Patient Consent & Termination

Legal Requirements & Practical Solutions

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HOLLAND&HART LLP

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Overview

- Patient Consent
  - Capacity
  - Minors
  - Surrogates
  - Refusal
- Physician / Patient Relationship
  - Creation
  - Termination / Dismissal

Patient Consent

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General Principles

- Valid consent is required prior to treatment.
- Consent is a process.
- Must provide sufficient information to ensure that the consent is informed:
  - *"pertinent facts respecting the need for, the nature of, and the significant risks ordinarily attendant upon such person receiving such care. . . ."*
- Consenting individual must have capacity.

Capacity to Consent

- "Any person . . . who comprehends the need for, the nature of and the significant risks ordinarily inherent in, any contemplated . . . health care, treatment or procedure is competent to consent thereto on his or her own behalf."

(IC 39-4503, emphasis added)

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Capacity: Minors

- May minors consent to their own care?

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Minors

- Consent for the furnishing of health care to any person [1] who is not then capable of giving such consent or [2] who is a minor may be given or refused by the following. . . .
  - Court appointed guardian.
  - Person named in living will and durable power of attorney.
  - Spouse.
  - Adult child.
  - Parent.
  - Delegation of parental authority per IC 15-5-104.
  - Relative.
  - Any other competent person representing himself or herself to be responsible for health care.

(IC 39-4504(1))

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Minors

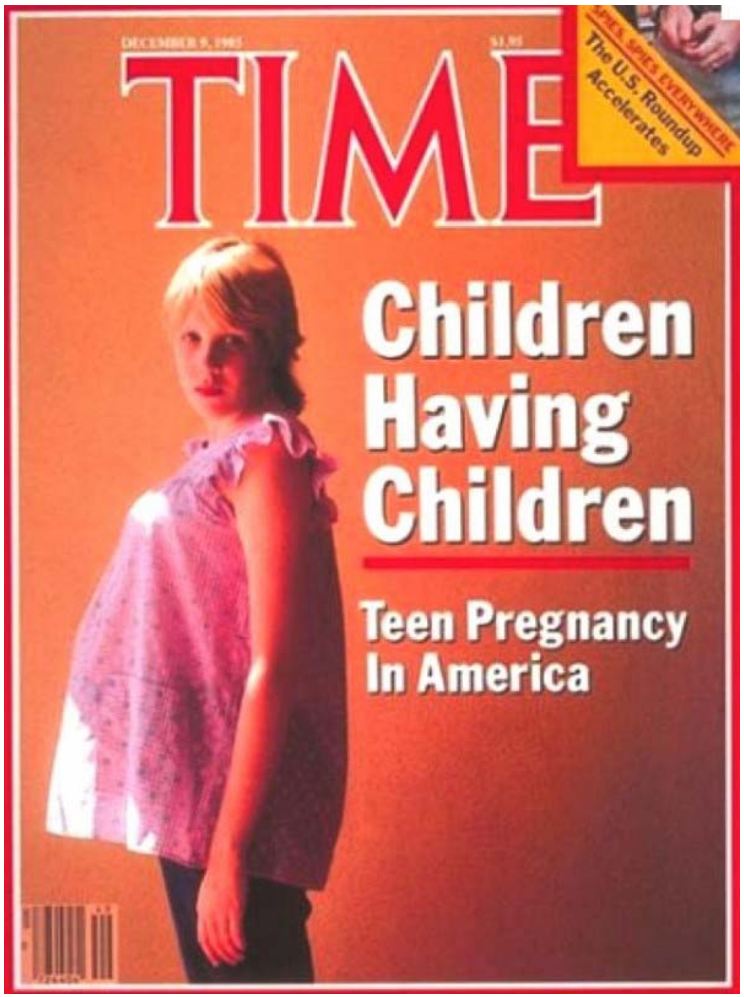
- Conservative approach: do not allow minor to consent to their own care unless:
  - Minor is emancipated.
  - Statute authorizes minor to consent to their own care.
  - Statute authorizes care regardless of consent.
- Mature minor doctrine might apply, but be careful.

Minors: Emancipation

- Minor is probably emancipated and able to consent to their own healthcare if:
  - Married or has been married (*see* IC 18-604(3))
  - In armed forces (*see* IC 18-604(3))
  - Living on own and self-sufficient (*see* IC 66-402(6))
  - Court declares them emancipated (*see* IC 16-2403(1))
- Must still satisfy the basic test, i.e., be able to "comprehend the need for, the nature of and the significant risks ordinarily inherent in, any contemplated . . . health care. . . ."

  (IC 39-4503)

Minors: Emancipation



- *What about pregnant minors?*

Minors: Emancipation

- Pregnancy is probably not an emancipating event.
  - "Capacity to become pregnant and capacity for mature judgment concerning the wisdom of bearing a child or having an abortion are not necessarily related."

  (IC 18-602)
  - "To protect minors from their own immaturity," abortions for "pregnant unemancipated minors" generally require:
    - Parental/guardian consent, or
    - Judicial finding that minor is mature and capable of giving informed consent.

  (IC 18-602, 18-609A)
- *If pregnancy were an emancipating event, you would not need parental consent for abortion.*

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Statutes Allowing Minor Consent

- Emergency medical exam and stabilizing treatment in hospital. (HHS Interpretive Guidelines to 42 CFR 489.24)
- Examinations, prescriptions devices, and info regarding contraceptives if practitioner determines that minor has sufficient intelligence and maturity to understand the nature and significance of treatment. (IC 18-603)
- Family planning services funded by Title X of the Public Health Services Act. (42 USCX300(a))

Statutes Allowing Minor Consent

- Drug treatment or rehab. (IC 37-3102)
  - If minor is age 16 or older, cannot notify parents without minor's consent.
- Age 14: testing or treatment for reportable infectious or communicable disease. (IC 39-3801)
- Age 14: hospitalization for observation, evaluation and treatment for mental condition. (IC 66-318(a)(2))
  - Treating facility must notify parents
- Age 17: unpaid blood donations. (IC 39-3701)

Mature Minor Doctrine

- In other states, minors with sufficient maturity may consent to their own care.
- Idaho statutes are ambiguous.
  - IC 39-4503 states "any person" of sufficient comprehension may consent to or refuse their own care. *See also* IC 18-603 and 18-609A; Idaho AG Op. (2/16/10).
  - IC 39-4504 identifies those who may consent for minors.
- No Idaho cases resolving the conflict.

Capacity: Mature Minor Doctrine

- Risks of allowing minor to consent to their own care absent express statute or case:
  - May expose practitioner to liability if court concludes minor lacked capacity to consent.
  - May limit ability to disclose info to parents.
  - May limit ability to obtain payment.

Capacity: Mature Minor Doctrine

- As general rule, practitioners should require parent/guardian consent unless minor is emancipated or statute applies.
- If rely on mature minor doctrine, be careful; consider and document relevant factors.
  - Age
  - Maturity, intelligence and understanding per IC 39-4503
  - Nature of treatment, including risks

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Capacity to Consent

- What if a patient lacks capacity to consent?
  - In an emergency and no time to obtain consent, provide necessary care.
  - Provide care consistent with patient's advance directive.
  - Obtain consent from authorized surrogate.

(IC 39-4504(1))

Authority: Emergency

- Medical emergency:
  - There is a substantial likelihood of the patient's life or health being seriously endangered by withholding or delay in the rendering of health care.
  - The patient has not communicated and is unable to communicate his or her treatment wishes.
- "The attending health care provider may, in his or her discretion, authorize and/or provide such health care, as he or she deems appropriate, and all persons, agencies and institutions thereafter furnishing the same, including such health care provider, may proceed as if informed, valid consent therefor had been otherwise duly given."

(IC 39-4504(1))

Authority: Emergency

- "No … physician or hospital licensed in this state shall be subject to civil liability, based solely upon failure to obtain consent in rendering emergency medical, surgical, hospital or health services to any individual regardless of age where [1] that individual is unable to give this consent for any reason and [2] there is no other person reasonably available who is legally authorized to consent to the providing of such care, provided, however, [3] that such person, physician, or hospital has acted in good faith and without knowledge of facts negating consent."

(IC 56-1015)

Authority: Surrogates

- Surrogate must have capacity.
- Cannot contradict patient's advance directive, POST, or other known wishes.
- Authority of surrogate determined by the following statutory hierarchy:
  - Court appointed guardian.
  - Person named in living will and durable power of attorney if conditions triggering authority are satisfied.
  - Spouse.
  - Adult child.
  - Parent.
  - Delegation of parental authority per IC 15-5-104.
  - Relative representing himself as appropriate responsible person to act under the circumstances.
  - Any other competent person representing himself or herself to be responsible for health care.

(IC 39-4504(1))

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Authority: Surrogates

- Surrogate who, in good faith, gives consent for another is immune from civil liability.
- Practitioner who, in good faith, obtains consent from apparently competent patient or other authorized surrogate is immune from civil liability.

(IC 39-4504(2)-(3))

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Form of Consent

- "It is not essential to the validity of any consent … that the consent be in writing or any other specific form of expression."

(IC 39-4507)

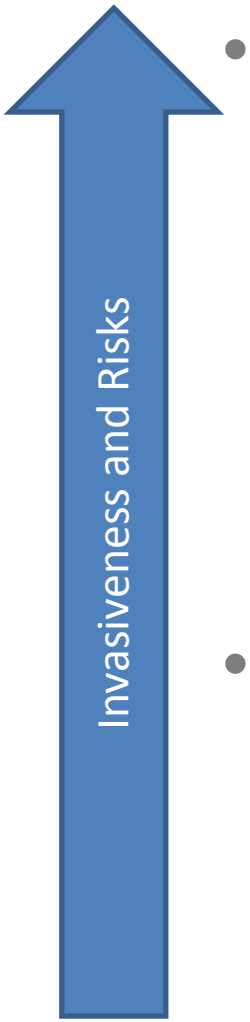
- Other laws or payor standards may require documented consent.
  - IDAPA 16.03.14.220 – Patients rights for Hospitals
  - COPs 42 CFR 482.13(b), 482.24(c)(2)(v), 42 CFR 482.51(b)(2); 485
  - Joint Commission RC.02.01.01

Form of Consent

- "When the giving of such consent is recited or documented in writing and expressly authorizes the care …, and when such writing or form has been executed or initialed by a person competent to give such consent for himself or another, such written consent, in the absence of convincing proof that it was secured maliciously or by fraud, is presumed to be valid for the furnishing of such care…, and the advice and disclosures of the attending [practitioner], as well as the level of informed awareness of the giver of such consent, shall be presumed to be sufficient."

(IC 39-4507)

Form of Consent: Suggestions



- Specific consent: significant treatment
  - Communication about specific treatment.
  - Pre-published forms may help provide info and document consent, but beware undue reliance.
  - Medical record notes confirming that elements of consent satisfied, e.g., patient competency, discussion, understanding, questions/answers.
- General consent: upon registration
  - Covers basic treatment activities, e.g., physical exams, basic medications, diagnostic tests, labs and pathology, photos, etc.

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Lack of Informed Consent

- Treat patient who lacks capacity to consent to their own care (e.g., patient medicated, intoxicated, underage, etc.).
- Ignore patient's prior wishes or decisions (e.g., provides care contrary to advance directive).
- Provides treatment that exceeds scope of consent.
- Fails to inform patient of sufficient info reasonably necessary to enable patient to make an informed decision.
- Fails to effectively communicate with patient so as to convey or receive informed consent (e.g., limited English proficiency, disability, etc.).
- Continue treatment even though patient has objected or withdraws consent.

Refusing or Withdrawing Consent

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Patient Self-Determination

- Idaho "recognizes the established common law and the fundamental right of [competent] persons to control the decisions relating to the rendering of their medical care, including the decision to have life-sustaining procedures withheld or withdrawn...."

(IC 39-4509)

- Right to consent = right to refuse care or withdraw consent.

(See IC 39-4502(7), "'Consent to care' includes refusal to consent to care and/or withdrawal of care.")

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Refusal of Treatment: "Against Medical Advice"

- Provide sufficient info to allow patient to make informed refusal.
- Document in chart:
  - Patient's competency.
  - Explanation of risks and benefits.
  - Practitioner's attempt to obtain patient's informed consent.
  - Patient's signature confirming voluntary decision.
  - Witnesses.
- Attempt to obtain patient's signed refusal.

Refusal of Treatment: Surrogates

- Generally, consent for health care "may be given or refused" by the authorized surrogate.

(IC 39-4504(1))

- Exceptions:
  - Child Neglect: "without proper … medical or other care … necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them."

(IC 16-1602(25))

  - Vulnerable adult neglect: "failure of a caretaker to provide … medical care reasonably necessary to sustain the life and health of a vulnerable adult…"

(IC 39-5302(8))

- Providers must report suspected neglect.

(IC 16-1605; 39-5303)

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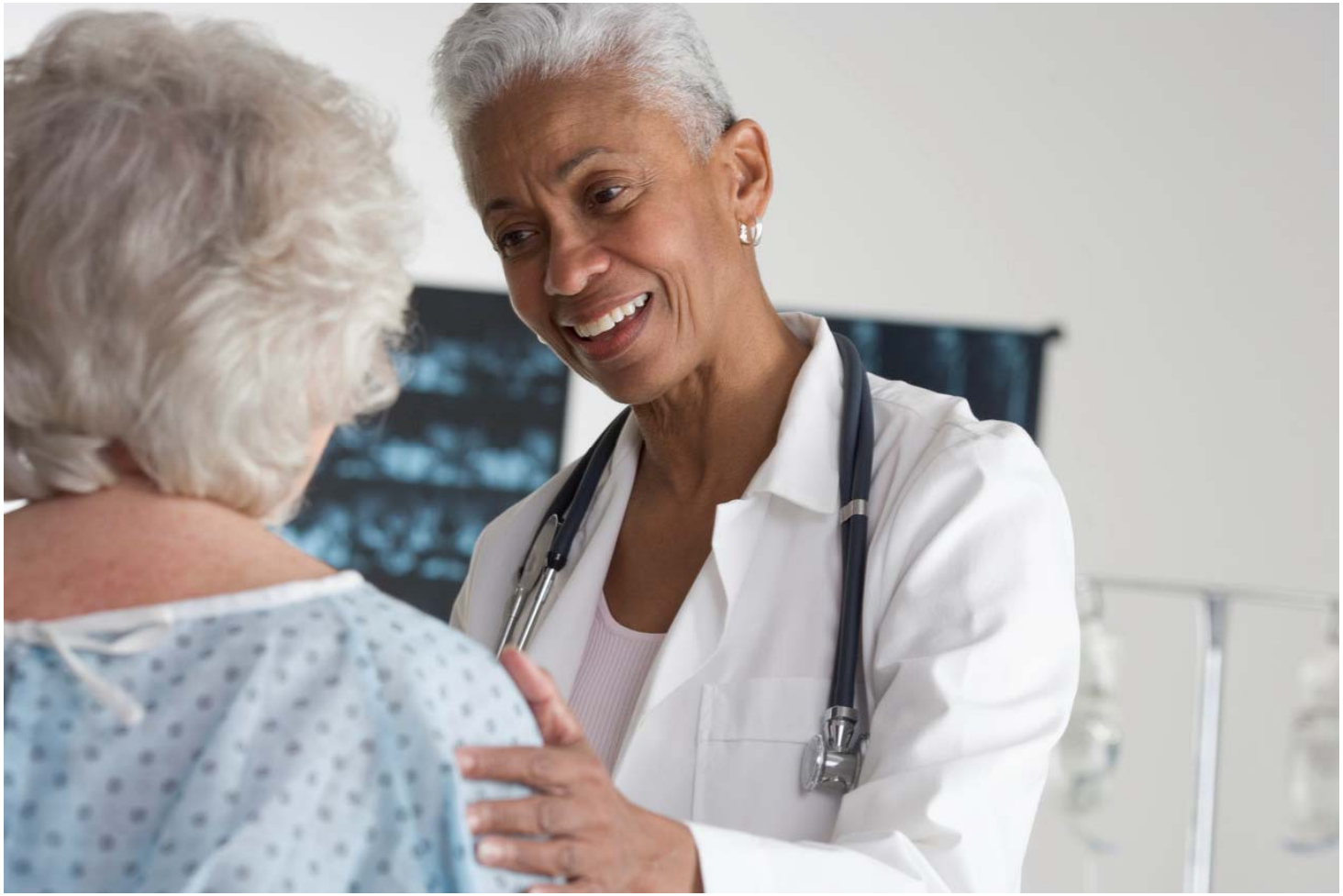
Provider–Patient Relationships



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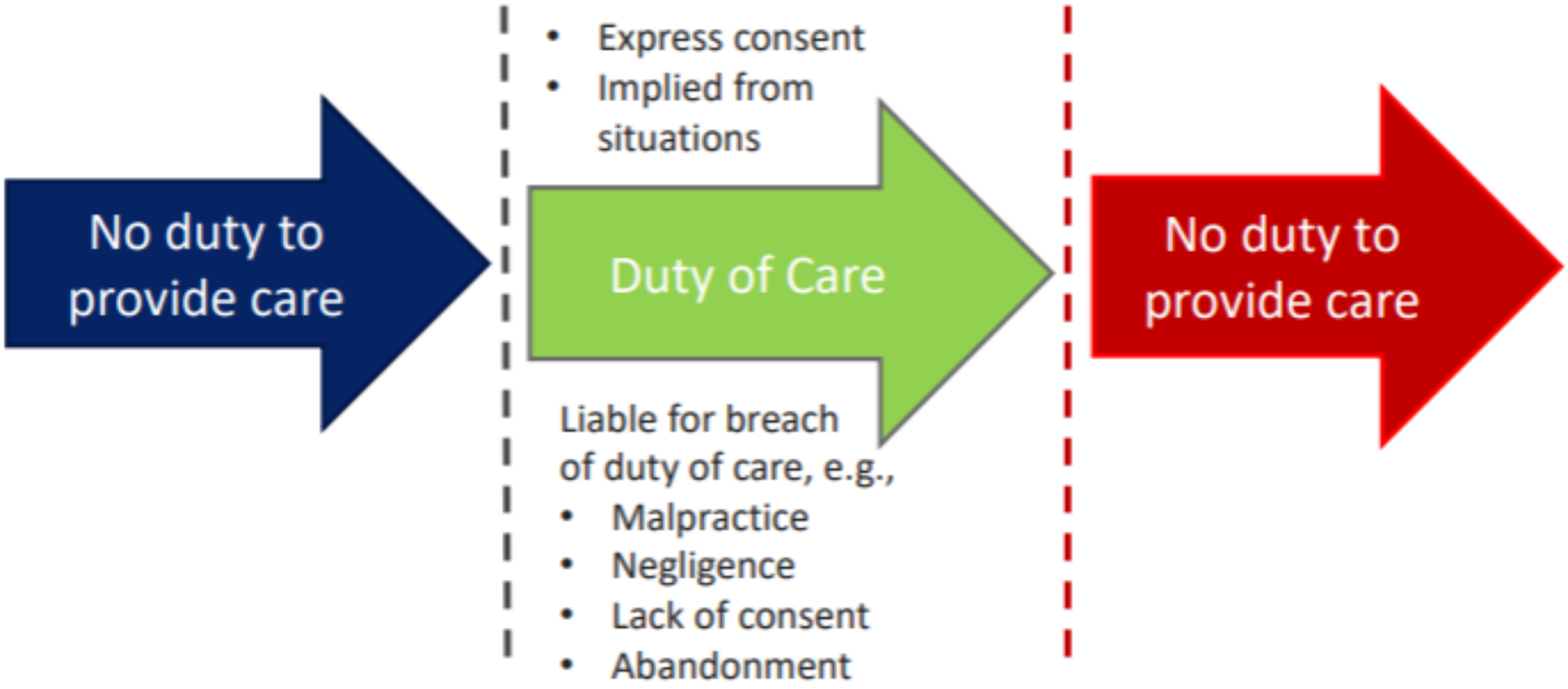
Lifecycle of the Relationship



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Creation

- Beware of situations where a relationship may be implied:
  - Phone calls or emails with a patient.
  - Telemedicine.
  - Social media.
  - Consultations with colleagues.
  - Courtesy or favor.
  - Emergency care.

Refusing Patients

- Generally, providers can legally refuse to treat someone.

(*See* IC 39-1391b, c)

- Exceptions:
  - EMTALA.
  - Anti-discrimination.
  - Contracts.
  - Grants.
  - Charity care.
  - Abandonment.
- Provider can terminate the relationship for any legitimate reason, or for no reason, but not for a bad reason.

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Problem Patients

- ***Do not do this...***

- **Unless you <u>want</u> to risk liability for:**
  - Malpractice.
  - Patient abandonment.
  - Civil penalties under EMTALA or COPs
  - Participation in third party payor programs.
  - Adverse licensure actions.

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Patient Abandonment

- Abandonment
  - Leaving town without securing coverage for patients.
  - Terminating the relationship without giving patient sufficient:
    - Notice that you are ending the relationship.
    - Time to find a new practitioner.
    - Care until the patient can transfer care.

Problem Patients

- Document everything!
- Patient Responsibilities
- Patient Care Conference / Contracts
- Warning Letters

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Avoiding Patient Abandonment

- Factors to consider before ending patient relationship
  - Patient's current health needs.
  - Availability of alternative care.
  - Basis for termination.
  - Whether patient is in protected class.
  - Documentation supporting termination.
  - Alternative actions (what has been done to mitigate or avoid dismissal).

Avoiding Patient Abandonment

- If termination is necessary and appropriate:
  - Notify patient in writing.
  - Give sufficient time to transfer care.
  - Provide necessary care in the interim.
  - Facilitate transfer of care.
  - Retain letter in patient chart or elsewhere.
- Always remember: "What would a jury think?"

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Questions?

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