

The Basics of Surgical Consent in Nebraska

Every surgeon in Nebraska should be aware that he or she – not the hospital – bears the *entire* legal responsibility for obtaining a patient's informed consent prior to surgery (except in cases where the hospital is actually the surgeon's employer). Therefore, non-employee surgeons should never simply rely on a hospital to perform the consent function.

It was not always clear in Nebraska precisely who bore the duty to obtain the patient's informed consent prior to surgery. This is because the language of Nebraska's consent statute, Neb. Rev. Stat. 44-2816, imposes the obligation on "health care providers," which are statutorily defined to include hospitals. Clarity was provided when the Nebraska Supreme Court held that the duty belongs to the surgeon alone except in cases where the hospital is the surgeon's employer. In reaching its conclusion that the responsibility should not be shared between a hospital and a non-employee surgeon, the Court, in Giese v. Stice, 252 Neb. 913, reasoned that since it was the surgeon, not the hospital, who possessed the specific knowledge of the procedure and the particular patient's history, the buck should stop with the surgeon alone.

What constitutes adequate informed consent for surgery in Nebraska? The statute defines it as being "consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by [surgeons] engaged in a similar practice in the locality or in similar localities." The statute goes on to specify that informed consent must be obtained in any "case in which a reasonably prudent [surgeon] in the community or similar communities would have obtained . . . consent for such operation . . . or procedure under similar circumstances."

Note that there are two parts to the requirement of informed consent. The first part refers to the information that must be provided to the patient. The second part refers to the obligation to obtain the patient's consent. Because the language of both parts is so general, what legally constitutes informed consent for any given surgery is a highly fact specific inquiry, varying from surgery to surgery and having to do with what the Nebraska Supreme Court has deemed adequate or inadequate in its malpractice jurisprudence.

Because the content of the information to be disclosed and the obligation to disclose it are defined in terms of the customary prudent practice of other physicians, Nebraska is said to be committed to a "professional" theory of the duty to disclose risks to a patient. The professional theory provides that expert evidence will determine if the physician acted the same as a reasonable practitioner under the same or similar circumstances and similar locality. It will not be an adequate defense for a physician to demonstrate that he or she followed his or her own personal or customary routine.