

CALCASA
PRESENTS

CALIFORNIA
SEXUAL ASSAULT RESPONSE
TEAM
(SART)
MANUAL

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PATIENT CONSENT ISSUES

Patient Rights

Patients have the right to refuse an examination for the purpose of collecting evidence. Consent for evidence collection, once given, can be withdrawn at any time during the examination. Patients have the right to refuse the collection of reference specimens, such as pubic and head hair; blood and/or saliva for typing; and blood and/or urine for toxicology.

These four consent items are on the OCJP 923: Sexual Assault Forensic Medical Report:

- I understand that a forensic medical examination for evidence of sexual assault at public expense can, with my consent, be conducted by a health care professional to discover and preserve evidence of the assault. If conducted, the report of the examination and any evidence obtained will be released to law enforcement authorities. I understand that the examination may include the collection of reference specimens at the time of the examination or at a later date. I understand that I may withdraw consent at any time for any portion of the examination.
- I understand that collection of evidence may include photographing injuries and that these photographs may include the genital area.
- I hereby consent to a forensic medical examination for evidence of sexual assault.
- I understand that data without patient identity may be collected from this report for health and forensic purposes and provided to health authorities and other qualified persons with a valid educational or scientific interest for demographic and/or epidemiological studies.

Minors: Consent Issues

- Minors, 12 years of age and older, may give consent to the provision of medical care related to the diagnosis or treatment of a sexual assault and the collection of evidence (Family Code Section 6927 and 6928).
- Minors, 12 years of age or older, may give consent to the provision of medical care related to the prevention of treatment of pregnancy (Family Code Section 6925).
- Minors, 12 years of age or older, may give consent to the provision of medical care related to the diagnosis or treatment of sexually transmitted diseases (Family Code Section 6926).
- Consent given by a minor is not subject to disaffirmance because of minority (Family Code Section 6921). This means that a minor's rights cannot be taken away by an adult.
- Family Code Section 6500 defines a minor as an individual who is under 18 years of age.
- For suspected child abuse cases, parental consent is not required to examine, treat or collect evidence. In the absence of parental consent or in case of parental refusal, children must be taken into protective custody by a child protective agency in order to perform the examination.

Minors: Non Consent Issues

- Non-consent by minors
Since California law clearly establishes a minor's right to consent, the reverse is also true; they have the right to refuse consent. Questions regarding minors' rights should be directed to the District Attorney's Office or to hospital counsel.
- Non-consent by children under age 12
The conventional and collective wisdom of child abuse experts is to never force a sexual abuse forensic medical examination upon a child. This can have the effect of terrorizing the child and rekindling the memories of victimization. It can also create fear of healthcare providers.

For a non-acute examination, reschedule the appointment and use the first visit to acquaint the child with the surroundings and the personnel. For an acute exam or a non-acute exam when there is suspicion of a foreign body in the vagina or other medical concerns, consider sedation and follow the established sedation protocol. **Never hold a child down for an examination and never allow anyone else to hold a child down for an examination.**

Incapacity to give consent for a sexual assault forensic medical examination

Patients may be considered temporarily incompetent for giving consent because of incapacitating injuries, sedation, alcohol or drug intoxication, hallucinations, delusions, mental retardation; acute organic brain syndrome from any cause; or permanently incompetent because of irreversible dementia.

- For purposes of consent for medical treatment, competency is defined as the ability to understand the nature and consequences of the illness, the proposed treatment, alternatives to treatment, and the ability to make a reasoned decision in this regard.
- For medical purposes, competency is required at the time consent is given. If consent or refusal was given by the patient during a period of competency, then that consent or refusal remains valid even if the patient later lapses into incompetency. If a patient is assessed to be incompetent, the basis for this must be documented in the patient's chart. If the patient is not competent to give informed consent, then another authorized party must approve the proposed treatment on the patient's behalf. See suggested policy on the next page.
- In the case of sexual assault, in the absence of state law on this subject, it is recommended that specific procedures be developed in conjunction with law enforcement agencies, the District Attorney's Office, and hospital counsel. Without a protocol, obtaining sexual assault forensic medical evidence without appropriate consent procedures could subject an examiner or a hospital to serious legal liability. Some strong views have been expressed on this issue, particularly involving a temporary incapacity to give consent.

Suggested Policy in Cases of Incapacity to Give Informed Consent

Definitions:

Non-Emergent Medical Care: A non-emergent condition means that the patient is medically stable.

Emergent Medical Care: Emergency medical care or a medical emergency means that prompt treatment appears to be necessary to prevent deterioration or aggravation of the patients' condition.

Suggested Procedures:

When *non-emergent* medical examination and treatment is required for incompetent adults, informed consent should be obtained from the following individuals in this order:

1. A Legal Representative:

- An agent as designated by a Durable Power of Attorney for Health Care.
- A conservator of the patient's "person" authorized to consent to care on behalf of the patient. The conservatorship papers must expressly grant this authority.

2. Family Members:

If a patient has neither a duly authorized conservator or agent, consent for treatment may be obtained by the patient's closest available relative in the following order of priority and limited to spouse, adult child, parents, adult brothers/sisters, and adult grandchildren. Such consent may be accepted under the following conditions based upon the information available to the treating clinician:

- There is no substantial question as to whether the patient, if competent, would object to the treatment or procedure.
- The competence or motive of the closest available relative is not suspect or questionable.
- No other close relative of equal rank objects to the treatment or procedure.

3. Family Member Declines to Participate in the Process:

If the closest available relative declines to participate in the consent process or arrives at a decision that is not apparently in the best interests of the patient, a judicial authorization can be sought.

4. Judicial Option:

When a patient requiring **non-emergent medical treatment** is determined to be incompetent to give informed consent and there is no legal representative or a close available relative, a Declaration in Support of a Petition for Judicial Authorization should be requested. If approved, this order grants the petitioner the right to consent to treatment on behalf of the patient. The petition should outline the anticipated course of medical treatment contemplated by the attending physician or healthcare provider. If additional therapeutic, diagnostic, or surgical procedures requiring informed consent are advisable, and judicial authorization has not been granted a new petition must be completed.

Suggested Procedures:

When *emergent* medical examination and treatment is required for incompetent adults, these procedures are recommended:

In a medical emergency, treatment may be provided even if the patient or his/her legal guardian or conservator is unable to give consent. However, the nature of the emergency and the need for treatment must be clearly documented in the medical progress note. Only the emergency condition may be treated. Once the patient's condition has been stabilized, informed consent or a court order for additional treatment must be obtained. Some institutions require signatures of two physicians or healthcare providers attesting to this circumstance. It is recommended that this documentation include information that evidence will be lost or will deteriorate unless it is collected immediately.

Keep in Mind...

It is important to remember that these patients are typically brought to the hospital by a friend or relative or by a law enforcement officer who have knowledge or a reasonable suspicion that a sexual assault occurred. It is uncommon for there to be a suspicion or knowledge that a sexual assault occurred upon the arrival of an unconscious or intoxicated patient in the Emergency Department independent of the involvement of another person.