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IRB REFERENCE MANUAL
SECTION 17
SURROGATE CONSENT IN RESEARCH

13.0 SURROGATE CONSENT IN RESEARCH

13.1 CONTENTS

13.2 BACKGROUND

All adults (including those with cognitive impairments) are presumed to have the capacity to consent unless legally judged to be incompetent or determined to lack decisional capacity by an appropriate provider. Cognitively impaired persons are considered a *vulnerable research population* because their mental disability may compromise their capacity to make a reasoned decision about participation in a study. People with Alzheimer's disease, dementia, mental illness and developmental disabilities may be considered cognitively impaired and may not be able to provide informed consent for participation in research.

In certain circumstances, when it is determined that a potential research participant is cognitively impaired, federal regulations and state statute permit researchers to obtain consent from a legally authorized representative (LAR) via surrogate consent.

Federal regulations permit investigators to obtain consent from a legally authorized representative (LAR) in research that involves enrollment of prospective research subjects who cannot provide consent on their own behalf. The Christ Hospital IRB Policy SOP 3.18 “Additional Safeguards for Individuals Without Decision-making Capacity” describe who may serve as an LAR in research.

For research studies involving subjects who have fluctuating or limited decision-making capacity or prospective incapacity, Principal Investigators should establish and maintain ongoing communication with involved caregivers, consistent with the subjects' autonomy and with medical confidentiality and privacy laws.

The ability of individuals to participate in research if they are unable to consent depends on the law of the state where the research is being conducted. In Ohio, adults who are unable to consent because of decisional impairment may only participate in research under the following circumstances:

- If the IRB waives the consent requirement under the federal regulations allowing for waiver of consent after consideration and comment by the local community on the research.
- If a Durable Power of Attorney for Healthcare names an individual who has authority to consent specifically for research, and the state where the research is conducted recognizes the legality of the document. The state of Ohio recognizes the legality of the Durable Power of Attorney for Healthcare.
- In emergency situations, if the researcher has obtained the consent of a family member of the participant. In states other than Ohio, the researcher must submit to the IRB a legal opinion supporting the validity of the surrogate consent.

13.3 DEFINITIONS

Legally Authorized Representative (LAR)
Per Federal regulations, LAR means "an individual, or judicial, or other body authorized under applicable law to consent on behalf of a prospective research subject to the subject's participation in the procedure(s) involved in the research" (45 CFR 46.102(c) and 21 CFR 50.3(l)).

The 2018 Revised Common Rule provided clarification to supplement this definition. Specifically, "in jurisdictions where there is no applicable law for allowing an LAR to provide consent on behalf of a prospective research subject, LAR means an individual recognized by institutional policy as acceptable for providing consent in the non-research context on behalf of the prospective research subject to the subject's participation in the procedure(s) involved in the research" (45 CFR 46.102(i)).

Surrogate Consent
In research, surrogate consent is the use of an LAR.

Advanced Healthcare Directive
Documents written in advance of serious illness in which a person states their choices for healthcare or names someone to make those choices. When a person is

selected to make medical decisions, the document is called a Durable Power of Attorney and the designated person is called an Agent. In certain circumstances, the Agent can serve as an LAR to provide surrogate consent for participation in research.

Capacity to Consent (to Research)
The ability of the individual to understand the choices presented, to appreciate the implications of choosing one alternative or another, and to make and communicate a decision (e.g., whether or not to participate in a study).

13.4 WHEN IS THE USE OF AN LAR REQUIRED IN RESEARCH?

An LAR is required to conduct human research with a person who is an adult incapable of making an informed decision at the time consent is required. The person's legally authorized representative may issue informed consent/permission and the signature shall be witnessed.

It is important to note that even though verbal consent, obtained over the phone may be obtained from the LAR for clinical care, verbal consent from the LAR is not allowed for research if written consent is required for the study.

The research participant should be invited to participate in the informed consent discussion and provide his/her assent.

13.5 REQUESTING THE USE OF SURROGATE CONSENT

To have the option to obtain consent from a subject's LAR, the investigator must request the use of surrogate consent from the IRB. Preferably this is requested in the study application at the time of initial submission; however, it can be done as an amendment to the protocol. In certain limited circumstances, the IRB could approve the use of an LAR for a single subject on a case-by-case basis.

Investigators must use appropriate safeguards to protect the rights and welfare of these participants and those providing consent on their behalf if it determines that they may be vulnerable to coercion or undue influence. Sufficient justification for inclusion of participants who lack decision-making capacity and a plan to protect them and their surrogates from coercion and undue influence must be included in the research plan.

13.6 IRB CONSIDERATIONS FOR THE USE OF SURROGATE CONSENT IN RESEARCH

The IRB will review any requests to enroll adults who are not capable of providing consent using surrogate consent.

IRB Considerations may include:

- Whether all eligible subjects will require an LAR OR only some subjects may be able to provide assent or even consent for themselves
- Ensuring that the plan includes documents to assess capacity and solicit the consent for continued participation for adult subjects who will or may regain decision making capacity.
- Ensuring a written or script-supported consent document (or other information relevant to the research) will be provided to the research participant accompanied by a consent conversation, as applicable.
- The circumstances of the consent process provide the prospective participant or the LAR sufficient opportunity to consider whether to participate.
- The circumstances of the consent process minimize the possibility of coercion or undue influence.
- Ensuring the person communicating information to the participant or the LAR during the consent process will provide that information in language understandable to the participant or the representative.

The IRB must determine:

- whether the involvement of such individuals in the research is justified, and
- whether the proposed plan minimizes or eliminates the risks to vulnerable subjects.

The IRB may request additional safeguards to protect participants depending on the amount of risk involved in the research and the likelihood that participants will derive health benefits from their participation. Additional safeguards may include:

- requiring involvement of participant advocates,
- requiring independent monitoring,
- requiring waiting periods, and/or
- appointing a monitor to supervise the informed consent process.

When consent will be obtained from an LAR (surrogate), the IRB usually will require that the assent of the subject be obtained. Assent is defined as affirmative agreement to participate in research. Failure to object does not qualify as assent.

13.7 CONDITIONS LIMITING LAR USE

The ability of individuals to participate in research if they are unable to consent depends on the law of the state where the research is being conducted.

In Ohio, adults who are unable to consent because of decisional impairment may only participate in research under the following circumstances:

- If the IRB waives the consent requirement under the federal regulations allowing for waiver of consent after consideration and comment by the local community on the research.
- If a Durable Power of Attorney for Healthcare names an individual who has authority to consent specifically for research, and the state where the research is conducted recognizes the legality of the document. The state of Ohio recognizes the legality of the Durable Power of Attorney for Healthcare.
- In emergency situations, if the researcher has obtained the consent of a family member of the participant. In states other than Ohio, the researcher must submit to the IRB a legal opinion supporting the validity of the surrogate consent.

Use of LARs for research being conducted outside of Ohio

Different states may vary how they define:
- The age of children and/or minors, including emancipated minors,
- Which individuals can give permission for their participation in research and for the participation of children who are in court-appointed custody, and
- Which individuals are qualified to serve as legally authorized representatives.
- Determinations about who can serve as an LAR, that is, consent on behalf of someone else's participation in research, are based on the jurisdiction in which the research is being conducted.

The PI must understand the implications of state laws for the proposed research and describe how differing state requirements will be met in the research. Also note that research being conducted in foreign countries is subject to applicable laws for designating a legally authorized representative for the region or country in which the research is being conducted.

If the site of the research is outside Ohio, the researcher must provide a legal opinion acceptable to the IRB of the circumstances under which the law of the state where the research is conducted allows individuals who do not have the capacity to consent to participate in research. Also, the IRB or investigator may seek advice from The Christ Hospital Risk Management Department on the definition of a legally authorized representative for the applicable jurisdiction.

<u>Additional Considerations/Conditions</u>
- If two or more persons who qualify as legally authorized representatives and have equal decision-making priority inform the principal investigator or attending physician that they disagree (with each other) as to participation of the prospective subject in human research, the subject shall not be enrolled in the human research that is the subject of the consent.
- No informed consent form shall include any language through which the person who is to be the human subject waives or appears to waive any of his legal

rights, including any release of any individual, institution, or agency or any agents thereof from liability for negligence.

- Notwithstanding consent by a legally authorized representative, no person shall be forced to participate in any human research if the investigator conducting the human research knows that participation in the research is protested by the prospective subject.
- In the case of persons suffering from organic brain diseases causing progressive deterioration of cognition for which there is no known cure or medically accepted treatment, the implementation of experimental courses of therapeutic treatment to which a legally authorized representative has given informed consent shall not constitute the use of force, unless prior knowledge of participant refusal is known.
- Unless the research constitutes the best medical interests for the prospective participant and is not available outside of the research context, dissent or objection on the part of the participant ought to be respected regardless of the LAR's wishes.

13.8 DETERMINING DECISION-MAKING CAPACITY

A primary consideration when recruiting subjects with severe cognitive disorders is to establish procedures for determining which individuals are able to provide legally valid consent, and which are not.

The protocol reviewed by the IRB must detail a specific plan for the assessment of the decision-making capacity of the subject. The assessment will be conducted by the investigator for any subject who may qualify for Surrogate Consent. While there are no standardized measures for determining capacity to consent, subjects may be assessed on their ability to understand and to express a reasoned choice concerning the:

- Nature of the research and the information relevant to his/her participation;
- Consequences of participation for the subject's own situation, especially concerning the subject's health condition; and
- Consequences of the alternatives to participation.

The capacity to understand all these concepts may not be necessary to consent to participate in a particular research protocol -- greater capacity is required for higher-risk protocols.

In protocols in which surrogate consent has been approved by the IRB, assessment of the decision-making capacity of the surrogate should be implemented only when the investigator has reason to believe that the subject's decision-making capacity may be impaired.

If a study anticipates using surrogate consent from legally authorized representatives, the method of assessment must be specified in the IRB Application.

Assessment Methods

- Assessment tools: Various methods of assessment may be acceptable for differing studies. In general, a greater capacity to consent and more rigorous methods of assessing capacity are needed in studies that have higher risks for subjects.

- Review of consent documents with the subject: The assessor may review the IRB-approved consent form with the prospective subject in the normal manner used to obtain consent. A simplified study summary may be used as an aid to emphasize/remind subjects of major points.

- Capacity assessment: The assessor can ask the prospective subject to explain the main elements of this study and indicate a decision about taking part or not. The prospective subject may use a simplified study summary to answer the questions. Based on these responses, and whether the decision to participate or not appears to be a rational choice reflecting an appreciation of the facts, the assessor can then make a final determination about capacity for consent.

- Sample questions to assess consent capacity: These questions pick up at the point that consent form review has been completed. They are examples only — clinical judgment remains the best guide for what to ask.
    - Are we offering you your usual medical care, or asking you to be in a research study?
    - Do you have to take part in this study, or is it OK to say "no"?
    - What is the purpose of this study?
    - Tell me the main things that would happen to you in this study. ? Tell me the main risks to you of being in this study.
    - Will this study mainly help you or others?
    - If you want to drop out of the study, when can you do this?
    - Considering the risks and benefits we've discussed, what have you decided about taking part in this study?

- Educational procedures: For subjects scoring less than perfect on the initial presentation, educational procedures may be employed to raise understanding to sufficient levels for them to make a meaningful choice about participating. Potential measures include repetitive teaching, group sessions and audiovisual presentations.

13.9 OBTAINING SURROGATE CONSENT FROM AN LAR

Initial Consent

If the research subject is responsive but lacks the capacity to consent, the investigator must make a reasonable effort to describe the research to the subject in a manner consistent with the standard consent process and indicate the intent to obtain surrogate consent. This communication should be documented in the research file. If, however, the research subject is non-responsive (e.g., unconscious due to trauma or medication administered to treat that trauma), the investigator will document this observation in the research file, and a note in the participant's medical record that references the research file.

If the research subject expresses resistance or dissent to being in the research or to the use of the surrogate consent by word or gesture, they will be excluded from the research study.

Ongoing Consent:
Consent in research is an ongoing process. If reconsent is ever required, the LAR should sign the amended consent on behalf of the subject if still incapacitated. In addition, researchers must also be prepared to re-evaluate a subject's ability to consent over time:

In cases where the subject regains the cognitive ability to consent, the research subject must be re-consented using the standard consenting process as soon as possible. After re-consent, the consent previously granted by the LAR is no longer considered valid. If in the re-consenting process, the research subject indicates that s/he no longer wish to continue participation, the subject must be withdrawn from study in a safe and respectful manner.

In the event that a research subject has been initially consented by an LAR, and a surrogate of higher priority subsequently notifies the investigator of that relationship to the research subject, the investigator must defer to the higher priority surrogate's decision regarding whether the research subject will continue to participate or to withdraw from the study.
Investigators must describe to potential surrogates the nature of ongoing decisions during the study, including decision to participate in certain procedures, changes to the study, etc., in order to ensure that the surrogate will be willing to undertake these ongoing responsibilities.

In the event that the LAR dies, the research subject or next available surrogate must be re- consented upon any event that would otherwise trigger re-consenting the research subject.

In conformance with the Common Rule, for research that is no more than minimal risk, the IRB may approve a request to waive some or all of the required elements of informed consent under specific criteria, and in such cases the need for surrogate consent may also be waived.

13.10 RESOURCES

- Revised Common Rule Q&As - Definition of Legally Authorized Representative
- [Refer to 45 CFR 46.102(i) the revised Common Rule.]
- IRB SOP 2.02 Informed Consent
- IRB SOP 3.18 Additional Safeguards for Individuals Without Decision-making Capacity
- IRB Reference Manual - RM 06 Vulnerable Populations
- IRB Reference Manual - RM 16 Informed Consent Process
- Ohio Revised Code 2317.54

Appendix 1: Decision Tree for Assessment of Capacity to Consent