

HIPAA Privacy Rule CLIN-202: Personal Representatives of Patients

I. Policy

A. Definition of Personal Representative

A patient's "Personal Representative" is the person who has the authority, under California law, to make health care decisions on behalf of the patient. Although there are exceptions, in general a person who has the capacity to make his or her own health care decisions does not have a Personal Representative. It should not be assumed that a family member or caregiver is a Personal Representative of the patient, unless such individual meets the definition set forth in this policy.

B. Authority of Personal Representative.

A Personal Representative may stand in the shoes of the patient and authorize USC's¹ use and disclosure of the patient's Protected Health Information.² In general, the scope of the Personal Representative's authority to act for the patient derives from his or her authority under state law to make health care decisions for the patient. Where the authority to act for the individual/patient is limited or specific to particular health care decisions, the Personal Representative is to be treated as the individual only with respect to Protected Health Information that is relevant to those particular health care decisions.

C. Who May Act as a Personal Representative

1. In General

Under the laws of California, the following persons may act as a Personal Representative of a patient³:

¹ For purposes of the HIPAA Privacy Rule, USC includes those entities that comprise Keck Medicine of USC, including but not limited to, USC Norris Cancer Hospital, Keck Hospital of USC, USC's employed physicians, nurses and other clinical personnel, those units of USC that provide clinical services within the Keck School of Medicine, School of Pharmacy, the Herman Ostrow School of Dentistry, Physical and Occupational Therapy as well as the Keck Doctors of USC, USC Care Medical Group, affiliated medical foundations of Keck and their physicians, nurses and clinical personnel, USC Verdugo Hills Hospital, its nurses and other clinical personnel, Verdugo Radiology Medical Group, Verdugo Hills Anesthesia, and Chandnish K. Ahluwalia, M.D., Inc. and those units that support clinical and clinical research functions, including the Offices of the General Counsel, Audit and Compliance.

² Protected Health Information is identifiable information that relates to an individual's past, present or future physical or mental health condition or to payment for health care.

³ See California Health and Safety Code Section 123105.

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- a. A person named in a written health care power of attorney or advanced directive (i.e., an attorney-in-fact or agent).⁴
- b. A surrogate who is 18 years or older and appointed by the patient to make health care decisions on the patient's behalf.⁵ A patient with capacity to revoke a surrogate designation may do so at any time and in any manner that communicates an intent to revoke.
- c. A conservator in accordance with the court-issued letters of conservatorship or other applicable California law.⁶
- d. For an unemancipated minor⁷, a parent, a relative pursuant to a Caregiver's Authorization Affidavit, or a guardian appointed by a court to make health care decisions for the minor. Contact the USC's Office of General Counsel if more than one of such persons claims to be the legal representative for the minor patient.

⁴ The power of attorney or advanced directive will specify any limitations on an agent's ability to make health care decisions on behalf of the patient, (*e.g.*, only where the patient lacks capacity). A patient with capacity may revoke the designation of an agent in writing, or by personally informing the supervising health care provider. If the patient informs a USC employee who is not the supervising health care provider the supervising health care provider should be contacted immediately to revoke the designation of the agent.

⁵ The patient must personally inform the supervising health care provider, orally or in writing, of the surrogate appointment. The patient's appointment of the surrogate must be promptly recorded in the patient's medical record. Unless the patient specifies a shorter period, a surrogate appointment is effective only during the course of treatment or illness or during the patient's stay in the health care facility when the surrogate designation is made, or for 60 days, whichever period is shorter. Unless otherwise stated by the patient, the surrogate has priority over an agent for purposes of making health care decisions on behalf of the patient.

⁶ As a general rule, unless the patient's power of attorney for health care or advanced directive provides otherwise, the designated agent who is known to the health care provider to be reasonably available and willing to make health care decisions has priority over the conservator. However, a court can modify an advanced directive. Therefore, contact the USC's Office of General Counsel should a dispute arise relating to whether an agent or conservator has priority for making health care decisions on behalf of the patient.

⁷ An unemancipated minor is a minor who is legally under the control of such minor's parents or other legal guardian.

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2. *Personal Representative for Adults and Emancipated Minors Who Lack Decisional Capacity*

If the patient is an adult or emancipated minor who lacks decisional capacity as documented in the patient's record, then USC, through the appropriate health care provider, must make a reasonable inquiry as to the availability and authority of a Personal Representative under state law.

3. *Minors*

As a general rule, USC will treat a parent or guardian or relative with a Caregiver's Authorization Affidavit as the Personal Representative of a minor with respect to such minor's Protected Health Information, except in the following circumstances:

- a. The minor is emancipated as determined by a court of law. In this case, a copy of the minor's Department of Motor Vehicles identification card evidencing the minor's emancipation should be placed in the patient's record.
- b. An unemancipated minor with the right to consent to treatment under state law.⁸ In this situation, the unemancipated minor must be given a Notice of Privacy Practices. By way of example, minors may lawfully consent to the following types of treatment among others:
 - i. Pregnancy-related services (Cal. Family Code §6925)
 - ii. Treatment of reportable contagious disease (Cal. Family Code §6926)
 - iii. Treatment related to rape, if age 12 or older (Cal. Family Code §6927)
 - iv. Drug or alcohol-related treatment, if age 12 or older. (Cal. Family Code §6902 and 6929). California law requires that the minor's treatment plan include the involvement of the minor's parent or guardian, if

⁸ Where the minor is authorized by law to consent to treatment, the right of access with respect to that patient information rests with the minor, not the parent or guardian. Additionally, a provider may deny a parent or guardian access to a minor's patient information where the provider determines that access would have a detrimental effect on the provider's professional relationship with the minor or on the minor's physical safety or psychological wellbeing.

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appropriate, as determined by the practitioner or facility treating the minor. The practitioner must document in the minor's medical record when the practitioner attempted to contact the minor's parent or guardian, whether the attempt was successful or the reason why, in the practitioner's opinion, it would be inappropriate to contact the minor's parent or guardian. (Cal. Family Code §§ 6924 and 6929)

- v. HIV tests, if age 12 or older (Cal. Health and Safety Code §121020)
- vi. Treatment related to an alleged sexual assault. California law requires the practitioner to attempt to contact the minor's parent or guardian, note in the minor's medical record the date and time of the attempted contact and note in the medical record whether the contact was successful. This requirement does not apply if the practitioner reasonably believes the minor's parent or guardian committed the sexual assault. (Cal. Family Code § 6928).

Except as permitted by law, or as authorized in writing by the minor, USC may not tell the minor's parents or legal guardian about medical care the minor is legally able to authorize.

4. *Deceased Patient*

If, under applicable state law, an executor, administrator, or other person has authority to act on behalf of a deceased patient or of the patient's estate, USC will treat such person as the decedent's Personal Representative. As discussed in Section II below, USC must obtain written documentation of a person's authority under state law to act as the patient's Personal Representative before allowing the person to act as the patient's Personal Representative.

5. *Victim of Abuse, Neglect or Endangerment*

USC may elect not to treat a person as the Personal Representative of a patient if the following two elements are satisfied and the election is documented in the patient's record:

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(i) USC has a reasonable belief that the patient has been or may be subjected to domestic violence, abuse, or neglect by such person; or

(ii) Treating such person as the Personal Representative could endanger the patient; AND

USC, in the exercise of the professional judgment of the relevant health care provider, decides that it is not in the best interest of the patient to treat the person as the patient's Personal Representative.

II. Procedures

B. Verify Authority of Personal Representative

For all categories of patients, USC must obtain *written documentation* of a person's authority under state law to act as the patient's Personal Representative before allowing the person to act as the patient's Personal Representative in connection with the use or disclosure of the patient's Protected Health Information.

C. Documentation

1. USC shall maintain in the patient's record the written documentation of a person's authority to act as the patient's Personal Representative. Examples of appropriate documentation include an "advance directive" executed by the patient, which appoints a person as the patient's "health care representative"; or documentation of the patient's verbal authorization of a particular individual to act as the patient's surrogate for health care decisions.
2. USC also should maintain in the patient's record the Personal Representative's name, address, telephone number and relationship to the patient.

D. Out-of-State Personal Representatives

As set forth in Section II.B, USC must obtain written documentation of the authority of any out-of-state Personal Representative. Thereafter, USC employees should use good clinical judgment in communications with that personal representative. For example, the Personal Representative should provide contact information (e.g., telephone numbers) on initial contact and the identity of that Personal Representative should be verified through callbacks if USC employees are not familiar with the Personal Representative's voice.

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Additional References

45 C.F.R. § 164.502(g)

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