8.06 HEALTH CARE PROVIDER MALPRACTICE – JUSTIFICATION FOR LACK OF CONSENT

If you find that the defendant failed to obtain [informed] consent, you must then decide whether any defenses apply. It is a defense to the plaintiff’s claim based on a failure to obtain [informed] consent that [the risk not disclosed was too commonly known or too remote to require disclosure] [the plaintiff stated to the health care provider that the plaintiff would undergo the treatment or procedure regardless of the risk involved or that the plaintiff did not want to be informed] [under the circumstances, consent by or on behalf of the patient was not possible] [the health care provider, after considering all of the facts and circumstances, used reasonable discretion as to the manner and extent that the alternatives or risks were disclosed to the patient because the health care provider reasonably believed that a full disclosure would have a substantially adverse effect on the plaintiff’s condition].

If you find that [this defense] [one or more of these defenses] is more likely true than not true, then you must find for the defendant.

# Use Note

This instruction should be used after Instruction 8.03 or 8.04, and after Instruction 3.06 (Legal Cause), whenever the justification defense is raised.

# Comment

These justifications for failure to obtain the informed consent of a patient are listed in AS 09.55.556 as defenses, and thus the burden of proving their existence is on the defendant.