

PRACTICAL ISSUES REGARDING INFORMED CONSENT

Dental malpractice claims are on the rise. The average indemnity payment for a dental claim is \$34,327. This does not include defense costs nor personal costs to you and your practice (such as lost revenue due to time away from your practice). Many of these claims can be prevented. Establishing realistic patient expectation is a fundamental risk management practice and begins with obtaining patients' informed consent.

What is informed consent?

Informed consent is a process of informing and educating the patient about the proposed procedure's risks, benefits, and alternatives. By law, the dentist is responsible for informing the patient.

Florida Statute 766.103, Florida Medical Consent Law, states that informed consent is appropriate when:

- (a) 1. The action of the physician, osteopath, chiropractor, podiatrist, or **dentist** in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community.

Why do I need to obtain informed consent?

Dentists have both a legal and ethical duty to disclose known risks of treatment.

A specific informed consent discussion and documentation of that discussion are strong deterrents to litigation. Frivolous claims based on communication errors, misunderstandings, and unrealistic expectations can be avoided by obtaining informed consent.

If a suit is filed, documentation evidenced by an executed consent form and progress notes made in the patient's chart will significantly help your defense. A jury is more likely to find that the patient assumed the risks of treatment in the face of written documentation to support your position.

What should be included in the consent discussion?

- Explain the patient's condition and the treatment or procedure in lay terms.
- Disclose the risks:
 - Include severe risks such as, death, paralysis, loss of function.
 - Include frequent risks and the possibility of additional treatment or procedures.
 - Include the incidence of risk such as a one in 10,000 complication rate.
- Provide information about common side effects such as infection and/or bleeding.
- Explain the benefits of the procedure.
- Don't make any guarantees of success.
- Provide information about potential outcomes if the treatment is refused.
- Encourage the patient to ask questions.
- Acknowledge that the patient may withdraw consent.
- Make an offer for a second opinion.

How do I document that informed consent was provided, especially to a special needs patient (e.g., minors, elderly, mentally disabled, HIV, deaf patients, and visually impaired)?

- Document in the progress notes that the risks, benefits, and alternative procedures were discussed and the answers provided to any questions asked.

Table of Contents

1	Practical Issues Regarding Informed Consent
2	Florida Administration Codes
3	Sample Consent Form
6	Frequently Asked Legal Questions

Continued on page 4



FPIC publishes Preventive Action on a quarterly basis as a service to its policy-holders. Information in this publication does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained in this newsletter are generalized and may not apply to all practice situations. FPIC recommends you obtain legal advice from a qualified attorney for a specific application to your practice. The information should be used as a reference guide only.

For comments, questions, or to obtain additional copies contact the FPIC Risk Management Department at 800-741-3742, ext. 3016.

Cliff Rapp

Vice President of Risk Management, Editor-in-Chief

Sandra C. Strickland

Risk Management Consultant

Kathleen Worley

Risk Management Consultant

Amy D. Pettigrew

Director of Communications

FPIC

1000 Riverside Avenue
Suite 800
Jacksonville, FL 32204

800-741-3742
Local 904-354-5910
Fax 904-358-6728
www.medmal.com

FOCUS ON FLORIDA ADMINISTRATIVE CODES FOR DENTISTRY

64B5-17.004 Emergency Care

It is the responsibility of every dentist practicing in the State of Florida to provide, either personally; through another licensed dentist, or through a reciprocal agreement with another agency; reasonable twenty-four (24) hour emergency services for all patients under his continuing care.

Specific Authority 466.004(4) FS. Law Implemented 466.028(1)(u), (v) FS. History-New 4-26—87, Formerly 21G-17.004, 61F5-17.004, 59Q-17.004.

Dental problems often occur outside of normal office hours. Remember that you are responsible for providing 24-hour coverage for your patients in the event of a dental emergency. Providing your practice with a reliable answering service allows patient access to emergency, dental care. The service should have written protocols for screening phone calls appropriately. The primary advantage of using an answering service is the human contact versus “a machine.”

Periodically evaluate the quality of the service. The answering service should be able to access you by phone or pager without delay. They should also provide instructions for patients experiencing a medical emergency to proceed to the nearest emergency department. In order to facilitate documentation of after-hour’s patient contacts, most services provide daily listings of after-hour’s patient calls to the practice.

Another alternative is the answering machine. One advantage of an answering machine is that you control the message that is delivered to your patients. For example:

“Thank you for calling _____. Our office hours are _____. If you have an emergency you may reach Dr. _____ at _____. If this is a potentially life-threatening emergency please proceed immediately to your nearest emergency department or call 911. If you would like to schedule an appointment or discuss a non-emergency matter, please call during office hours or leave a message at the tone. Thank you for calling _____.”

Use a Telephone Contact Record form for recording information from phone contacts and after-hour’s communications. File the form in the patients chart and document any follow-up action taken.

DID YOU KNOW?

Florida Administrative Rule 64B5-17.002 Written Dental Records; Minimum Content; Retention, sets forth that:

(3) Each licensed dentist in Florida shall retain a copy of each entry in his or her patient appointment book or such other log, calendar, book, file, or computer data used in lieu of an appointment book for a period of no less than four years from the date of each entry thereon.

SAMPLE CONSENT FOR DENTAL CARE

I hereby consent/refuse to the following described dental procedure upon me by or under the direction of
Dr. _____, his associates and assistants.

Patient Name: _____

In the event that Dr. _____ becomes unavailable, I authorize
him/her to select a replacement to accomplish the agreed-upon procedures without delay.

I acknowledge that the following information has been provided to me.

Nature of my dental illness: _____

Purpose of the procedure and treatment sequence: _____

Alternative forms of therapy: _____

Risks of the recommended procedure (severity, frequency, incidence): _____

Risks of the alternative procedures: _____

Risks of not undergoing therapy for my illness: _____

I further consent to administration of local anesthesia and other drugs deemed necessary in my case and understand risks of reactions, such as redness, swelling, pain, itching, vomiting, and/or anaphylactic shock associated with the administration of any drug or anesthetic.

I consent to the admission of observers into the procedure for the purpose of medical education or science. I further agree that photographs may be taken of me during the procedure and that the photographs and a narrative of my case may be utilized for medical education or science, including publication in professional journals and medical books.

I consent to the performance of operations and procedures in addition to or different from those now contemplated which Dr. _____ or his associates and assistants consider therapeutically necessary even though this procedure may not be an emergency. I understand that the extension of this procedure may include risks not previously discussed but, nevertheless, grant to Dr. _____ his associates and assistants, the authority to proceed with such additional procedures.

I further consent to the disposal of tissue or parts removed at the time of the operation.

I realize that it is mandatory that I give as accurate and complete medical and personal history as possible, follow any and all instructions as directed, and permit prescribed diagnostic procedures.

I understand that there can be no guarantee of outcome with my dental procedure and acknowledge that no guarantee has been made to me with regard to the procedures I have requested and authorized.

I further acknowledge that I have been given full opportunity to discuss the matters contained herein with Dr. _____, his associates, assistants, or replacements and that I understand the information provided and my financial responsibility as explained to me.

(Patient or patient's authorized representative)

(Date)

(Witness)

(Date)

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Continued from page 1

- When indicated, have the patient or legal guardian sign a special written consent form. Place one copy in the patient's dental record (*remember to include the date and time on the consent form*), **and provide a copy to the patient or legal guardian.**

What if the Patient Refuses my Recommendations?

It is important to include this element in your informed consent discussion. If the patient refuses your recommendations,

explain the possible adverse outcome. This conversation should be documented in the patient's chart and when possible, the patient should sign an informed refusal statement. If the potential adverse outcome is severe, confirm the refusal of care or treatment in writing by letter to the patient.

If your office would like a copy of FPIC's Dental Risk Management CD-ROM, which includes copies of sample informed consent forms, contact FPIC's Risk Management Department at 800-741-3742 ext. 3016.

SAMPLE

TELEPHONE CONTACT RECORD

Patient Name: _____ Date/Time of Call: _____

Return Phone Number: _____

Age: _____ Allergies: _____

Current Problem: _____

History/Medications: _____

Follow Up Response/Medications: _____

Pharmacy: _____ Phone: _____

See in office: _____

Other: _____

Date/Time Dentist

Returned Call: _____ Signature: _____

SAMPLE REFUSAL TO CONSENT

Patient: _____ **Date:** _____

1. I have been advised by my dentist, Dr. _____, that the following operation or treatment should be performed upon me:

(Describe operation or treatment)

2. My dentist has explained to me, and I understand, the following:
- a. The nature of the recommended treatment.
 - b. The purpose of and need for the recommended treatment.
 - c. The possible alternatives to the recommended treatment for which I similarly refuse consent.
 - d. The probable consequences of not proceeding with the recommended treatment and/or alternatives.

3. I know that my failure to follow the aforesaid recommendations may endanger my dental health. I nonetheless refuse to consent to the proposed treatment.

4. My reason for refusal is _____

5. I personally assume the risks and consequences of my refusal, and release for myself, my heirs, executors, administrators, or personal representatives, dentists who have been consulted in my case from any and all liability for ill effects which may result from my refusal to consent to the performance of the proposed treatment.

6. I acknowledge that I have read this document in its entirety and that I fully understand it and that all blanks have been either completed or crossed off prior to my signing.

CAUTION: THIS IS A RELEASE OF LIABILITY. READ BEFORE SIGNING.

Patient or Patient's Authorized Representative

Date

Witness

Date

FREQUENTLY ASKED



LEGAL QUESTIONS

Should professional fees be waived or refunded when a patient is dissatisfied?

Not always. It depends on the particular situation. First give the patient the opportunity to describe the reason for their dissatisfaction. Attempt to correct the situation, if possible. If the patient demands a refund, waiver of fees, or the issue cannot be remedied, contact FPIC's Risk Management Department or personal counsel for specific guidance. What some may interpret as an act of accommodation, others may view as an admission of liability.

How long must a Dentist retain patient records?

Florida Statute 466.028(1)(m) and (o) requires that a dentist maintain the written dental record for a period of four (4) years from the date the patient was last examined or treated by the dentist. However, given the maximum statute of limitations, FPIC recommends that records be retained for a seven (7) year period.

What action should be taken when an error is made or a complication encountered?

Contact FPIC's Risk Management Department or personal counsel for guidance as soon as possible. Make no admissions of liability. Federal and/or State reporting requirements under strict time constraints may apply. Always attempt to discuss the situation with personal counsel or FPIC before meeting with any third parties.

May a dentist be sued for malpractice in the State of Florida without first being placed on notice?

No. Under Florida Statute 766 a dentist must first be placed on notice of intent to initiate litigation by the patient or the patient's attorney and given a ninety (90) day presuit period in order to investigate the claim being made. If, at the conclusion of the 90 day presuit period, the patient's claim is rejected or denied, suit may be filed. Contact FPIC or personal counsel immediately whenever a notice of claim is received.

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Jacksonville, FL

FPIC
Insurance Solutions for Healthcare Providers
P.O. Box 44033
Jacksonville, Florida 32231-4033
1-800-741-3742 (FPIC)
www.medmal.com