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Informed Consent for Surgery in Illinois: Does Surgeon's Experience Level Matter?

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If a surgeon fails to tell his patient about the material risks of a procedure, thereby causing the patient to consent to treatment that the patient otherwise would not have consented to, then the surgeon could be accused of malpractice in the event that the patient is injured. In such a situation, the patient would likely pursue a malpractice action based on the doctrine of informed consent. To succeed, the patient would have to prove, among other things, that the surgeon failed to disclose "material risks" regarding the proposed treatment. ***Coryell v. Smith*****,** 274 Ill. App. 3d 543, 546 (1st Dist. 1995).

But what exactly is a material risk? Does it go beyond the inherent risks of surgery (infection, blood loss, complications with anesthesia, etc.) and include information personal to the surgeon, such as the surgeon's experience level? There are no published opinions in Illinois that directly address whether a surgeon has a duty to disclose his experience level in order to obtain informed consent. However, Illinois' approach to the doctrine of informed consent, and case law from states with similar approaches, strongly suggests that a surgeon has no affirmative duty to disclose his\her experience level to a patient.

There are essentially two approaches, or standards, regarding the duty to disclose: the reasonable physician standard, and the reasonable patient standard. The reasonable physician standard is the rule in the majority of states, including Illinois. *Guebard v. Jabaay*, 117 Ill. App. 3d 1, 8-9 (2d Dist. 1983). Under this standard, a physician must disclose the risks that a reasonable medical professional would have disclosed under similar circumstances. "The physician's duty extends to disclosure of those risks, results, or alternatives that a reasonable medical practitioner of the same school, in the same or similar circumstances, would have made known." *Hansbrough v. Kosyak*, 141 Ill. App. 3d 538, 551 (4th Dist. 1986). This standard looks to what physicians commonly disclose when handling a similar case.

The minority approach is the reasonable patient standard, which looks to "whether a reasonable person in the patient's position would consider the information material to his decision as to whether to agree to allow the physician to perform the surgery upon him." *Willis v. Bender*, 596 F.3d 1244, 1256 (10th Cir. 2010). "Obviously, what a reasonable person in the patient's position would find relevant in deciding whether to proceed with a particular procedure by a specific doctor is not necessarily what a reasonable practitioner of like training and experience would have disclosed in the same circumstances." *Willis,* 596 F. 3d at 1256.

In applying the reasonable physician standard, Illinois courts have indicated that the duty to disclose applies to the material risks inherent in the surgical procedure itself, as opposed to professional-background information about the surgeon. *Coryell*, 274 Ill. App. 3d at 546, 549 (the duty to disclose applies to "the diagnosis, the general nature of the contemplated procedure, the risks involved, the prospects of success, the prognosis if the procedure is not performed and alternative medical treatment;" *i.e.*, significant information "relating to the treatment") (quotation omitted); *see also Crim v. Dietrich*, 2016 IL App (4th) 150843, ¶ 7.

States that follow Illinois' reasonable physician standard include Vermont, New York, and Wyoming. In each of those states, the courts have held that physicians and surgeons do not have an affirmative duty to disclose their experience in order to obtain informed consent. *See, e.g., Wissell v. Fletcher Allen Health Care, Inc.*, No. 232-2-12, 2014 Vt. Super. LEXIS 89, *40 (Vt. Super. Ct. May 22, 2014) (observing that Vermont and New York apply the traditional standard, under which "[p]hysicians and medical practitioners do not have an affirmative duty to disclose physician-specific information to the patient, such as a physician's statistical success/complication rate concerning a particular procedure, the existence of more experienced physicians who could perform the procedure, or the availability of other facilities better equipped to handle the procedure"); Johnson v. Jacobowitz, 65 A.D.3d 610, 614 (N.Y. App. Div. 2009) (court correctly precluded evidence that surgeon did not have proper credentials to perform heartport procedure because informed consent does not require disclosure of treatment provider's qualifications); *Willis*, 596 F.3d at 1256 (under Wyoming law, informed consent does not require a physician to affirmatively disclose his experience).

Several states that apply the patient-based approach, which asks what a reasonable person in the patient's position would consider in deciding whether to consent to proceed with a particular procedure, have reached the opposition conclusion. For example, courts in Maryland and Wisconsin have recognized that a surgeon's experience level may be a fact that a reasonable patient would consider material to the decision-making process. *See, e.g., Goldberg v. Boone*, 396 Md. 94, 123-27 (2006); Johnson ex rel. Adler v. Kokemoor, 199 Wis. 2d 615, 636-48 (1996).

In sum, while many states have specifically considered whether a surgeon has an affirmative duty to disclose his experience level in order to obtain informed consent, Illinois has not. However, Illinois' reasonable physician standard strongly hedges against such a duty. But as a word of caution, if a patient asks the surgeon about his experience, the surgeon should answer honestly. Deliberate misrepresentations serve no purpose in the informed consent process; rather, an open and honest dialogue with the patient about his concerns, coupled with adequate documentation of the discussion, puts the surgeon on the best footing in the event that there is a dispute about informed consent.

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