

Informed Consent

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So What is Informed Consent?

- ▶ Informed Consent (IC) is a process of providing people with sufficient information so they can make intelligent informed decisions about whether to accept or refuse treatment, care, activity, etc.

Concept-Autonomy

- ▶ Patient's right to determine what to do with his or her own body – patient has the right to decide what risks to take

Let take a look at the case of Mary Schloendorff (1914) which clearly demonstrate the concept of autonomy

- ▶ Agreed to be examined under anesthesia to determine if a diagnosed fibroid tumor was malignant
- ▶ Specifically told the surgeon *not* to remove it
- ▶ He examined her ... and did remove it
- ▶ She sued him

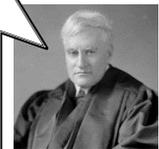


The Court found that the operation to which the patient did not consent constitute medical battery

Battery is defined at common law as any unlawful touching of the person of another without consent

Here is the quotation from the opinion of Justice Cardozo in Schloendorff which rooted in the principle of autonomy

“ Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages....”



What are the functions of Informed Consent ?

What are the legal requirements when you provide patient with informed consent ?

First legal requirement: Adult of Sound Mind. 'Adults' are generally considered to be "of sound mind"

- ▶ Unless they are obviously impaired by drug, alcohol, or mental or physical disease. Further, patients under the influence of narcotic painkillers or other psychotropic drugs are likely to be considered "impaired" by the courts even though they may appear lucid

IC: Second Legal Requirement

- ▶ Has been presented with all the material facts that a reasonable person would consider in making the decision to accept or refuse care

Standards of Disclosure

- ▶ ***Professional***
 - What *reasonable professionals* tell patients
 - This is the standard under Nevada law
- ▶ ***Reasonable Person***
 - Asks what the *reasonable patient* would want to know, rather than what the MD thinks the patient *should* know
- ▶ ***Subjective***
 - Maximizes the right of an individual patient to learn how the procedure will impact her *personally*

How do you effectively convey the "diagnosis"?

- ▶ This needs to be explained on the patient's level of understanding.
- ▶ Dialogue with the patient on her own level of understanding, and listening to her as well as talking to her.
- ▶ If she does not speak English well, consider using Medical interpreter to maximize understanding
- ▶ Avoid family members, medical explanations are difficult to interpret
- ▶ It's okay to use technical terms as long as follow immediately with a lay explanation.

Third Requirement : No Material Misrepresentations

- ▶ Include any misstatements or omissions of facts made to obtain informed consent.
- ▶ Misrepresentations can also be implied—for example, offering to perform a procedure in your office while knowing you lack of optimal equipments. Likewise failure to disclose the fact that you seldom perform a difficult proc.

General Elements of Informed Consent

- ▶ Disclosure
- ▶ Competence
- ▶ Understanding
- ▶ Voluntariness
- ▶ Consent



(Beauchamp & Childress –1994)

Professional Negligence

- ▶ **"Professional negligence" means a negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death. The term does not include services that are outside the scope of services for which the provider of health care is licensed or services for which any restriction has been imposed by the applicable regulatory board or health care facility.** (NRS 41A.015)

Nevada Malpractice Law

- ▶ "Malpractice" means failure on the part of a dentist to exercise the degree of care, diligence and skill ordinarily exercised by dentists in good standing in the community in which he or she practices. As used in this section, "community" means the entire area customarily served by dentists among whom a patient may reasonably choose, not merely the particular area inhabited by the patients of that individual dentist or the particular city or place where the dentist has an office. (NRS 631.075) (2011)

Lack of Informed Consent

- ▶ Can be a battery – an intentional wrong
 - Classic Intentional Tort
- ▶ Elements
 - Intent (Can prove an intent by lack of consent)
 - Harmful or Offensive Touching
 - Harm (can be physical or emotional)

Lack of Informed Consent

- ▶ Most courts see it as malpractice – negligent behavior
- ▶ In both cases, the physician or dentist does not need to perform the procedure negligently. Merely need to *violate* the patient's *right to consent* to the procedure and to risks of the procedure.

Conclusively Establishing Consent

- ▶ A dentist has conclusively obtained the consent of a patient for a surgical or dental procedure if s/he has done the following:
 - Explained to the patient in general terms without specific details, the procedure to be undertaken;
 - Explained to the patient alternative methods of treatment, if any, and their general nature;
 - Explained to the patient that there may be risks, together with the general nature and extent of the risks involved, without enumerating such risks; and
 - Obtained the signature of the patient to a statement containing an explanation of the procedure, alternative methods of treatment and risks involved, as provided in this section. (NRS 41A.110) (2011)

Objections to informed consent

- ▶ Full disclosure is impossible.
- ▶ Complete understanding is unattainable.
- ▶ Belief that patients don't wish to be involved in decision making.
- ▶ Harmful effects of informing patients.
- ▶ It takes too much time.

Related Concept: Implied Consent

- ▶ A consent to any dental procedure will be implied if:
 - In competent medical judgment, the proposed dental procedure is reasonably necessary and any delay in performing such a procedure could reasonably be expected to result in death, disfigurement, impairment of faculties or serious bodily harm; and
 - A person authorized to consent is not readily available. (NRS 41A.120) (2011)

Closing Thoughts: Obtaining Consent

- ▶ Provide ample opportunity for consideration
- ▶ Minimize coercion/undue influence
- ▶ Use simple & clear language so the patient understands
- ▶ Explain risks and alternatives
- ▶ Get signed, written consent

Questions?