Dentist's Advantage
PROFESSIONAL LIABILITY & PRACTICE PROTECTION

The National Society of Dental Practitioners and the Dentist's Advantage Insurance Program for Dentists

RISK MANAGEMENT ARTICLE

Defending Informed Consent Claims

As expected, the vast majority of "dental malpractice" claims and lawsuits are those involving standard of care allegations; in other words, the patient is alleging the quality of the dental treatment received falls below industry standards. However, dentists should be aware that many claims come in to our office involving allegations of a dentist's failure to secure the patient's informed consent prior to treatment, and can be difficult to defend.

Informed consent claims are rarely brought independently, but are most often standard of care claims with informed consent allegations weaved into those claims. In many cases, a patient will initially bring a standard of care claim and later allege the dentist failed to warn them of the risks of the treatment at issue resulting in a distinctly separate informed consent claim. Savvy attorneys will almost always include an informed consent claim when filing a lawsuit against a dentist, as it is often more difficult to get an informed consent claim dismissed in the early stages of litigation. Early dismissal can be difficult because whether the dentist adequately secured a patient's consent for treatment is fact-based and often comes down to a "he said-she said" argument.

Because informed consent claims are fact-based (as opposed to expert testimony-based like a standard of care claim), documentation is often the dentist's only defense. Although most dentists think of "informed consent" as what the dentist communicates to the patient, there is a big difference between communication and documentation. They are equally important.

Sample Claim:
Dr. Davis had been practicing in a mid-sized city for over 20 years. He owned his own practice for the previous 15 years and never had a claim or lawsuit brought against him. Mrs. Jones, a 67 year old long-time patient presented for an emergency exam complaining of pain. Although Mrs. Jones had been a patient of Dr. Davis's practice for over 10 years, she never came in on a regular basis and often only agreed to emergency treatment.

At her latest emergency exam, Dr. Davis diagnosed irreversible pulpitis in tooth #30 and recommended root canal treatment. At that time Dr. Davis reminded Mrs. Jones that she had multiple teeth that require restorative treatment, and she had several missing teeth that should be replaced with implants, bridges, or partial dentures. Mrs. Jones responded that she was "tired" of the ongoing problems with her teeth and wanted to have all of her teeth removed and replaced with full dentures.

Dr. Davis strongly recommended Mrs. Jones attempt to save her teeth; or in the alternative save enough teeth to support partial dentures. Nevertheless, Mrs. Jones insisted that she wanted full dentures and did not want to go through any additional restorative treatment on her teeth. Dr. Davis warned Mrs. Jones that dentures are almost always initially uncomfortable and often result in sore areas on the gum tissues requiring multiple adjustments, and sometimes re-fabrication of the dentures after the tissues have completely healed. Mrs. Jones acknowledged the challenges with dentures and told Dr. Davis she still wanted to move ahead with the treatment. On this visit, Dr. Davis made explicit notes in the chart that the patient" requires extensive restorative treatment" and that although Dr. Davis recommended against it, the patient insisted on full dentures. No other notes were made.

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As planned, Mrs. Jones had her teeth removed by the oral surgeon and Dr. Davis fabricated the upper and lower dentures. As what often occurs, Mrs. Jones suffered from post-delivery soreness and continually complained that the lower denture was too loose. Dr. Davis assured Mrs. Jones this was quite common and relined the lower denture and later re-made the lower denture. After multiple adjustments, Dr. Davis eventually referred Mrs. Jones back to the oral surgeon for a consultation for lower implants to be used with an overdenture.

The oral surgeon thereafter placed four implants and Dr. Davis fabricated an overdenture. Unfortunately, all four implants failed and Mrs. Jones required extensive bone grafting in order to have replacement implants placed. What started out as a three to four month process of extractions and denture fabrication ultimately turned into a two year ordeal for Mrs. Jones that involved thousands of dollars of unexpected treatment.

Mrs. Jones then threatened to sue Dr. Davis alleging Dr. Davis failed to adequately inform her that one of the risks of having a lower denture is that the denture may never be completely comfortable, and that she may later require expensive implants and bone grafting in order to adequately restore her lower arch. She then demanded $13,000 to pay for the bone grafting and new implants, alleging that had Dr. David adequately informed her of all of the possible risks of having full dentures, she would have not underwent the procedure.

After reviewing Dr. Davis's patient chart, an expert reviewer advised our office that Dr. Davis could possibly face liability for this matter due to insufficient documentation of the informed consent discussions between Dr. Davis and Mrs. Jones. It did not matter that Dr. Davis likely did not have the duty to warn Mrs. Jones that implants may be necessary in the future. Dr. Davis was surprised to hear this, as he very explicitly noted in the chart that he counseled Mrs. Jones against the dentures. However, what Dr. Davis didn't do is document the entirety of his discussions with Mrs. Jones. He failed to document that he communicated the possibility that additional procedures may be necessary after the delivery of the immediate dentures; he failed to document the wide variety of possible post-operative complications, such as on-going soreness, and he failed to document the alternative treatment available. Although this information was verbally communicated to Mrs. Jones, none of it was documented in the chart. To avoid a lawsuit, Dr. Davis eventually agreed to pay a settlement to partially fund Mrs. Jones's future treatment. However, had Dr. Davis been more mindful of documentation as to his communications with Mrs. Davis, we could have likely successfully defended this claim.

The following are some tips to successfully defend against an informed consent claim:

- Include a written treatment plan for each and every plan you present to the patient. Even if you know the patient is not going to accept your recommended plan, document exactly what treatment you suggest. A general "extensive restorative treatment" note in the chart is inadequate.

- Document the specific risks of the treatment you discussed with the patient, and further document that you advised the risks of declining treatment.

- Once you have settled on a treatment plan, present the patient with a written consent form for all major restorative or surgical treatment. The form should include the risks of the treatment, as well as the risks of declining the treatment.

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• Ideally the doctor should present the consent form, rather than the dental assistant. The doctor is in a better position to answer any questions regarding the treatment and the patient will generally place more value on information presented by the doctor.

• Check the Dentist's Advantage website regarding some sample consent forms that you can integrate into your practice. http://www.dentists-advantage.com/sites/DA/rskmgt/forms/Pages/FormsIndex.aspx

• Remember, whether a specific "risk" of treatment should be discussed with a patient is not based upon how often that complication has occurred during your years of practice. Informed consent is based upon what a reasonable patient would want to know regarding the treatment, and whether they would choose to forego the treatment had they known of those risks.

• Make all chart notes on the day you make the diagnosis and/or recommendations for treatment. Adding notes later will only put you in a bad light and make it look like you are adding inaccurate information to protect yourself from your own wrongdoing.

• If a patient is signing a consent form, be sure the specific treatment is noted on the form. A general "consent for extractions" form will not be as effective in providing evidence of consent as one that includes the specific teeth numbers.

• Always ask the patient if he or she has any questions regarding the consent. If the patient's spouse is present during the presentation of the form, ask the spouse if he or she has questions.

Remember, a dentist always has the opportunity to present "his side of the story" when it comes to defending a claim or lawsuit alleging failure to secure informed consent. However, if a doctor can testify that he or she adequately informed the patient of all risks and benefits of a procedure, and the testimony mirrors the documentation in the patient chart, the chances of convincing a jury the doctor fulfilled his or her duty are significantly increased.

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