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Tales from the Legal Trenches: "I should have put it in the record…"

That is what my dentist client had to tell the jury in a recent medical professional liability (MPL) trial in Virginia. The trial centered on informed consent for the removal of tooth #14 and what risks the patient had been informed about. The suing patient suffered an intrusion into the sinus cavity, a fractured buccal bone, and possible neurologic problems stemming from the surgical extraction. Right now, you are probably thinking, "Hey, those are recognized risks of the procedure." You are right if that is what you've been thinking, but unfortunately, we had no documentation that informed consent was given, were working with a signed informed consent document that was four years old (at the time of the extraction), and failed to list some of the key recognized risks of a tooth extraction. Obviously, my client did not remember the specifics of an informed consent conversation that took place years earlier, but he was able to state he verbally gave informed consent "because he always does it."

With that background, let's look at what the law in North Carolina and Virginia requires for informed consent. I only practice in those two venues, but something tells me the situation in other states is likely very similar. Once we look at the law, we will come back to our trial story for some practice pointers and to find out how things turn out for my client, who we will call "Dr. N."

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North Carolina

Informed consent is governed by statute in North Carolina. The requirements are found at N.C.G.S. § 90-21.13. Paraphrasing (to keep you interested and reading…) the statute states that (a)

(1) Informed consent must be obtained in accordance with the standards of practice among members of the same healthcare profession with similar training and experience in similar communities. This simply means in North Carolina a general dentist practicing in (insert name of any city) must obtain informed consent in a similar manner to a general dentist practicing in a similar community. This means an expert will be required on both sides to establish what the standard of practice is concerning informed consent.

(2) A reasonable person would have a general understanding of the procedure or treatments at issue once given the "most frequent risks and hazards" inherent in the proposed procedure and treatment. Obviously, folks can differ concerning the "most frequent risks and hazards" of a procedure, but the intent of the statute is clear: that the medical provider has to tell a patient the treatment options available and the key risks presented by each.

(3) A reasonable person would have undergone the treatment or procedure if advised of the risks. Practically, this means a person facing a life-threatening illness will not be able to argue they would not have undergone the potentially lifesaving procedure if only they had known of the risks. This section is also important when performing experimental procedures where the risks are not yet established.

Finally, (3) is disjunctive of parts (1) and (2), as

a provider would have difficulty showing all three in the instance of an elective- or cosmetic-type surgery. *See Foard v. Jarman,* 326 N.C. 24, 387 S.E.2d 162 (1990).

The North Carolina statute also notes that informed consent in writing, meeting the foregoing standards, is presumed to be a valid consent. This means that the burden is on the patient to demonstrate they did not understand the information given to them; with a written document, the provider does not have to prove validity.

Virginia

Virginia does not have a statute governing informed consent. Informed consent requirements are basically folded into the general requirements the law holds for any healthcare provider in satisfying (or violating) the standard of care. Virginia law imposes a duty on a dentist to exercise ordinary care to inform a patient of the negative consequences of and alternatives to a proposed medical treatment or procedure. *See Rizzo v. Schiller,* 248 Va. 155, 158, 445 S.E.2d 153, 155 (1994).

In order to recover an award, the patient has to show through expert testimony what information should have been disclosed, essentially arguing the provider did not meet the standard of care for informed consent. *Tashman v. Gibbs,* 263 Va. 65, 73, 556 S.E.2d 772, 777 (2002). The standard of care in Virginia is equated with that degree of skill and diligence exercised by a reasonably prudent practitioner in the same field or specialty. *Id.* at 73, 777 quoting *Bryan v. Burt,* 254 Va. 28, 34, 486 S.E.2d 536, 539 (1997). Ultimately, an expert is required to testify for both sides at trial as to what risks and options the standard of care requires a dentist to provide to a patient. The patient may then testify factually as to what risks and options were not presented. There is then a requirement that the patient demonstrate to the jury that he would not have had the procedure done if he had known the risks (proximate cause—but that is another article in and of itself).

Analysis

As noted previously, the law in North Carolina and Virginia is essentially the same.

Additionally, verbal informed consent can satisfy the standard-of-care requirement in both states. However, how do you as the provider prove informed consent was given verbally if there is no documentation? In essence, this presents a classic "he said, she said," and it is left to the jury to ultimately decide which party they believe.

As the judge in our case said in chambers, no matter how much continuing education you get, we all become set in our ways after practicing for a number of years.

That is what happened in our trial. Dr. N and his office staff all testified to the jury that informed consent is always given verbally to a patient as part of the habit, custom, and practice of the office. The opposing attorney tried to make the entire case a referendum on the sloppiness and lack of documentation in the dental record. The plaintiff's expert, a professor from UNC Chapel Hill, claimed the standard of care requires a general dentist to have the equivalent of subjective, objective, assessment, and plan (SOAP) notes for every patient visit, which would also include a separate informed consent document for procedures as well as notation in the note that it was given. Dr. N did not have anything close to SOAP notes and, again, had no documentation that informed consent had been given or a specific informed consent document signed by the patient stating the risks of tooth extraction.

Before I reveal the outcome, this is a good place to pause and determine the practical takeaways. The first and most obvious is this: always document the key parts of your treatment in a patient's record. This includes the informed-consent process. You should have a separate informed-consent document signed by the patient for every dental procedure, but at a bare minimum, at least write in your chart entry that "informed consent given to patient." In addition, check the code or statutes governing dental care in your state to determine what has to be included in your dental charting. Unbeknownst to my client, the Virginia code now required documentation of procedures offered, treatment options, and cost estimates (among other things). *See 18 VAC 60-21-90 Patient Information and Records.*

As the judge in our case said in chambers, no matter how much continuing education you get, we all become set in our ways after practicing for a number of years. So take time with your office manager and look through your forms to make sure they are up to date. Dr. N was working with an informed consent form that was more than 20 years old from a prior place of employment.

You can ask my client which is better: spending a few hours updating your documentation or shutting down your practice for a week to attend a trial with all the worry that comes with it. That old saying, "An ounce of prevention is worth a pound of cure" is very appropriate here. If you are looking for a place to start, there are a number of good resources you can check to make sure your forms are adequate, to include:

http://www.nnoha.org/resources/dental-program-management/dental-forms-library/

https://www.thedoctors.com/patient-safety/informed-consent-Forms/informed-consent-samples-for-dentistry/

Back at trial, we were able to clearly demonstrate Dr. N's habit, practice, and custom, which his very credible and likable office staff confirmed on the stand. We were also able to show the jury that the plaintiff had a number of prior and subsequent tooth removals, helping to demonstrate that she would have gotten #14 removed regardless of informed consent. Ultimately, we won and the jury said that was in large part due to the credibility of Dr. N when on the stand. They believed that he warned the patient and had thus satisfied the standard of care. One juror came to talk with Dr. N after the trial and relayed what the jury thought about him and his practice, all good, before telling him she was making an appointment with him the next day. She then paused and looked at us while asking if she could give some advice. Dr. N of course said yes, to which she replied, "You should have put it in the record. . . ." All we could do is smile and agree. This trial story on informed consent had a happy ending. However, a trial win is never guaranteed, so review your forms and documents, so you can stay away from the courthouse! MPL

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