternative of not having the treatment, could affect the client's quality of life.

iii) the capable client's choice of treatment must not be substantially based on a delusional belief.

4.1.6 When giving a client information about a treatment, the health practitioner shall use, to the best of his or her ability, a means of communication that takes the client's education, age, language, culture, and special needs into account.

The health practitioner proposing the treatment will determine if the client is capable to consent to the proposed treatment by applying the definition in the Health Care Consent Act.

4.2 If Client is Capable, Treat if Person Consents

If the client is capable, obtain an informed consent or refusal from the client: Provide information to the client, in accordance with the requirements of the Act, about the treatment, alternative courses of action, material effects, risks and side effects in each case and consequences of not having the treatment that a reasonable person in the same circumstance would require in order to decide.

Treat if the client consents.

If the is incapable, or capable but unable to communicate, proceed to Section 4.3 of the Consent to Treatment Policy.

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EXCEPTIONS to 4.2

If the client has a Guardian of the Person with authority to give/refuse consent to the treatment, the guardianship continues in effect until it is terminated by application to court.

4.3 If Client is Incapable, or Capable but Unable to Communicate, Determine if Grounds Exist for Emergency Treatment Without Consent

i) Incapable Client

Determine if incapable client is experiencing severe suffering or is at risk of suffering serious bodily harm if treatment is not administered promptly (examinations and diagnostic procedures that are reasonably necessary may be performed, without consent, to make this determination).

If not emergency, proceed to Section 4.4 of Consent to Treatment Policy.

If an emergency, determine whether it is reasonably possible to obtain a decision from a Substitute Decision Maker or whether the delay required to do so will prolong the client's suffering or put the client at risk of serious bodily harm. If a Substitute Decision Maker is available, proceed to Section 4.6 of Consent to Treatment Policy. If a Substitute Decision Maker is not available, start treatment. Treatment may continue as long as reasonably necessary to find a Substitute Decision Maker, or until client's capacity returns, in which case the client's own decision to give or refuse consent to the continuation of treatment governs (unless client has Guardian of the Person with authority to give/refuse consent to the treatment).

Continue efforts to find Substitute Decision Maker.

Document the clinical decision regarding the grounds for emergency treatment without consent on the client's record.

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If client needs new treatment but is no longer an emergency, proceed to Section 4.4 of Consent to Treatment Policy.

If Substitute Decision Maker is available and refuses to consent to the treatment, a health practitioner may administer treatment to an incapable patient despite the refusal of the Substitute Decision Maker if the health practitioner is of the opinion that,

a. the incapable client is experiencing severe suffering or is at risk of suffering serious bodily harm if the treatment is not administered promptly; and

b. the Substitute Decision Maker who refused consent did not comply with the principles for giving/refusing consent on an incapable person's behalf (see Section 4.6 of Consent to Treatment Policy).

ii) Capable Client

If a client is capable, but communication is not possible, treatment may be administered and continued without consent in an emergency situation, only for as long as is reasonably necessary to find a practical means of enabling communication to take place so that the client can give/refuse consent to the continuation of treatment.

EXCEPTIONS to 4.3

1. Health Practitioner has grounds to believe, or is advised by an incapable client's Guardian, of the Person, Attorney for Personal Care, or Representative appointed by the CCB, with authority to make decisions, that the client while capable, and at least 16 years of age, expressed a wish applicable to the circumstances, to refuse consent.

2. If the client becomes capable, his or her own decision to give or refuse consent does not govern if the client has a Guardian of the Person with authority to give/refuse consent to treatment.

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3. The health practitioner cannot admit or treat an incapable client (16 years of age or more) who objects to the admission and treatment for a psychiatric disorder, unless there is a Guardian of the Person with the authority for giving/refusing consent to the psychiatric admission and treatment, or an Attorney for Personal Care with that authority; unless involuntary admission is authorized under the Mental Health Act.

4.4. If Client is Incapable and it is Not an Emergency, Determine the Requirements for Rights Notification and Give Notification as Required.

i) Non-Psychiatric Facility

If a health practitioner finds a client incapable with respect to a proposed treatment in a non-psychiatric facility, and it is not an emergency, the health practitioner is responsible for following the guidelines established by the health practitioner's governing body to notify the client of the consequences of the incapacity finding.

If the client disagrees with the need for a Substitute Decision Maker because of the finding of incapacity, or disagrees with the involvement of the present Substitute Decision Maker, the health practitioner must advise the client of his/her options, i.e.:

a) finding another Substitute Decision Maker of the same or more senior rank; and/or

b) applying to the CCB for a review of the finding of incapacity.

The health practitioner should assist a client if he/she expresses a wish to exercise these options.

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CONSENT TO TREATMENT POLICY (Continued)

ii) Psychiatric Facility[3]

If a health practitioner finds a client incapable with respect to a proposed treatment in a psychiatric facility, and it is not an emergency, the health practitioner must:

a) give written notice of incapacity finding to client; and

b) notify a rights advisor (see Rights Advice Policy - III-h-21-22).

In the case of either (i) or (ii) above, except in an emergency, treatment must be deferred in the following instances:

a) the client intends to apply or has applied to the CCB for a review of an incapacity finding and the client has not applied to the CCB in the last six months for a review of an incapacity finding; or

b) the client intends to apply or has applied to the CCB for an appointment of a representative; or another person intends to apply or has applied to the CCB to be appointed as the incapable client's representative and no such application has been brought to the CCB in the last six months.

In such instances, the health practitioner must take reasonable steps to ensure treatment is not begun:

a) until 48 hours has elapsed since the health practitioner was first informed of the intended application when no such application is brought;

b) until the application to the CCB is withdrawn;

c) until the CCB has rendered a decision and the health practitioner is not informed of an intent to appeal;

[3]The patient is considered to be in a psychiatric facility if he/she is being treated for a mental disorder by a psychiatrist. The patient, therefore, may or may not be physically located in the Psychiatry In-Patient Unit.

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ii) Psychiatric Facility[4] (Continued)

d) if notified of an intent to appeal, until the period commencing the appeal has elapsed (where no appeal is being commenced); or

e) until the appeal of the CCB's decision has been finally disposed of.

A client who has a Guardian of the Person or an Attorney for Personal Care with authority to give/refuse consent cannot apply to the CCB for a review of the incapacity finding.

4.5 Identify Substitute Decision Maker

The health practitioner obtaining a consent for treatment for an incapable person is responsible for identifying the patient's Substitute Decision Maker.

Determine if client has a Guardian of the Person with authority to give/refuse consent to treatment, an Attorney for Personal Care with authority to give/refuse consent to treatment, or a Representative Appointed by the CCB.

If a relative is present and willing to make decisions, ensure that the relative meets the requirements to qualify as a Substitute Decision Maker as listed in Section 2.4 of the Consent to Treatment Policy.

If no Guardian of the Person, Attorney for Personal Care, Representative Appointed by the CCB or relative is available, capable and willing to assume the responsibility for making decisions, or if equal-ranking relatives cannot agree, contact the PGT, which is the decision maker of last resort (phone: (416)
314-2788).

[4]The patient is considered to be in a psychiatric facility if he/she is being treated for a mental disorder by a psychiatrist. The patient, therefore, may or may not be physically located in the Psychiatry In-Patient Unit.

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4.6 Obtain Consent from Substitute Decision Maker

Provide information to the Substitute Decision Maker, in accordance with the requirements of the Act. The Substitute Decision Maker shall give/refuse consent to a treatment in accordance with the following principles:

a) If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give/refuse consent in accordance with the wish.

b) If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person's best interests.

This would include considering the following factors:

a) the values and beliefs that the incapable person held when capable and would still act on if capable,
b) any wishes expressed by the incapable person;
c) whether treatment is likely to improve the condition or well being of the client; prevent the condition or well being from deteriorating; or reduce the extent to which or rate at which the condition or well being of the client is likely to deteriorate;
d) whether the client's condition or well-being is likely to improve or deteriorate without the treatment;
e) whether the benefit expected from the treatment outweighs the risk of harm to the client; and
f) whether a less restrictive or less intrusive treatment would be as beneficial as the proposed treatment.

Respond to Substitute Decision Maker requests for other information about the treatment, alternative courses of action, and potential outcomes.

If a Substitute Decision Maker is required to refuse consent to a treatment because of a wish expressed by the incapable person while capable and at least 16 years of age, the Substitute Decision Maker may apply to the CCB for permission to consent to the treatment despite the wish.

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Record the Substitute Decision Maker's consent or refusal in the patient's health record.

If Substitute Decision Maker consents, administer the treatment.

If Substitute Decision Maker refuses, do not administer the treatment.

EXCEPTIONS to 4.6

If the health practitioner is of the opinion that the client is experiencing severe suffering or is at risk of serious bodily harm if treatment is not administered promptly, and no Substitute Decision Maker is available, or if available the Substitute Decision Maker did not comply with the principles for giving/refusing consent on an incapable person's behalf, treatment may still proceed.

The health practitioner may apply to the CCB to have the CCB substitute its own decision whether to refuse or consent to treatment in a non-emergency situation, if the health practitioner believes that the Substitute Decision Maker is not acting in accordance with the wishes of the incapable patient.

4.7 Non-Emergency Treatment Decisions from the Public Guardian & Trustee

If the client is incapable and no other Substitute Decision Maker is available and willing to make treatment decisions, or if Substitute Decision Makers with equal authority to make the decision disagree whether to give or refuse consent, then:

a. The Health Practitioner proposing the treatment places a telephone call to the Office of the Public Guardian and Trustee between 8:00 a.m. and 6:00 p.m., 7 days a week @ (416) 314-2788.

b. A Treatment Decisions Health Information Questionnaire will be filled out by Public Guardian and Trustee staff during conversation.

c. Health Practitioner Confirmation form to be faxed to the Public Guardian and Trustee @ (416) 314-2637.

d. The Public Guardian and Trustee may wish to discuss the details of the case with the Health Practitioner.