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## Law

# Legal Briefing: Informed Consent in the Clinical Context

*Thaddeus Mason Pope and Melinda Hexum*

### ABSTRACT

This issue's "Legal Briefing" column covers recent legal developments involving informed consent.<sup>1</sup> We covered this topic in previous articles in *The Journal of Clinical Ethics*.<sup>2</sup> But an updated discussion is warranted. First, informed consent remains a central and critically important issue in clinical ethics. Second, there have been numerous significant legal changes over the past year. We categorize recent legal developments into the following 13 categories:

1. Medical Malpractice Liability
2. Medical Malpractice Liability in Wisconsin
3. Medical Malpractice Liability in Novel Situations
4. Enforcement by Criminal Prosecutors
5. Enforcement by State Medical Boards
6. Enforcement through Anti-Discrimination Laws
7. Statutorily Mandated Disclosures Related to End-of-Life Counseling
8. Statutorily Mandated Disclosures Related to Aid in Dying
9. Statutorily Mandated Disclosures Related to Abortion
10. Statutorily Mandated Disclosures Related to Telemedicine
11. Statutorily Mandated Disclosures Related to Other Interventions

12. Statutorily Mandated Gag and Censorship Laws
13. Informed Consent in the Research Context

### 1. MEDICAL MALPRACTICE LIABILITY

Virtually all clinicians aspire to excellence in diagnosing disease. But far fewer, unfortunately, aspire to the same standards of excellence in diagnosing what patients want. A powerful recent report states that "preference misdiagnosis" is commonplace.<sup>3</sup> Moreover, clinicians are rarely even aware that they have made a preference misdiagnosis. It is the "silent misdiagnosis." Still, the legal doctrine of informed consent recognizes that patients can suffer just as much from a preference misdiagnosis as from a medical misdiagnosis. Accordingly, both medical misdiagnosis and preference misdiagnosis are types of medical malpractice.<sup>4</sup>

### Legal Primer

In the United States, *informed consent* is typically based in the state common law tort doctrine of negligence. Failure to obtain a patient's informed consent is a form of medical malpractice. The first of four elements in an informed consent action is the *duty of disclosure*. In the U.S., there is general agreement that the following information should be given to patients: (1) the nature and purpose of the proposed intervention, (2) the intervention's probable risks and benefits, and (3) alternative interventions and their risks and benefits. But the exact scope

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