8.04 HEALTH CARE PROVIDER MALPRACTICE - LACK OF CONSENT

The law requires a health care provider to obtain consent before performing a treatment or procedure. If a health care provider fails to obtain consent, [he] [she] [it] may be responsible for the patient’s harm even though the treatment itself met the applicable standard of care. Consent may be given orally or in writing. Consent may also be implied when the words or acts of the patient would lead a reasonable person to believe the patient consented to the treatment or procedure. [A person’s consent may be limited. If a person consents to one form of treatment, it does not mean [he] [she] has consented to other forms of treatment.]

The plaintiff claims that the defendant failed to obtain consent. In order for the plaintiff to prevail on this claim, you must find it is more likely true than not true that:

(1) the plaintiff did not consent to the [insert treatment or procedure];

(2) if the plaintiff had been given a choice, [he] [she] would not have consented to the [treatment] [procedure]; and

(3) the [insert treatment or procedure] was a legal cause of the plaintiff’s harm.

I will define the term legal cause for you in a moment.

# **Use Note**

This instruction is to be used when the plaintiff alleges complete lack of consent. Instruction 8.03 should be used in cases where the issue is whether the consent given was informed. When both lack of consent and failure to inform are raised, both Instructions 8.03 and 8.04 should be given.

# **Comment**

AS 09.55.556 plainly covers cases where the plaintiff consented to the procedure, but alleges that the health care provider failed to provide adequate information to allow informed consent. Those claims are covered by Instruction 8.03. Instruction 8.04 covers situations where the plaintiff alleges that he or she did not consent to the procedure. It is unclear whether lack of consent claims are governed by the informed consent statute or by common law.

In a common law battery cause of action, the case is complete with proof that there was no consent. The additional requirement of a showing that, had the plaintiff been informed, the plaintiff would have declined the treatment is not required for the battery cause of action. See Article 12 for instructions on battery. No Alaska cases have determined whether a common law battery claim arising out of health care can be made against a health care provider.

Consent has not been specifically defined in Alaska law. The definition provided in the first paragraph of the instruction is taken from Colorado Jury Instruction 15.10. See also Restatement (Second) of Torts § 892 (1979); W. Keeton and W. Prosser, Handbook on the Law of Torts § 18 (5th ed. 1984).