

Valid Informed Consent: The Best Practice Is Shared Decision-Making

By J. Kathleen Marcus, JD

When it comes to informed consent, healthcare providers invariably want magic words. What phrase in a consent form will both satisfy the obligation to receive informed consent from the patient *and* ensure the patient will not bring legal action if they are unhappy with the results of the procedure?

I have good news and bad news. There are no magic words. There are no guarantees that a patient won't sue a healthcare provider if they are unhappy with the result of the procedure. But, luckily, you *can* reduce liability risk in the doctor-patient relationship simply by deciding how the dental care will proceed *together*.

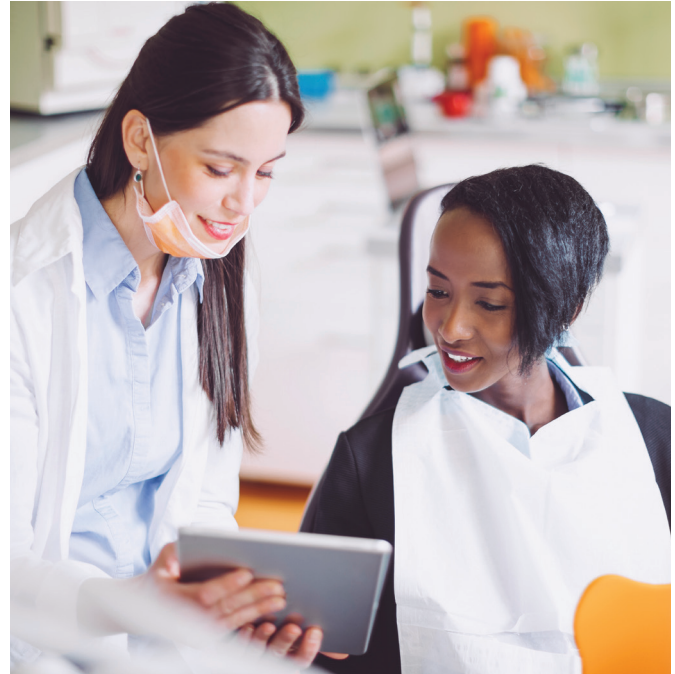
Informed consent is more than just a form to sign. It's a collaboration between the patient and healthcare provider. As a dentist, you must disclose all necessary information, but you must also ensure that what you have disclosed has been understood by the patient. It is this understanding that creates *valid informed consent*.

At the heart of informed consent is the belief that every adult of sound mind has the right to bodily autonomy. The legal requirement to obtain informed consent from a patient prior to a medical procedure originated in common law in the criminal law of battery — unwanted touching. Healthcare practitioners were charged with battery when a medical procedure was performed without the patient's consent. Gradually, informed consent became shaped by the civil law of negligence. From there, the elements of effective informed consent were established.

In a seminal case, the court stated the following definition: "True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each."¹ Today, obtaining valid informed consent is also a process of shared decision-making.²

It should be well known that for consent to dental treatment, the dentist must:

1. Disclose the dental diagnosis to the patient.
2. Inform the patient of the options for treatment (including the option not to treat).
3. Describe to the patient all risks and benefits of each treatment option.



However, for the consent to be truly informed and effective, the dentist must also confirm that the patient understands all risks and benefits of each of the treatment options. It is in this process that the dentist and patient agree upon the procedure to be performed. The process must be thoroughly documented in writing, and a consent must be signed by the patient.³ The signed consent alone does not document valid informed consent, so the discussion itself should be documented in the dentist's notes.

Here are some simple steps to follow — and document — that will both assure valid informed consent and that can be used as evidence valid informed consent has been obtained:

- **Ask patients to repeat what they heard.** Many patients will be uncomfortable asking questions or admitting they didn't fully comprehend what was said. If the patient can explain what they've heard, it's important evidence that the patient did understand what you said.
- **Use procedure-specific consent forms.** Be sure the consent form names the diagnosis and the procedure and that the risks of the procedure are included. This serves as a reminder to the patient that, while you may have discussed many things, this is the specific course of action you have agreed upon together.
- **Keep narrative notes describing the informed consent process and the goals of care in the patient file.** In the absence of filming the exchange, this is the best way to show the elements were met.
- **Create decision aids for particularly complex decisions.** Patients may need a visual guide to remember how the risks and benefits fit together with a procedure choice and diagnosis. Does obtaining valid informed consent take more time than having an assistant obtain a patient signature on a consent form? Yes, it does. However:

“Time cannot and must not be shorted, as adjuncts such as pamphlets and videos are helpful, but cannot replace a physician taking time with a patient. All true relationships are time-dependent. Meaningful shared decisions require time and that time will result in better clinical decisions/outcomes and less potential for liability.”⁴

Certainly, there will be some patients who do not want to participate in this process. If, after explaining the importance of shared decision-making, the patient does not want to engage in the process, document this in the patient record.

How does shared decision-making reduce the risk of litigation? Very little research has been done on informed consent in dentistry, but the masterful analysis of existing studies by Kevin I. Reid, DMD, MS, MA,⁵ concludes in part that:

“Infractions that were emotional and intelligence-related comprised nearly 57% of all disciplinary actions taken by 21 state dental boards. The most frequently observed violation among the four clusters of emotional intelligence-related studied was that of ‘Transparency,’ which refers to maintaining integrity and acting congruently with one’s values. Dentist transparency is perhaps one of the most beneficial virtues in the informed consent process, along with humility, veracity, and compassion.”⁵

In litigation and in dental board prosecutions, the burden is always on the dentist to prove the patient’s signature was a voluntary choice free of undue influence. It’s also the responsibility of the dentist to show the patient understood the information given by the dentist. Well-documented shared decision-making is the best evidence of valid informed consent and most likely to create a secure patient relationship. The “magic words” are the conversation. ♦

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