MLMIC
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THE SCOPE

DENTAL EDITION

ISSUE 15
FIRST QUARTER 2024

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AM BEST A+ Superior

AM Best Update

MLMIC Insurance Company is pleased to announce that **AM Best**, the preeminent credit rating agency for insurance companies, has again "affirmed MLMIC's Financial Strength Rating of A+ (Superior) and its Long-Term Issuer Credit Rating of "aa-" (Superior)."

Per AM Best, "these ratings reflect MLMIC's balance sheet strength, which AM Best assesses as strongest, as well as its adequate operating performance, limited business profile, and appropriate enterprise risk management."

For more information: **AM Best Press Release**
MLMIC Acknowledgement

EXECUTIVE MESSAGE

Dear Policyholders,

My career at MLMIC Insurance Company has brought me the privilege of managing malpractice claims, representing practitioners in lawsuits, and now, helping healthcare providers and facilities recognize and manage risk. It is my goal to employ MLMIC's unparalleled data, experience, and resources, including relationships with our esteemed policyholders, toward improving patient outcomes and enhancing the defensibility of malpractice claims.

We at *The Scope* endeavor to stay current with the ever-changing landscape of dentistry. Certainly, AI will continue to develop, as will teledentistry and the ubiquitous developments in technology: radiology, 3D printing, dental lasers, etc. In the delivery of good care and positive patient outcomes, we must grow with these developments to meet the changing standard of care.

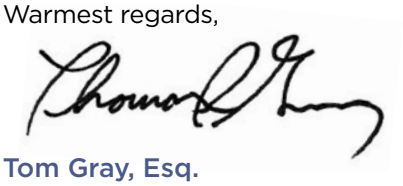
MLMIC is in your corner when negative treatment outcomes lead to complaints and litigation. But what of complaints and lawsuits where the outcome is as anticipated by the practitioner and compliant with reasonable standards of dentistry? Many patient complaints/actions arise from a misperception that treatment should achieve the feel and utility of their natural, healthy teeth and gums.

Good technical dentistry is not always enough to satisfy, and many lawsuits arise from disappointment rather than deviations from the standard of care. This type of lawsuit may be easily defended with an affidavit or testimony from a credible expert. MLMIC has an exceptional success rate in defense of these lawsuits. But what of the damaged relationships with these patients? What of a dentist's undue stress as a defendant, or the time that litigation takes them away from their practice and family? The key to avoiding the litigation trap often lies in good communication.

This issue of *The Scope* will cover the age-old topic of informed consent. While it might not have the headline magnetism of lasers and AI, appropriate informed consent practices provide the opportunity to manage patient expectations and, as a result, eliminate actions brought by the uninformed. The adage holds: "An ounce of prevention is worth a pound of cure."

As we aim to meet your needs in MLMIC's services and publications, we remain open to your education and article topic requests. A plan for future editions includes a profile section acknowledging the contributions of dentists and dentistry in New York. Please contact me with any recommendations/nominations you may have.

Warmest regards,



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New York State Dental Association

WOMEN'S HISTORY MONTH:

Prabha Krishnan, DDS

*As part of **Women's History Month**, MLMIC would like to celebrate the role that women have played, and continue to play, in contributing to the practice of dentistry.*

MLMIC recently had the pleasure of connecting with New York State Dental Association (NYSDA) President-Elect Dr. Prabha Krishnan, who will be installed as the 144th President of NYSDA at their House of Delegates taking place May 31 through June 2, 2024. Dr. Krishnan will be the second woman president in NYSDA history.

Q: Tell us a bit about your background and the early days of your career in dentistry.

A: I'm a graduate of New York University College of Dentistry, where I received both my DDS degree and my specialty training in Periodontics and was among the youngest at that time to become a Diplomate of the American Board of Periodontology when I received my board certification as a Periodontist.

I started my practice in Queens from the ground up immediately after graduation. I rented space but had no patients — literally zero!

Joining the Queens County Dental Society right away was a tremendous help in terms of networking with my peers and building my practice. During this time, I also met my soulmate, and we started a family. I had to juggle many different roles at the same time — being a professional, a business owner, an educator, a wife, a mother, and more!

Q: An American Dental Association (ADA) article published in June 2022 noted that for the first time in 2021, the majority, 56%, of first-year dental students were women.

A: The dental profession has certainly come a long way, and opportunities have opened! Just 10 years ago, women only made up approximately 35% of first-year dental students.

I think it would be great to see the profession reaching out to students early on, let's call them pre-dental students. We need to talk about the career of dentistry, especially in minority communities, to show them how and why the dental profession is one of the top careers in the nation.

I will be the second woman president in the history of NYSDA and the first woman of diverse origin to hold that position. If I can do it, anyone can do it!

Q: What do you think are the biggest challenges for women in dentistry?

A: I'm someone who looks at everything as an opportunity. Of course, there are always challenges, but I believe everything is best approached with a "glass is half full" attitude. So, I see challenges more as opportunities, with each being a chance to learn and grow.

Starting my practice from the ground up was an opportunity for me to get involved at Queens County Dental Society, which fueled my commitment to being involved in organized dentistry.

To build my patient base, I had to reach out to the local dental community and knock on the doors of dentists practicing in my area to let them know that, "Hello, I'm a periodontist. I just graduated and started my practice, and I'm happy to help you with patient care."

I reached out to establish relationships for the betterment of the community and to help build my practice in the process. Through this challenge, I met many future patients and fellow professionals who helped advance my practice.

So, my best advice to young women *and* men would be to look at everything as an opportunity. With innovations in dentistry on the upswing, there are opportunities for everyone.

Another challenge that young dentists face, and perhaps young female dentists even more so than males, is acceptance: establishing trust with patients and gaining their confidence in your decisions and treatment plans. This may be due to patients simply being more accustomed on some level to older, male dentists.

As a specialist, I've had instances when a patient was referred to me and I had to tell them things they don't want to hear — that they have to lose some teeth, or they need gum surgery, or anything else they may perceive as painful. They look at me as if to ask, "How long have you been doing this?"

Trust and confidence must be developed with the patient through honesty, sincerity, and establishing a good rapport. Always keep in mind that some patients may wish to get another opinion from a male dentist or one they perceive as older and more experienced.

Q: How do you deal with pressures to change your treatment plan?

A: Great question. These can be difficult to manage, and not getting swayed by feeling the need to please everyone — from patients and their families to the colleagues who refer patients to you — is critical. You need to advocate for, and provide patients with, the treatment that you honestly and ethically feel is the best course of action. You do not want patients or others to dictate the treatment plan.

Q: Do you have any special closing thoughts you would like to share?

A: I would emphasize to both female dentists and new dentists in general the importance of getting involved early on with your community — where you live, where you work, and with your peers — and give back to the public we serve.

Dentistry is my profession, but organized dentistry is my family and has given me camaraderie, friendships, and the gift of being part of a community of people who understand what's needed to succeed and are willing to help by providing education, direction, and motivation.

So, join local and national dental professional associations like NYSDA and be part of the decision-making process. You will quickly realize that you're not the only one who has a particular issue or problem.

If you are not at the table, you will be on the menu.

Informed Consent and Dentistry

One of the contributing factors that often leads to dental malpractice litigation is the failure to obtain adequate informed consent from a dental patient.

Frequently, a dentist may fail to discuss the material risks and benefits of, and the alternatives to, the proposed treatment, including no treatment at all. Unfortunately, when a discussion about informed consent does not take place, the record is completely silent on the subject. This failure will buttress a patient's argument that there was a lack of informed consent. Failure to document the informed consent discussion, the clinical findings, and the rationale for the proposed treatment often results in a successful allegation by a patient's attorney that an informed consent discussion did not occur.

The Informed Consent Process

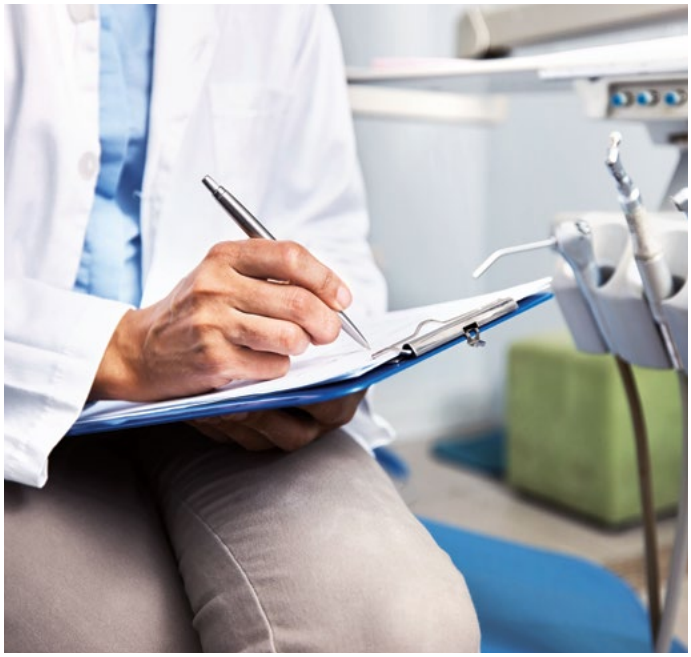
Effective communication between dentists and patients is vital to generate and maintain a healthy professional relationship, and informed consent discussions are essential to afford dental patients an opportunity to reflect on their options based on meaningful information provided to them by their dentist. Merely having a patient sign a consent form does not substantiate that informed consent was obtained. It is the conversation the dentist has with the patient, and the patient's agreement to go forward with the care plan, that is truly the informed consent.

Generally, an informed consent discussion must include the type of procedure, the reason for the procedure, the anesthesia anticipated, and the risks and benefits of, and alternatives to, the procedure, including the option and risks of not undergoing the recommended treatment. The proposed treatment plan should be discussed with the patient throughout the course of care. The patient must be continuously educated to ensure that they comprehend and agree with the contemplated procedure(s). Should the patient's dental or medical condition change during the course of care, the dentist should consider whether a new informed consent discussion, factoring those changes to the patient's status, needs to be had with the patient.

> **The proposed treatment plan should be discussed with the patient throughout the course of care.**

The dentist should strongly consider using an interpreter if English is not the patient's primary language or if the patient has a hearing deficit. When using an interpreter, that individual should also sign the consent form, indicating their role as interpreter. Documentation in the progress notes should reflect the interpreter's name and involvement during all informed consent conversations.

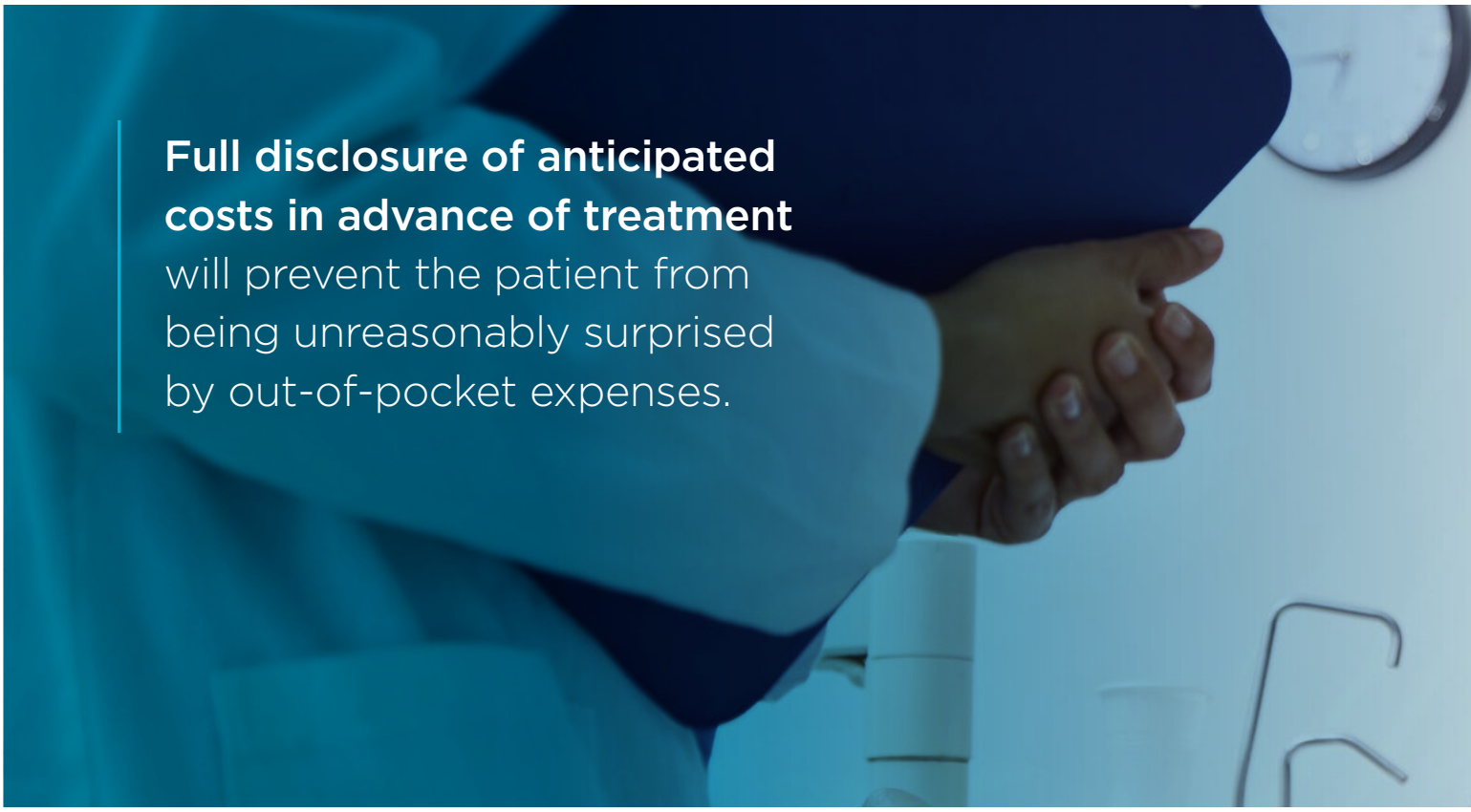
Good documentation not only confirms good patient care but often prevents litigation or



assists in the defense of a dental malpractice lawsuit. The documentation should consist of the informed consent discussion, including the patient's assessment, the contemplated procedure(s), that all the patient's questions were answered, and that the patient provided informed consent. Any other pertinent communications that the dentist had with the patient about the procedure should also be documented. Stating in the documentation that the patient fully understood the conversation, leading up to the provision of the patient's informed consent to the procedure or treatment, is crucial. Perhaps the most important part of documentation is that the patient fully understands the treatment plan. It is also advisable to document necessary referrals before the treatment plan is instituted, especially if the patient seems uncomfortable with recommendations that were made. Whether the patient went forward with all referrals should also be documented in the record. In addition, it is important to inform the patient that any complications that may develop during the course of treatment will be appropriately addressed by the dentist.

Signed Documents Are Not Sufficient

Good documentation of the consent discussion with the patient should always include a discussion



Full disclosure of anticipated costs in advance of treatment will prevent the patient from being unreasonably surprised by out-of-pocket expenses.

of the risks of noncompliance with the dentist's advice. It is important that the patient be provided with oral as well as written instructions for the procedure so that faulty or unrealistic expectations for the outcome of care can be eliminated. This in turn lends credibility to the dentist's fulfillment of the informed consent obligations.

It is crucial that the informed consent conversations with patients be well documented in the dental progress notes, especially before initiating an invasive procedure. Signed consent forms must be made part of the patient's dental record. Completed consent forms should be maintained in paper records or scanned into the EMR. Additionally, any reports from referral care should be added to the patient's record.

> **Signed consent forms must be made part of the patient's dental record.**

Patients often commence a dental malpractice lawsuit based upon inadequate informed consent when there are serious damages such as nerve impairment with symptoms of burning, numbness, or pain. Thus, appropriate verbal communication with patients, along with documentation of the risks of the procedure and any anticipated follow-up care, will be helpful to defend against allegations of lack of informed consent. The written informed consent form, which must be signed and dated by the patient before the procedure, should justify the dental therapy. Minor patients who are less than 18 years of age, or who are unemancipated or otherwise lack capacity to consent, must have the consent form signed by a custodial parent, a legal guardian, or another representative who is able to provide informed consent under New York State law.

Ramifications of Poor or Missing Documentation

Unfortunately, not only is the lack of informed consent often a basis for an allegation in dental malpractice lawsuits, but unhappy patients are also apt to complain to the Office of Professional

Discipline (OPD), the New York State dental disciplinary agency. The patient may also place unfavorable reviews on social media websites about a dentist's abilities. Thus, there can be a triple negative effect from poor care and an unhappy patient. In fact, dissatisfied patients often seek opinions from other dentists, who then may voice condemnation of the prior dentist's treatment. This often results in malpractice litigation, as well as reports to OPD and scathing online reviews.

> **The patient may also place unfavorable reviews on social media websites about a dentist's abilities.**

If a patient sustains nerve damage, neuralgia, an infection, or the need for costly and extensive corrective dentistry, substantial damages can result in a significant indemnity payment of several hundred thousand dollars as well as exorbitant legal defense costs and expenses. However, if the dental record is well documented that the patient was fully informed about, and agreed to, the potential for the development of a risk that did, in fact, affect the patient, the dentist is more likely to prevail should the allegations focus on lack of informed consent.

Additional Informed Consent Components

An integral aspect of the informed consent process should be to screen the patient for any unusual risk factors before performing a procedure. This includes consideration of whether the contemplated procedure requires prior consultations from, or referrals to, specialists. Communicating these considerations to patients should be a component of ongoing informed consent discussions. It is important to listen carefully to the patient during informed consent dialogs and to provide the patient ample opportunity to ask questions before obtaining the patient's consent to a very complex procedure. Consideration must also be given to any history of general noncompliance and/or gaps in dental care of great length so that discussions with patients include the necessity of strict cooperation with the treatment plan.

> Remain attentive to red flags that require intervention with the patient before a problem develops.

Further, as part of the informed consent discussion, dentists should include an explanation of the billing requirements and whether procedures are covered under the patient's insurance policy. Full disclosure of anticipated costs in advance of treatment will prevent the patient from being unreasonably surprised by out-of-pocket expenses. Such issues often lead to patient dissatisfaction and result in the patient questioning whether consenting to the procedure was a mistake. In fact, it can create an inference that the dentist did not obtain a true informed consent.

Unfortunately, when patients are incapable of accepting adverse treatment outcomes despite providing consent, they may contact their insurance company to withhold payment to the dental provider. Detailed documentation of the informed consent discussion will greatly assist dentists in payment-related disputes, along with the defense of malpractice lawsuits or OPD investigations that include allegations of lack of informed consent. In the absence of adequate documentation of informed consent, patients are afforded an opportunity to escalate the value of cases presented to their insurer or an attorney, especially when there is an allegation of irreversible damage.

Preventative Measures for Dentists

There are several ways to mitigate an insurance complaint or lawsuit based upon lack of informed consent. Remain attentive to red flags that require intervention with the patient before a problem develops. Do not make promises that may be unrealistic and that cannot be kept. Strong professional relationships are built on trust. That trust can be established through good communication. When patients recognize through informed consent discussions that dentists made a concerted effort to meet or manage their expectations, they are more likely to comply with established dental plans and provide consent to the proposed treatment. By thoroughly communicating and properly obtaining informed consent for various invasive procedures, controversy can be avoided.

> Strong professional relationships are built on trust.

If Nothing Else, Read This Paragraph

It is crucial that patients are kept in the loop with informed consent discussions, as well as documents, so that they not only remain well informed but will provide educated consent to recommended treatment plans. The informed consent process should be utilized throughout the course of the patient's treatment as an effective tool to assist in achieving these goals. Time spent on engaging in frequent conversations to obtain informed consent and generating detailed documentation on the provision of consent will undoubtedly contribute to building positive dentist-patient relationships. It will also provide invaluable proof should dental malpractice litigation include allegations that informed consent for dental treatment was not obtained. Strict adherence to engaging in and carefully documenting informed consent conversations with patients is sage advice that should lessen the risk of lawsuits for dentists.

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The Grieving Families Act — Defeated, but not Finished

One of MLMIC Insurance Company's many value-added services is providing legislative updates to our Policyholders. By now, you have probably heard that Governor Hochul vetoed a second version of the commonly called "Grieving Families Act" (or GFA), a bill that would dramatically increase dental and medical professional liability costs in New York State. This bill would have added noneconomic damages, which are notoriously difficult for juries to quantify, in the form of "grief or anguish" monetary awards for family members whose loved one was found to have suffered a wrongful death through negligence of the defendant in a wrongful death lawsuit. Well-respected actuarial firm Millman conducted a study that found the addition of "grief or anguish" damages would increase overall medical professional liability insurer premiums in New York by over 30%.

MLMIC, acting in concert with our dental and physician Policyholders, as well as organized medical and dental groups and multiple industry partners, actively opposed the GFA due to the concern over the economic repercussions that would be felt throughout New York's healthcare sector if the act had passed.

In a quick turnaround from the December veto, this same bill was introduced in the senate on February 5th, with legislators again looking to expand exposure in these cases. Rest assured, MLMIC will continue to work with our dental Policyholders, the New York State Dental Association, and all of our medical organization allies to advocate against any new GFA bill that still contains the costly addition of noneconomic damages.

Thank you for your continued support of MLMIC's efforts to advocate on your behalf in opposing any new bill that would expand liability for dental professionals and other healthcare providers.

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CASE STUDY:

An Unaddressed Language Barrier

An 85-year-old-female presented to her MLMIC-insured dentist's office for an emergency visit due to complaints of pain at tooth #31. The dentist's examination revealed swelling and mobility of that tooth. He initially prescribed antibiotics for the patient. He also noted in the patient's record that English was her second language and that she primarily spoke and understood Italian.

He also noted in the patient's record that English was her second language and that she primarily spoke and understood Italian.

The patient came back to the office 2 weeks later. The dentist removed the old crown on tooth #31 and performed a pulpotomy. He intended to complete root canal therapy at the next visit. There was no documentation in the dental record that the dentist engaged in an informed consent discussion with the patient to address the risks and benefits of, and alternatives to, the procedure that was contemplated.

Two weeks later, the patient returned to the office, and the tooth was extracted without complication. There was no other discussion documented in the patient's dental record. The dentist did take a periapical film that showed that the inferior alveolar nerve was very close to the apices.

The patient presented back to the dentist's office 1 week post extraction complaining of pain and numbness at the extraction site. The dentist prescribed antibiotics and promptly referred her to an oral surgeon. This was the last time the patient was seen at this dentist's office.

The patient was seen by an oral surgeon, who confirmed paresthesia. His examination revealed diminished sensation to a cotton swab and dental explorer to the lower right side. He did not recommend any further treatment.

Lawsuit Filed

The patient commenced a suit alleging failure to refer her to an endodontist, failure to refer her to an oral surgeon for extraction, the negligent performance of an extraction resulting in both the loss of the tooth as well as a paresthesia, and the failure to provide her with an adequate informed consent.

With the assistance of an interpreter, the plaintiff testified at her deposition that she was unaware that an extraction was part of the treatment plan until after the procedure was completed. However, according to the insured dentist, the patient refused to undergo root canal therapy and opted instead for an extraction. There was no documentation of the patient's refusal or her preference.

Expert Opinions

Our expert agreed that an allegation of lack of informed consent, especially from a patient with limited English proficiency, was problematic for the defense of this lawsuit. The expert also felt a pulpectomy would have been more appropriate rather than a pulpotomy in the face of a nonvital tooth. Due to the proximity of the apices to the nerve, a referral to an oral surgeon may have been warranted.

The District Claim Committee focused on the lack of valid informed consent and written documentation in the patient's record. The Committee felt the insured should have documented a discussion with the patient regarding the risks and benefits of, and alternatives to, the proposed treatment. The dentist should have confirmed and documented that the patient was able to comprehend this information.

When asked about the language barrier, the insured thought the patient understood English well enough. However, he acknowledged that English was not her primary language and that it is possible she did not comprehend the treatment plan. Upon further reflection, the insured felt that perhaps one of his employees who spoke her native language should have been available, or the patient should have been accompanied by a family member who spoke English well and could have acted as an interpreter.

> **The Committee felt the insured should have documented a discussion with the patient regarding the risks and benefits of, and alternatives to, the proposed treatment.**

Although the insured was qualified as a general dentist to perform the extraction, given the proximity of the root to the nerve, a referral to an oral surgeon should have been considered. An appropriate referral to an oral surgeon was not made by the dentist until after the procedure when the patient complained of numbness. The dentist informed MLMIC that he does not use written informed consent forms and does not document any consent discussions. These failures significantly impacted the ability to successfully refute the patient's allegations. The plaintiff's demand was $450,000, and the case was ultimately settled for $135,000.

Legal Analysis

Healthcare providers have an ethical and legal obligation to obtain informed consent prior to treating patients. It would be helpful for providers to implement, and document the use of, the teach-back technique during patient encounters to determine if patients have grasped the essence of consent discussions. Lack of any documentation of informed consent was a significant factor in the decision to settle this case.

The patient's credibility was enhanced by the fact that she had limited English proficiency. It is essential that providers consider whether patients require language assistance from either bilingual staff, a telephone interpreter service, or a volunteer or paid interpreter. Prior to treating the patient, the dentist did not address whether the patient comprehended information that was disclosed. Failure to obtain an interpreter to ensure that the patient understood conversations about the treatment plan and procedures performed undermined the defensibility of the case.

> **Prior to treating the patient, the dentist did not address whether the patient comprehended information that was disclosed.**

Whenever interpreter assistance is obtained, the interpreter, in addition to the patient and provider rendering treatment, should sign the consent form. Documentation of informed consent through the use of consent forms, progress notes, and, if necessary, interpreters, will all serve to counter a patient's argument that "a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought."[1]

It is important to emphasize that New York's consent statute requires that it is "the person providing the professional treatment or diagnosis" who has the non-delegable duty to disclose information during the informed consent process "in a manner permitting the patient to make a knowledgeable evaluation."[2] Conversations with patients should focus on the risks and adverse effects of treatment and alternative treatment options, and should be obtained for "a procedure which involved invasion or disruption of the integrity of the body."[3]

After the settlement of this case, the dental practice realized the wisdom of implementing the use of consent forms. However, consent forms alone do not adequately suffice to avert or refute allegations of lack of informed consent. It is very common for patients to claim that they were simply given multiple forms to sign but did not read or comprehend them or discuss the content with the provider. Patients have been known to claim a total lack of recall of significant aspects of oral discussions or written materials or forms that were provided a day earlier.

In addition to obtaining signed consent forms after discussions with patients, a crucial component to further substantiate the informed consent process is that the provider took the time to document the conversation in a progress note. A brief synopsis is all it takes to lend credibility to the fact that the provider and patient engaged in an informed consent discussion (e.g., "Discussed nature and purpose of the procedure with the patient, as well as risks, benefits, and alternatives, all questions were answered, patient provided consent.").

Lack of informed consent often results in malpractice litigation. The outcome of this case highlights the importance of thorough communication with patients when obtaining informed consent and the necessity of documentation. Improvement of discussions to ensure that patients are better informed, as well as the use of consent forms and progress notes, will serve to protect dentists from claims of lack of informed consent or prove to be invaluable in the defense of malpractice lawsuits.

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[1] PHL ss 2805-d(3)
[2] PHL ss 2805-d(1)
[3] PHL ss 2805-d(2)

COMMUNICATION CHECKLIST #2

EFFECTIVE COMMUNICATION WITH PATIENTS

Effective communication is the cornerstone of the dentist-patient relationship. Patients' perceptions of the dentist's communication skills may impact patient satisfaction as well as the potential for allegations of malpractice. The following are utilized to promote open communication and enhance our ability to reach an accurate diagnosis and develop an appropriate plan of care.

	YES	NO
1. Active listening techniques are used, and patients are allowed sufficient time to voice their concerns.	☐	☐
2. Dentists sit at the level of the patient and maintain eye contact.	☐	☐
3. The patient's literacy level is assessed. This may be as simple as asking what is the highest grade level the patient attained.	☐	☐
4. Lay terminology is used when communicating with patients and their families.	☐	☐
5. Procedures are in place for communicating with patients who are hearing impaired, deaf, or have limited English proficiency.	☐	☐
6. The teach-back method is used when providing patients with instructions and information. This technique requires that patients repeat the information presented in their own words. The teach-back method is particularly useful in assessing patients' understanding of: • Informed consent discussions. • Medication instructions, including side effects and adverse reactions. • Procedure preparation. • Follow-up instructions. If the patient is unable to convey the information, it is restated in simpler terms, perhaps utilizing pictures and/or drawings.	☐	☐
7. Educational tools and consent forms have been evaluated to determine the grade level at which they are written. This allows written materials to be given that are understandable to the majority of our patient population.	☐	☐
8. At the conclusion of each patient encounter, the patient/family are asked if they have any questions or concerns that have not been addressed.	☐	☐
9. Record documentation reflects all aspects of patient interactions and comprehension. This demonstrates the effectiveness of our communication skills and promotes patient satisfaction.	☐	☐

For additional information or assistance, please contact the MLMIC Risk Management Department at **(518) 786-2815** or **RMC@mlmic.com.**

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