



RISK MANAGEMENT

Informed Consent and Other Lessons Learned at Trial

By Richard C. Engar, DDS, FAGD

In all of the cases that our malpractice company has seen go to trial, including one we recently experienced, the topic of informed consent has been raised by the plaintiff’s lawyers. Lawyers want to prove the patient was unaware of the risks of the procedure in question and then try to assert that the patient would have never undergone the procedure had he or she known the risks.

Many state and provincial laws are clear on the topic of informed consent, but simply asking a patient to sign a form does not constitute true informed consent. How many of you who have undergone hospital procedures really take the time to read the two-page informed consent form given to you?

What constitutes true informed consent? Although I am not going to set the standard of care in this column when it comes to informed consent, I can provide suggestions to help you ensure that your patients are well-informed about the procedures you plan to do, as well as the risks, so that they offer their consent for you to proceed. I’ll also cover some of the things we learned about labeling records and retaining the best expert witness.

Informed Consent

An informed patient is one who has been told about the basic steps of the planned procedure, as well as the risks, prognosis and alternatives. Keep these recommendations in mind in relation to informed consent.

1. Whether an assistant goes over the steps of the procedure, or you handle this yourself, you — the dentist — should answer any questions the patient has and make sure he or she understands what is going on. It does not hurt in some cases to emphasize the most common risks of the procedure and check these off on your written form. Many oral surgeons ask the patient to initial each part of the informed consent form they use to prove that the patient actually read and understood it.
2. Asking the patient to sign a written form verifies that a discussion took place and that risks, etc., were presented to him or her. The written form ensures the avoidance of any “he said/she said” scenarios coming up later.
3. Add the following comment to your written records: “Procedure, risks, prognosis and alternative procedures explained to patient. Consent given to undergo procedure.”



4. If you are doing something such as placing multiple crowns, write the tooth numbers on the initial consent form the patient signed. For subsequent procedures, remind the patient that you went over risks, etc., beforehand and ask if he or she has any additional questions. Log those questions in your records.
5. If too much time passes between procedures, or if you do a more extensive follow-up procedure, you should have a discussion pertinent to that procedure and use an additional written informed consent form, if appropriate.
6. If patients object to or complain about having to sign the form or sit through a discussion about risks and alternatives, tell them that happy patients are informed patients. Remind them that in the dental office, no one likes surprises, and you make every effort to ensure that your patients understand what is going on and give their permission to allow procedures to be performed.
7. I recommend asking patients to sign a paper informed consent form and then scan it, rather than using a pad system. Some of you may disagree with me, and some software manufacturers may not like me anymore for advising this, but the reason for this recommendation is that whether you have your informed consent text on a laminated sheet that you reuse or on a computer screen, the actual wording is often not recorded with the pad signature. In court, when your defense counsel asks the patient if the signature belongs to him or her, the patient will respond, “Yes.” But then, when the defense counsel asks the patient what he or she sees on the screen, the patient could say, “I never saw that! The wording I saw looked different!”

Labeling Records

Be sure to carefully document the dates X-rays were taken, especially digital X-rays. Some software systems do not allow for easy labeling of X-rays, especially if they must be printed

on a sheet later, and it is easy to get things mixed up. If you use film, whether you keep your X-rays in coin envelopes or mount them, be sure the dates are recorded on the envelope or mount. If you take duplicate X-rays so one can be given to the patient in any form, document this fact in your chart.

Retaining the Best Expert Witness

If you have any input in the way your malpractice carrier obtains expert witnesses, help the carrier choose experienced, in-state practicing dentists to review the case and testify on your behalf. The expert cannot be anyone with whom you have social interactions, etc., but he or she should be someone who is well-respected in the community and experienced with credentials; for instance, a part-time faculty member at your state's dental school. We have found that local experts routinely trump "hired guns" the plaintiff's lawyers find through various means, such as online referral sources. As opposed to the plaintiff's out-of-state expert, who had not done the procedure in question for several years and who tried to strengthen his argument with several literature articles, when asked why he had not cited articles, our expert exclaimed, "I am at the tip of the spear! I don't need articles to state my opinion! I do the actual procedure routinely and regularly!"

In conclusion, I hope that none of you ever have to undergo the rigorous and traumatic experience of a jury trial. But if you do, I hope this article helps you to provide a better defense of your case. ♦

Points to Ponder

1. Visual aids may be helpful in explaining dental procedures to patients as you share with them information about the procedure, risks, prognosis and alternatives. There are several sources of good visual aids that help simplify the process. Some dentists use short videos to cover the procedure prior to asking patients to sign the actual consent form.
2. Consent forms should be reviewed and updated regularly as advances in dentistry dictate.
3. Remember that patients may not have great memories about procedures and associated risks. You are better off to count on a short memory rather than to assume that a patient may remember everything that you explained a couple of years ago.
4. Be sure to maintain X-rays as part of your records as long as the law requires, and ensure that they are all properly labeled. It is a good idea to retain all records of complicated cases indefinitely, as these may have more potential to require a review years later.

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