



# Legal Matters

## How to Effectively Document Informed Consent

A plaintiff once swore to me under oath that my client, a physician, failed to inform her of the critical risks, benefits, and alternatives of a particular medical procedure. Filled with righteous indignation, she stated that she never would have consented to the procedure "if she had known" of these certain risks. She was absolutely, 100 percent certain that her memory of the conversation, which occurred more than a year before the deposition, was infallible. She was, that is, until presented with the astute doctor's detailed office chart. Faced with the written records, she quickly conceded that she was, indeed, informed of the risks, benefits, and alternatives to the operation. My client had obtained informed consent.

This illustrates an important point: thoroughly document your informed consent discussions. Even if your communication skills, and bedside manner, are excellent, what you say may not be what the patient hears. For most people, going to the doctor and contemplating invasive procedures are stressful times. Medication may interfere with memory or upset a patient's delicate emotional balance. And if there is an incident and a lawsuit is filed, well, many plaintiffs — and their family members — only remember what they want to remember.

The following ideas are by no means an exhaustive list, but in my experience have been proven to reduce or negate a plaintiff's claim of lack of informed consent:

Develop a good routine and stick with it. Physicians see thousands of patients every year and cannot reasonably be expected to recall the details of every patient or every informed consent conversation. Developing a standard informed consent speech for a particular procedure, that is substantially similar for each patient, will assist the defense of an informed consent claim. Even if you do not recall a particular conversation or patient, if you have developed an invariably routine speech you can convincingly state, "I have done hundreds of these procedures, and these are the risks, benefits, and alternatives I always discuss with my patients, and I have no reason to believe this time would be any different."

A stitch in time saves nine. A conclusory statement in your office notes that the "risks and benefits of the procedure were discussed with patient" doesn't give you the best defense in an informed consent case. In this day and age, additional paperwork is unwelcome, but detailing the informed consent discussion can be devastating to a plaintiff's claim of lack of informed consent, as illustrated in my example above. Detailed medical records are also tangible indicators of your thoroughness and attention to detail.

Two heads are better than one. An assistant can offer powerful corroboration of your informed consent discussion with the patient. Cumulative testimony from an assistant who is present for the discussion bolsters the credibility of any physician. Assistants can testify from their memory or, as above, as to the physician's invariable routine. Sometimes, the mere presence of a third person in the room — and their expected testimony — is enough for plaintiffs to drop their informed consent claim. Due to frequent assistant turnover, it is important to legibly document the full name of the assistant in your records.

Make sure the consent form is properly filled out. The physician is responsible for discussing the risk, benefits, and alternatives of the procedure and for obtaining informed consent, but frequently other persons are tasked with filling out the consent form — including the procedure to be performed — and ensuring the patient signs the form. Sometimes, mistakes are made in filling out that form; for example, a nurse may write down the wrong procedure or fail to see that it is signed. If you are able, double-check the consent form to make sure that it is properly filled out and signed! This will prevent any conflict with your own office notes as to what procedure is to be performed, and is additional evidence that the patient understood and gave informed consent.

Not all these suggestions may be practical to your practice, and you may already be performing similar tasks. Nonetheless, it is important to realize that there are relatively simple ways to better document informed consent. Reducing the risk of a legal claim ever arising allows you to focus on what is really important: healing the sick and injured.



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