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Informed Consent Witness Programs

By Norman M. Goldfarb

There are several possible reasons for obtaining witness signatures on informed consent forms:

- Comply with regulatory requirement.
- Ensure that the site properly obtained informed consent.
- Ensure that subject does not later deny receiving information and signing the consent form.
- By making the consent process more official and formal, encourage subject to take it more seriously.

The purpose for witnessing informed consent defines the requirements for a proper informed consent witness program.

Regulatory Requirement for Witnesses

In the United States, the regulatory requirement for a witness is limited to subjects who are "unable to read and understand a regular informed consent form", but otherwise competent to give consent. The requirement is further limited to cases where the "short form" is used; if someone simply reads the normal consent form to the potential subject, a witness is not required.

The short form is not an abbreviated informed consent document. It is a statement "that the elements of informed consent required by §50.25 have been presented orally to the subject or the subject's legally authorized representative." (21 CFR §50.27 and 45 CFR §46.117) In other words, a witness is required only if there is an oral presentation and that oral presentation does not consist of reading the normal consent form.

For the witness to ensure that the site properly obtained informed consent, the witness must (a) be present during the entire informed consent interview and (b) have the ability to verify that the required elements of informed consent were presented. If, per 21 CFR §50.27 and 45 CFR §46.117, (a) the IRB approves "a written summary of what is to be said to the subject," (b) that summary includes the required elements, (c) the summary is read to the subject, but (d) the summary is different than the normal consent form, then very little expertise is required of the witness.

According to the regulations, there is no explicit requirement that the witness verify that the subject understood or even heard the information provided. Those requirements are addressed in the regulations pertaining to legal representatives, which do not mention witnesses. Nor does the witness regulation address the circumstance in which the subject is able to understand, but not physically sign a document.

Given that simply reading the normal informed form to the subject avoids the requirement for a witness, there is little advantage to creating a separate short form and summary. Further, if the summary and oral presentation do not include all of the information in the normal consent form, the gaps may become pertinent in subject injury litigation.

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FDA Guidance

FDA GCP Guidance (ICH E6 4.6.9) (see Regulations and Guidance section below) substantially expands witness requirements:

- The witness must be impartial, but the guidance does not specify the requirements for impartiality.
- "By signing the consent form, the witness attests that the information in the consent form and any other written information was accurately explained to, and apparently understood by, the subject or the subject's legally acceptable representative, and that informed consent was freely given by the subject or the subject's legally acceptable representative." Unless the presentation consists only of reading documents, the witness must be expert in the contents of the consent form and other written information presented. No guidance is provided as to how the witness is to determine that "the information in the consent form and any other written information was… understood by the subject…, and that informed consent was freely given by the subject…." This guidance does not mention the short form. Outside the U.S., there is no short form, but inside the U.S., the "contents of the [short form] informed consent form" is not information about the clinical trial.
- The witness dates his/her signature.

The FDA Information Sheet "A Guide to Informed Consent" expands the requirement for a witness to the situation in which the potential subject "is physically unable to talk or write,… [but is] able to indicate approval or disapproval by other means."

Other Reasons for Witnesses

The presence of a witness during the informed consent process and signature by the subject may provide a level of quality assurance that informed consent has been properly obtained. By making the consent process more official and formal, it may encourage subjects to take informed consent more seriously.

However, if the intent is to ensure a proper consent process and understanding by the subject, a rigorous witness training and provisioning program is required. In the absence of an effective program, the only benefit of witnessing signatures is probably to protect against claims in subject injury litigation that the subject did not sign the consent form. Videorecording is probably a more effective method of documenting a signature. A random employee walking down the hall is probably unable to witness more than a signature.

If the intent is to verify subject comprehension, a more effective approach is to administer a comprehension quiz. Videorecording the informed consent presentation does not document comprehension by the subject. Just because the subject says on the videorecording that he/she understands the information, does not mean he/she does, in fact, understand it. If the presentation is not just reading the consent form, it also sure to document gaps in the information presented.

Best Practices for Informed Consent Witnessing

The regulations, guidelines and supplemental material in the Regulations and Guidance section below provides guidance for a proper informed consent witness program:

- The witness is present for the entire informed consent interview. (If informed consent is a process that begins with a study advertisement and ends with the subject's completion of the study, this requirement is impractical.)

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- The witness verifies the identity of the person signing the informed consent form.
- The witness is impartial. A friend or relative of the subject is unlikely to be impartial. Employees of the research site have obvious conflicts of interest. Third-parties are unlikely to have the necessary expertise or be on-hand for the informed consent interview. Compensation of a third-party for standing witness by the site or sponsor creates another conflict of interest. Impartiality is thus a difficult trait to find in anyone qualified to be a witness.
- Information on the reason for using a witness and on the selection of the witness is provided to the subject. If the presence of the witness is for the protection of the research site and sponsor, this explanation may be a bit awkward.
- The witness signs, dates and prints his/her name under a statement of what he/she is witnessing.
- The witness has the necessary credentials and training to support his/her statement. If the witness is stating that the subject understood the information, the witness is provided with appropriate means of evaluating the understanding.
- The witness is indemnified against liability in any subject injury litigation. Employees are probably indemnified automatically by their employers, but such indemnification of third-parties creates another conflict of interest.
- Means are provided to contact witnesses years later, when litigation may occur.

A proper informed consent witness program that goes beyond witnessing signatures thus faces substantial challenges.

Regulations and Guidance

21 CFR §50.27 and 45 CFR §46.117 allow the use of a "short form" when the potential subject is unable to read and understand a regular consent form. The "short form written consent document [states] that the elements of informed consent required by §50.25 have been presented orally to the subject or the subject's legally authorized representative…. When this method is used, there shall be a witness to the oral presentation…. Also, the IRB shall approve a written summary of what is to be said to the subject or the representative…. Only the short form itself is to be signed by the subject or the representative. However, the witness shall sign both the short form and a copy of the summary…."

> **Key point:** If the potential subject is unable to read and understand a regular consent form, consent may be obtained with a short form and summary. The witness signs both documents after watching the oral presentation, presumably after the potential subject indicates consent in some manner.

FDA GCP Guidance and ICH E6 4.6.9 state that "If a subject is unable to read or if a legally acceptable representative is unable to read, an impartial witness should be present during the entire informed consent discussion… After the written informed consent form and any other written information to be provided to subjects, is read and explained to the subject or the subject's legally acceptable representative, and after the subject or the subject's legally acceptable representative has orally consented to the subject's participation in the trial and, if capable of doing so, has signed and personally dated the informed consent form, the witness should sign and personally date the consent form. By signing the consent form, the witness attests that the information in the consent form and any other written information was accurately explained to, and apparently understood by, the subject or the subject's legally acceptable representative, and that informed consent was freely given by the subject or the subject's legally acceptable representative."

> **Key points:** The witness must be impartial. The witness "should be present during the entire informed consent discussion." The witness signs and dates the consent form. "By

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signing the consent form, the witness attests that the information in the consent form and any other written information was accurately explained to, and apparently understood by, the subject or the subject's legally acceptable representative, and that informed consent was freely given by the subject or the subject's legally acceptable representative."

The FDA Information Sheet "A Guide to Informed Consent" states that "A person who can understand and comprehend spoken English, but is physically unable to talk or write, can be entered into a study if they are competent and able to indicate approval or disapproval by other means. If (1) the person retains the ability to understand the concepts of the study and evaluate the risk and benefit of being in the study when it is explained verbally (still competent) and (2) is able to indicate approval or disapproval to study entry, they may be entered into the study. The consent form should document the method used for communication with the prospective subject and the specific means by which the prospective subject communicated agreement to participate in the study. An impartial third party should witness the entire consent process and sign the consent document."

> **Key points:** A witness should be present if the potential subject is physically unable to talk or write,… [but is] able to indicate approval or disapproval by other means." "An impartial third party should witness the entire consent process."

The FDA Information Sheet "Frequently Asked Questions" states "Illiterate persons who understand English may have the consent read to them and 'make their mark,' if appropriate under applicable state law. The 21 CFR 50.27(b)(2) requirements for signature of a witness to the consent process and signature of the person conducting consent interview must be followed, if a 'short form' is used."

> **Key point:** If the standard consent form is read to the potential subject and the subject understands English and can "make his mark" (subject to state law), no witness is required. A witness is required only if the short form is used.

It also states, "FDA does not require the signature of a witness when the subject reads and is capable of understanding the consent document, as outlined in 21 CFR 50.27(b)(1). The intended purpose is to have the witness present during the entire consent interview and to attest to the accuracy of the presentation and the apparent understanding of the subject. If the intent of the regulation were only to attest to the validity of the subject's signature, witnessing would also be required when the subject reads the consent."

> **Key point: "**The intended purpose is to have the witness present during the entire consent interview and to attest to the accuracy of the presentation and the apparent understanding [and consent] of the subject."

The OHRP letter "Obtaining and Documenting Informed Consent of Subjects Who Do Not Speak English" (Melody H. Lin, Ph.D., November 9, 1995) states "…. §46.117(b)(2) permits oral presentation of informed consent information in conjunction with a short form written consent document (stating that the elements of consent have been presented orally) and a written summary of what is presented orally. A witness to the oral presentation is required…. When this procedure is used with subjects who do not speak English, … the witness should be fluent in both English and the language of the subject. … When the person obtaining consent is assisted by a translator, the translator may serve as the witness."

> **Key points:** If the potential subject does not speak English, " the witness should be fluent in both English and the language of the subject" and "the translator may serve as the witness."

EU Directive 2001/20/EC states "….if the person concerned is unable to write, oral consent in the presence of at least one witness may be given in exceptional cases, as provided for in national legislation."

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Key points: A witness is also required if the potential subject cannot write. There may be more than one witness.

The World Health Organization's "Standard operating procedures for clinical investigators" defines an impartial witness as "A person, who is independent of the trial, who cannot be unfairly influenced by people involved in the trial, who attends the informed consent process if the subject or the subject's legally acceptable representative cannot read, and who reads the informed consent form and any other written information supplied to the subject."

Key points: Impartiality requires that the witness "is independent of the trial [and] cannot be unfairly influenced by people involved in the trial." The witness **"**reads the informed consent form and any other written information supplied to the subject."

It further states, "If the study subject and/or legally acceptable representative is (are) unable to read, an impartial witness for the investigator should be present during the entire informed consent discussion. After oral approval by the study subject and/ or legally acceptable representative, the witness must sign and personally date the informed consent form and attest that the information was accurately explained and apparently understood, and that informed consent was given freely by the subject and/or legally acceptable representative."

Key points: The impartial witness is "for the investigator." The witness "attest[s] that the information was accurately explained and apparently understood, and that informed consent was given freely by the subject and/or legally acceptable representative."

It provides a sample signature block that includes spaces for the witness's printed name, signature, and date of signature.

Key point: The witness signs and dates the form, and prints his/her name.

Canada's "Tri-Council Policy Statement" states "In some circumstances, witnessing the signatures on the consent form may be felt to be appropriate. In law, the role of a witness is only to attest that the person actually signed the form; a witness is not responsible for certifying such factors as the signature being obtained under defined conditions or that the signers were competent. However, a court might subsequently seek the opinions of the witness on such issues."

Key point: "The role of a witness is only to attest that the person actually signed the form; a witness is not responsible for certifying such factors as the signature being obtained under defined conditions or that the signers were competent." This statement is contrary to U.S. and E.U. guidance that the witness signs after being present at the entire consent interview.

EU Guidance CT2 (R1) "Detailed guidance on the application format and documentation to be submitted in an application for an Ethics Committee opinion on the clinical trial on medicinal products for human use" states that "…. the clinical trial protocol should include…a description of the recruitment and informed consent procedures, especially when… a procedure with witnessed consent is to be used….If a procedure with witnessed consent is to be used, relevant information on the reason for using a witness, on the selection of the witness and on the procedure for obtaining consent should be provided to the subject."

Key points: When witnessed consent is to be used, the protocol should include a description of informed consent procedures. Also, "relevant information on the reason for using a witness, on the selection of the witness and on the procedure for obtaining consent should be provided to the subject."

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Conclusion

Proper witnessing of informed consent is probably impractical for anything beyond the subject's signature. Of course, if that is the only purpose, a cell-phone videorecording probably has more evidentiary value.

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