

# Concerns for Nevada Medical Providers: Use of AB 128 Form May Result in ADA Liability and Loss of Immunity

by Thomas F. Coleman, J.D.

On March 9, 2015, the Nevada Assembly Judiciary Committee passed AB 128 – a bill creating a medical power of attorney for adults with intellectual disabilities. To be eligible to use the power of attorney form authorized by the bill, an adult must have an IQ of 70 or less.

The wording of the bill is confusing. In some places it indicates that medical decisions are made jointly by the principal (person with intellectual disability) and the agent (person designated in the form). In another place it states that the principal makes the medical decision.

This mixed message is problematic enough – especially for medical providers who must obtain informed consent from someone – but what causes greater concern is the level of difficulty that people with intellectual disabilities may have in understanding what the document means.

For a contract to be valid, the person who signs it must understand what it means. This is often referred to as the capacity to contract.

If a person speaks only Spanish and a contract is written in English, no one would question that the person signing it lacks the capacity to understand it. Use of a Spanish-to-English interpreter would help, but if the person also has an intellectual disability, the problem goes beyond the issue of interpretation. It also involves the capacity to comprehend words, sentences, and concepts.

In terms of AB 128, the power of attorney form can only be used by people with an IQ of 70 or lower. Some users of the form will have an IQ of 50, while others may have an IQ of 40, or 30, or even lower. Therefore, whether someone has the capacity to understand what the document means, and realize the nature of the rights they are surrendering, requires a situation-specific evaluation. An assessment of capacity will need to be performed in each case.

The Disability and Guardianship Project alerted the Assembly Judiciary Committee to problems with the AB 128 medical form. We stated: “Many people with intellectual disabilities will not know what the following terms mean, terms which are essential to the contract – insert, designate, agent, health care, decisions, treatment, necessary, paperwork, records, alternative, principal, and authorized.”

We have performed “readability” tests on the form. The results are consistent with the prior concerns we sent to the committee. This form may not be understood by most people with intellectual disabilities.

Some tests placed the AB 128 form at the 11<sup>th</sup> and 12<sup>th</sup> grade reading level. Others placed it at the 7<sup>th</sup> and 8<sup>th</sup> grade level. The average of the tests scored it as 8.5.

Many people who would use this form are reading at the 2<sup>nd</sup>

to 3<sup>rd</sup> grade level. Using a form that is known to score at the 8<sup>th</sup> grade level is more than problematic – it may result in liability or eliminate immunity from liability.

When a medical provider has an adult patient with a known intellectual disability, the provider must take precautions to insure that the patient understands what is happening, unless the patient has a guardian. In that case, the provider obtains informed consent from the guardian.

If a medical provider relies “in good faith” on a power of attorney form signed by the patient, the provider may be immune from liability for obtaining all or a portion of the informed consent from the designated agent. However, if the form is written at the 8<sup>th</sup> grade level and the provider knows or should know that the patient functions at a 2<sup>nd</sup> grade level of understanding, good faith would be lacking. Immunity would not exist. That is one reason why the AB 128 power of attorney form could be a major concern to doctors.

The second aspect of liability is under the Americans with Disabilities Act. The ADA prohibits discrimination on the basis of disability in the delivery of services. Medical providers have liability under Title 3 of the act.

Use of a power of attorney form is one part of the medical process. Using a form that a doctor knows is above the comprehension level of a patient could be interpreted as a form of disability discrimination.

If something were to go wrong, there could be a lawsuit by a surviving sibling, or an estranged spouse who is the other parent of the patient. If a lawsuit is filed, the medical provider will could be the target.

AB 128 needs to be more thoroughly vetted. The form it authorizes should be field tested by a neutral agency with research expertise in this area. The results of the testing could be used by proponents to craft a form that would serve as a national model.

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