

Informed consent

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Why explaining to your patients all the possible consequences of a procedure—and keeping a detailed record of those conversations—is your best protection if something goes wrong. By Andy Kollmorgen

Unless you go so far as to foist a consent form on your patient, it can be hard to know whether they've officially given the go-ahead for a treatment you recommend.

Did they really say yes, or do you just think they did? Any ambiguity could turn into a matter of dispute if something goes wrong down the track, especially in those areas of dentistry that have proven the most litigious, such as dental implants, cosmetic dentistry and restorative dentistry.

All tend to involve costly procedures that can lead to patients feeling ill-served if there are complications.

Your patient may decide to call a lawyer if peri-implantitis sets in, for example, even though you're sure you gave fair warning that it was a risk.

That's why dentists need to write down everything that was discussed, especially about potential risks and complications, and keep the document locked away in a safe place. It's not enough to just throw it out there and assume the patient gets it.

As Dr Gerard Clausen, a clinico-legal adviser at the Sydney-based Medical Indemnity Protection Society, wrote in a recent blog focusing on informed consent in dentistry, "the key factor is not the consent process and what was or was not communicated, but rather what was documented in the contemporaneous clinical notes.

"Should the need arise, the fact that full and proper consent was obtained and documented will be a pivotal issue in the successful defence of any claim," Dr Clausen concludes.

Few would argue the point, but that doesn't mean practitioners always do a great job of documentation.

According to the managing director of Harris Friedman Lawyers, Jonathan Harris, who has expertise in dental-related cases, it's the quality of consent that's key.

"Informed consent in a dental environment is no different than informed consent in a medical environment, but it can be a problem when it starts to become a pro forma process that doesn't take the sensibilities of the patient into account. There can be a difference between a request for consent and the capacity to give it. It all goes to whether the patient understands the process."

Not speaking English as a first language, for instance, can pose obstacles to comprehension, especially in a medical environment. And if the consent process is delegated to a nurse or other assistant, it's that much further away from a legally supportable agreement between patient and dentist.

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For Harris, each patient/practitioner relationship comes with its own set of nuances. "It's about the patient fully understanding the implications of the treatment and their consent to it—the level of consent being commensurate with the potential risks of the procedure. Obtaining informed consent should not involve a generic document or a pro forma procedure. The consent process should be tailor-made to the person and the type of treatment."

It should also be done in good faith.

In a case that was decided by the NSW Civil and Administrative Tribunal in October last year, a dentist was found guilty of unsatisfactory professional conduct, in part because he failed to make and keep good clinical records and the clinical information he gave his patients before and after various treatments was inaccurate.

The dentist in question fell well short of the guidelines issued by the Dental Board of Australia, which state: "Dental practitioners must create and maintain dental records that

serve the best interests of patients, clients or consumers and that contribute to the safety and continuity of their dental care.”

Australian Dental Association (ADA) vice-president and chairman of its Schedule and Third Party Committee, Dr Carmelo Bonanno, agrees the idea of informed consent is as central to dental culture as it is to medicine in general. But that doesn't mean practitioners are always as careful as they should be to document discussions around complicated and costly procedures.

“The benefits of good discussion and good documentation are something that most practitioners would have a grasp of, and the ADA has certainly emphasised the importance of this,” Dr Bonanno said.

“But with any treatment where the costs are high, the cost of failure is high. And we know that patients don't remember everything you tell them. That's why sound clinical notes are so crucial if something does go wrong well after the procedure.”

Like most medical professionals, dentists are required to have professional indemnity insurance. But is it time for dentistry to take due diligence to the next level when it comes to informed consent?

“We are not at the stage yet where patients are required to sign a consent form as with many medical procedures performed by medical doctors, though some practitioners have gone down that road,” Dr Bonanno said. “But the critical thing for dentists is how good the records are. There's a legal saying along the lines of ‘good notes mean good defence; bad notes mean bad defence; no notes mean no defence’. Should legal action arise, it gets down to the quality of the clinical notes.”

Having good people skills certainly helps, and the record shows that good clinical skills alone may not be enough to keep you out of court.

An article in a 2014 edition of the Australian Dental Journal analysing legal cases and how they came about puts a fine point on it: “It must be noted that no decision or outcome [of the legal cases reviewed] was dependent on actual clinical treatment but rather the communication and consent process.

“Time spent getting to know the patient is seldom a waste of effort,” the article continues. “Patients will sue regardless of the standard of care as indicated by these cases. On the flip side, patients tend not to sue clinicians they like and who they feel rapport [with]; they sue doctors who never took the effort to know them and their beliefs.”