



## FEATURE

### Communication Central to Informed Consent

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Chiropractic malpractice includes, but is not limited to:

- failure to diagnose
- failure to refer out a patient
- failure to practice within the scope of your license
- negligently performing a procedure
- failure to obtain the informed consent of your patient regarding a particular procedure or treatment.

Failure to obtain the informed consent of your patient for a procedure or treatment is a species of malpractice that focuses on the *adequacy of the disclosures*, rather than the *treatment* of the patient. Even with a consent document in place, the doctor is not relieved of the responsibility to make good decisions and provide care(s) that would be considered as in the patient's best interest. Understanding the history and purpose of the doctrine of informed consent, as well as the rule that is followed in your jurisdiction, may reduce the risk of exposure to this sort of claim—and also be of help to the patient.

Malpractice cases over informed consent may not be numerous but using informed consent is a component of a great doctor-patient relationship. Informed consent is a process that tells a patient the key facts about a clinical procedure, including treatment options and the potential risks and benefits of care, before a decision is made about the procedure. Effective doctor-patient communication is an important key to providing informed consent. The doctor must remember that the patient does not know the possible consequences of receiving care. The doctor must also be aware of the guidelines and legal rules that apply to doctor-patient communications regarding informed consent.

Generally speaking, the information provided to patients must have the breadth and depth to allow patients the opportunity to make an informed decision about accepting/declining a procedure. Society does not expect the doctor to identify every possible adverse treatment effect. The legal scope of informed consent hinges on risk. As a general rule, the doctor should obtain informed consent when an intervention, or failure to intervene, poses a significant risk of harm<sup>1</sup>. The information provided should identify sig-

nificant adverse responses to care that have a reasonable risk of occurring<sup>2</sup>. The use of informed consent documents may assist in the defense of malpractice claims, especially if the consent addresses the specific and realistic potential hazards of care to an individual.

#### Informed Consent Doctrine

The doctrine of informed consent is rooted in the observations of Judge Benjamin Cardozo who held that “every human being of adult years and sound mind has a right to determine what shall be done with his own body.” Since chiropractic physicians possess superior knowledge of the risks and benefits of the procedures they perform, it is only natural that the law would impose a duty to disclose certain information to the patient—and the patient depends on the DC's skill in communicating that information. In time, certain rules evolved regarding the nature of the duty to disclose information.

#### Standards of Care: Two Divergent Rules

The authors used an anonymous web-based survey (N=190) in 36 states to study the usage of informed consent by doctors of chiropractic. Of those who responded, 73.7% (N=140) utilized informed consent documents. The 2 most common situations in which such documents are used involve atypical or severe headache (57.3% N=63) and the disc patient with myelopathic signs (57.3% N=63). Of the doctors who used informed consent documents, 89.3% (N=117) stated they provided the document to all patients.

Two different rules have developed for determining the adequacy of the warnings or disclosures that must be given to the patient. Some states codify their rules by *statute*, while in others, the applicable rule is judge-made or *common law*. Some state informed consent statutes provide that if certain disclosures are made to the patient, *informed consent* is presumed. *You must be aware of the applicable rule in your state because the rules vary from state to state and may differ widely*. A good example involves the neighboring states of Nebraska and Iowa—which apply 2 different informed consent rules. By statute, Nebraska adopts the traditional or “professional rule,” while its neighbor, Iowa, adopts by common law the “patient's



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rule.” *To understand the rules in your jurisdiction, we strongly recommend you consult your state chiropractic association as well as legal counsel who is familiar with the rule in your jurisdiction.*

The **professional or physician’s rule** (the majority rule in the country) requires the patient to prove that the doctor of chiropractic failed to make the “customary disclosures that reasonable physicians would have made under the same or similar circumstances in the same or similar locale.” This test focuses more on what other physicians similarly situated would have told the patient with respect to the risks, alternatives, and consequences of treatment/non-treatment. This test measures the adequacy of the disclosures from the physician’s point of view. Proving compliance with the prevailing practice may be enough to absolve the doctor from liability. Each case, however, is fact-specific and legal advice must be obtained when in doubt.

The **patient’s rule**, on the other hand, focuses on “what a reasonable person in the position of your patient under the circumstances would require to make an intelligent decision as to whether to undergo the procedure.” The patient’s rule provides that the physician must disclose to the patient “all material information concerning the procedure or treatment that would be significant to a reasonable patient in deciding whether to consent to a procedure or treatment.” “Material,” in this sense, means “information involving the risks of the procedure or treatment, the alternatives to the procedure or treatment, and the consequences of failing to have the procedure.”

The focus of each rule is different. Some courts have criticized the professional rule as too paternalistic because it defers too much to the judgment of the physician and not enough to the needs of the patient. Regardless, the professional or physician’s rule remains the majority rule in the country today.

### Risk Management through Informed Consent

A universal informed consent form does not necessarily address all issues. Blanket informed consent documents used as a pre-injury waiver to cover any and all possible adverse responses to care are not as useful to the patient or as helpful in the defense of a case as a specific informed consent document that addresses the particular problems of the patient who presents for care. An informed consent document may help in defense of a malpractice claim if the document addresses the specific and realistic potential hazards

of care to an individual. The purpose of the informed consent document is to show that the doctor recognized the patient presented with a more complex problem and the patient was made aware of the associated issues and care options associated with this problem.

Just because a patient sues for failure to obtain informed consent does not mean that the patient will prevail on the claim. Even under the most liberal rule, there are certain disclosures that generally do not have to be made to the patient and which may constitute a possible defense for the physician. These may include situations in which:

1. Disclosure of some risk might do physical or psychological harm to the patient. This example would be an unusual application in the chiropractic profession.
2. The patient is incapable of giving consent for some reason. Some patients may not be qualified to provide consent to care. These patients may include minors and adults who are not capable of independent thought and appropriate decision-making processes. In these cases, the patient’s guardian needs to provide the consent for care. It is important to ensure that the dependent patient is still involved in the decision-making process. Remember, an adult accompanying the pediatric patient may not be the lawful legal guardian who can provide consent to procedures.
3. An emergency makes it impractical or impossible to disclose some risk. This may apply to doctors that work athletic events where the potential for a serious or life-threatening injury may occur.
4. The risk is so obvious that it is presumed the patient had knowledge of it. This would apply to the patient who has a brief increase in pain level at the area of the presenting complaint.
5. The procedure is simple and the risk is commonly considered remote. Loss of consciousness secondary to an adjustive procedure to the cervical spine would fit this category.
6. A reasonable doctor may not know the risk or could not reasonably be expected to know it. An interesting possibility for consideration in this category would be the patient with an anomalous vascular formation in the vertebrobasilar circulation without attending warning signs or symptoms that would have



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alerted the doctor. These types of anomalies have been associated with stroke and spinal manipulative therapy, but the anomaly is not identifiable without advanced imaging techniques. Communicating this type of information provides an excellent opportunity to build the doctor-patient relationship and the patient's trust in the doctor. It is also important to remember that the information must be given enough in advance of treatment so the patient can make an informed decision. A good practice skill related to these types of communications is to include a question-and-answer session to ensure that the patient understands the issues at hand.

You should also know that in any jury trial, the jury will ultimately decide, based on the law given by the court, whether the disclosures were sufficient, whether any failure to obtain informed consent caused harm to the patient, and all other related matters. The jury is free to believe—or not—any expert or lay witness and is free to give any weight to testimony. Sel-

dom are issues of fault and causation decided by the court as a matter of law.

Forty-one percent of the doctors in the survey created their own forms without assistance. There are, however, acknowledged steps and procedures that need to be followed to provide patients with sufficient information for an informed decision. The doctor must have the essential knowledge and awareness of common possible significant adverse responses to the care(s) being considered for the patient. Also, the completed informed consent form should be kept with the individual patient's file and not intermingled with other patients' records<sup>3</sup>.

Some essential elements to include in an informed consent document are included in Table One. The form should be printed in language that is easy to understand, can be provided to the patients, and also discussed with them. Be sure to consider the non-English speaking patients in your practice.

**Table One**

<b><u>An Informed Consent Form Should Include</u></b>
1. Name and date of birth of the patient.
2. If the patient is a minor, include the name and relationship (the legal basis) of the guardian to the patient.
3. The assessment or diagnosis.
4. Description of the procedure in simple terms.
5. Disclosure of known adverse risk(s) of the proposed treatment or procedure including the frequency of harmful response to this care.
<i><u>6. Professionally recognized or evidence-based alternative treatment(s) to your recommended therapy.</u></i>
<i><u>7. The risk of not having the procedure or care.</u></i>
<i><u>8. An indication that all patient questions have been asked and adequately answered.</u></i>
9. Location for signatures of the patient, doctor of chiropractic, and an office staff member as a witness. The form should also provide space for a date.

### Alternative Treatment Options

A significant component to informed consent procedures is identifying other or alternative treatment options available to the patient. Remember to include your own alternative treatment options, as well. Typically, alternative treatment options to chiropractic care would include seeing a family practice doctor, physical therapist, orthopedist, or neurologist. By disclosing to the alternatives to the care that you can provide, you are giving the patient choices. While it seems obvious that the patient is presenting to you for care, patients may choose different health care providers for their problems after they better understand their treatment options.

This entire process may appear to be labor-intensive, but with proper preparation by the doctor, the process does not need to be unnecessarily time consuming. Perform research in advance to identify the most common alternative treatments and adverse responses to care. This information can then be built into the consent documentation. Training your staff to walk the patient through the document is beneficial. If this approach is selected, it is still important to confirm the patient's understanding through the question-and-answer process.



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Documentation of informed consent can be made directly into the patient's medical record or a form can be used. If a form is used, the patient should be provided with a copy. The doctor's personal attorney should review the prepared form. Remember, you are a doctor, not an attorney!

### Conclusion

Understanding the doctrine of informed consent, knowing the applicable rules in the practitioner's jurisdiction, and thinking about the disclosures from the perspective of the doctor and the patient may not prevent you from being sued by the patient. It is an unfortunate fact that even professionals who do nothing wrong and act reasonably are sometimes sued. This

process, however, will help your patients make an informed decision and reduce your risk of being sued for failure to obtain the informed consent of the patient.

The opportunity to teach and have meaningful communication with your patients is one of the cornerstones of the doctor-patient relationship. No uniform informed consent procedure works for every patient encounter. Each patient presents with his or her unique set of physical characteristics and problems. It is up to the doctor to identify the patient who should undergo the informed consent procedure on an individual basis. ■

### References

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