Consent to Treatment Form

In order for a valid consent to treatment to be given, several requirements must be met, both as to the ability of the patient to consent and the nature of the information provided. In some provinces and territories, these requirements have been codified in legislation. However, the law applicable to informed consent is governed by the same general principles in all Canadian jurisdictions.

Ability of Patient to Consent

Legal Capacity

The patient must have the capacity to consent to treatment. Most dental patients will have this capacity. The exceptions are:

- people who have been declared mentally incapable, in which case their guardian, or substitute decision maker, must provide the consent; and
- minors who are incapable of providing consent due to their age, in which case their parent or guardian must provide the consent.

Whether or not there is a specific age of consent for medical treatment, and if so, what the age is, varies from province to province. In New Brunswick, a person over the age of 16 is presumptively capable of giving or refusing consent to medical treatment on his or her own behalf. A person younger than 16 may consent if the attending physician or dentist believes he/she is capable of understanding the nature and consequences of treatment, and if the treatment and the procedure to be used are in the minor's best interests for continued health and well being. In Quebec, a person over the age of 14 is presumptively capable of giving or refusing consent to medical treatment on his or her own behalf, if the treatment is not one that is required by the patient's state of health; however, if the treatment entails a serious risk for his/her health or it may cause grave or permanent effects, consent from the minor's parent or guardian is required.

In most other provinces the common law applies. This means that a minor can give or refuse consent on his or her own behalf if he/she is capable of understanding the information about a treatment and appreciating the risks and likely consequences of proceeding with or without the treatment. If you are not sure what the age of consent is in your jurisdiction, you should contact your licensing body.

Mental Capacity

The patient must have the mental capacity to provide consent. This means that he/she must have the ability to understand the information about the treatment and understand the likely consequences of having treatment or not having treatment. If a patient does not understand English, an interpreter should be used. In Ontario, the *Health Care Consent Act, 1996* provides that a person is presumed to be capable with respect to treatment decisions unless there are reasonable grounds to believe otherwise.

If a patient lacks either the required legal or mental capacity, a substitute decision maker legally authorized to provide consent on behalf of the patient may consent on his/her behalf.

Voluntary

The consent to treatment must be given voluntarily by a capable individual and cannot be coerced or obtained through fraud or misrepresentation.

Consent to Treatment

Information Provided

The patient must give an informed consent to the treatment. This means that you must provide them with the information about:

- the treatment and its benefits
- the material risks and side effects of the treatment
- reasonable alternatives to the treatment (if any) that are available, and
- the consequences of not having the treatment that any reasonable person in the same circumstances would want to be aware of prior to treatment.

*In **Hopp v. Lepp (1980)**, which remains a leading Supreme Court of Canada case on informed consent, the Court held that the patient should be advised of all **probable risks** that might cause serious injury or death and also advised of **material risks**, which are defined as those risks associated with treatment that a reasonable person would attach significance to in deciding whether or not to undergo the proposed therapy. A third category of risks, **special or unusual risks**, which may go beyond those that are probable and could relate to serious consequences, should also be disclosed, even if they are less likely to occur. The Court added, however, that the scope of the duty of disclosure depends on the circumstances of each particular case. Remote risks do not have to be disclosed to a patient, unless the patient specifically asks about such risks.*

In determining whether the patient has been provided with appropriate information, Courts will consider what the general practice is among other dentists.

*In **Carter v. Higashi (1993)**, the patient suffered a fractured jaw while having her wisdom teeth extracted. She had not been warned prior to the surgery of the risk of a fractured jaw. Experts at trial testified that the risk of jaw fracture during wisdom tooth extraction was remote and therefore, most dentists do not warn patients of this risk. The Court agreed that it was the standard practice among dentists at the material place and time (Calgary in 1990), not to warn of the remote possibility of jaw fracture and accordingly, found that the dentist had not been negligent in failing to warn the patient of this.*

*Similarly, in **Schinz v. Dickinson (1984)**, the patient sustained paraesthesia and permanent damage to her lingual nerve likely caused by the needle used to administer a local anesthetic, as part of an operation to extract the patient's third right molar. The Court held that she had not been warned of any possible risk of damage resulting from the operation. The Court ruled that it "was not the practice of the dental community to warn patients of the risk of possible nerve damage resulting from local anesthesia injections because such damage rarely occurs". Accordingly, the Court held that no warning was required by the dentist. In its decision, the Court noted that no special or unusual circumstances existed, such as an impingement of the roots on the alveolar canal or the mandibular canal. If special circumstances do exist making certain risks more likely with respect to a specific patient, the dentist may have a duty to warn of those risks, even if he or she does not ordinarily do so.*

*In **DeFerrari v. Neville (1998)**, an Ontario case involving lingual nerve paraesthesia which persisted after a mandibular nerve block, the patient claimed that had she known of the risk of permanent numbness, she would not have consented to the treatment (and the injection). The Court relied on expert testimony in finding that the risk of paraesthesia after an injection is a remote risk which most dentists do not warn their patients about and therefore, no duty to disclose such a risk was required.*

Despite the Court's decision in DeFerrari v. Neville, there is a body of scientific knowledge suggesting that some local anesthetics may be more likely than others to be associated with paraesthesia, especially lingual paraesthesia. While this is not intended to suggest that dentists should or should not warn patients of the risk of paraesthesia when they use these local anesthetics, they should be up to date on the scientific studies for all the materials they use in their practice, in order to be in a position to disclose such material risks, if disclosure is warranted in the circumstances.

The failure to disclose required information is not necessarily determinative of the dentist having failed to meet the required standard of care. Even if a Court were to find that a dentist failed to disclose a probable, material, special or unusual risk, the dentist would not be found negligent in failing to advise the patient of the risk if the Court were to find that the average person in the patient's position would have consented to treatment even if they had been aware of the risk.

In order to determine if a failure to disclose a risk "caused" a patient's injury, the Courts evaluate what a reasonable person in the patient's circumstances would have decided about treatment if they had they received adequate information. The test used is whether a reasonable person in the patient's position would have refused the treatment if the risks had been disclosed to them.

In applying this legal test, one factor considered is how necessary the treatment was. A patient whose life is at stake or is in intense pain is more likely to accept a small risk of serious harm than a patient undergoing a treatment which is elective. It is therefore particularly important to provide full information about possible negative consequences to patients who are consenting to elective treatment.

*In **Rawlings v. Lindsay (1982)**, a dental malpractice case against a British Columbia oral surgeon for his alleged failure to disclose the risk of possible nerve damage in the lower lip and chin during the extraction of a lower impacted wisdom tooth, the patient was warned of pain, swelling and soreness, but not about any possible long term numbness. After hearing the evidence, the Court held that the oral surgeon's warning was insufficient on the basis that he himself acknowledged that the roots were in close proximity to the inferior alveolar nerve, but decided not to warn the patient about the risk of permanent paraesthesia. The case, however, turned on the patient's particular circumstances, in that she was not suffering any discomfort from her wisdom teeth prior to surgery, and they were not acutely infected. The Court held that a reasonable person in the patient's position, when faced with "optional" surgery and confronted with a choice between, on the one hand, surgery which may not have improved her condition, but which carried a chance of nerve damage and not having the surgery, even though there was the possibility that her wisdom teeth might cause her problems in the future, would most likely have elected to not have the surgery. Therefore, in the case, the failure to disclose the risk was seen as "causing" the injury.*

Dickie v. Minett (2012) *is a dental malpractice case against an Ontario dentist alleging the dentist's failure to disclose the risk of a jaw fracture during the extraction of three wisdom teeth. Similar to the Court in Carter v. Higashi (discussed above), the Court concluded that the risk of jaw fracture was not one that dentists routinely discussed with patients in advance of this type of procedure, as the risk is quite remote. Furthermore, the Court determined that, given the health risks that would exist if the impacted wisdom teeth were not extracted, a reasonable person in this patient's situation would have consented to the procedure, even if all risks, including that of a fractured jaw, had been thoroughly disclosed.*

You should also advise the patient of any risks arising to the patient following the completion of the procedure. If the treatment will affect the patient's ability to drive or to function safely, your responsibility extends to ensuring that the patient will have the assistance he/she needs after leaving your premises. You should ensure that any patient undergoing any such procedure whose ability to drive is affected is either accompanied by someone who can drive him/her home or is escorted to a taxi by your staff. You should also advise any such patient against driving for an appropriate period of time.

You must also answer any questions about the treatment the patient may have and provide the patient with any further information he/she may request.

Consent to Treatment Performed

The treatment performed must be the treatment to which the patient has consented. You can obtain consent for a "treatment plan". However, any treatment you perform must be covered by this treatment plan. You should therefore ensure that the treatment plan is broad enough to cover all of the specific treatments you provide. If any individual treatment is not clearly a part of the treatment plan, you should obtain a further consent for that treatment.

Quick v. Reitzik (2007) *is a B.C. decision that is helpful in outlining the level of specificity that needs to be provided to a patient, to allow them to give true informed consent. The patient in this case saw a maxillofacial surgeon to have her lower right second premolar tooth ("Tooth 4.5") extracted. Upon examination, the surgeon told the patient that she actually needed two "roots" extracted, not one. The patient interpreted this to mean that Tooth 4.5 had two roots, not one. In fact, the surgeon meant to indicate that he needed to extract not only Tooth 4.5 but also the one beside it, Tooth 4.4. The Court held that the surgeon had not obtained proper informed consent for this procedure, as he had used vague and imprecise language that left an unacceptable degree of ambiguity for the patient. The Court found that a reasonable person, in the shoes of the patient, would have wanted to discuss the procedure more fully, including the nature and scope of the steps the surgeon was about to undertake.*

Withdrawal of Consent

There may be occasions during dental treatment where a patient initially consents to treatment, but later changes their mind. What should a dentist do if part way through a procedure a patient tells them to stop?

In ***Ciarlariello v. Schacter****, a Supreme Court of Canada decision, while having a cerebral angiogram performed which the patient consented to, the patient experienced discomfort, hyperventilated and told the doctor to stop the test. The patient then calmed down and five minutes later, told the doctor to proceed and complete the test. The doctor then administered another injection of dye, following which the patient suffered an immediate reaction to the dye and was rendered a quadriplegic. In the case, the Court held that an individual has the right to stop a procedure, even while it is underway. If consent is effectively withdrawn during the course of the treatment, the treatment must be terminated, except in those circumstances where to terminate the process would be either life threatening or pose immediate and serious problems to the health of the patient.*

Once a patient withdraws consent for a procedure, the issue then becomes what is required for valid consent for the continuation of the procedure. The Court in Ciarlariello v. Schacter held that in order to proceed with a procedure after consent has been initially withdrawn, before re-starting the procedure, a patient should be told whether there are any significant changes in the risks involved and/or if there has been a material change in circumstances which could alter the patient's assessment of the costs / benefits of continuing with the procedure. Once this has been accomplished, the treatment can be restarted.

Persons Providing Treatment

You should ensure that the consent obtained is broad enough to include any person who may be assisting or replacing you in the procedure.

Who Should Obtain Consent

You should obtain the consent from your patients and should not delegate this task to your assistants. Your staff should be instructed that if the patient asks any questions when you are not present that cause them to question whether the patient fully understands the procedure, you

should be advised immediately. You should then have a further discussion with the patient before any treatment is commenced. Similarly, your staff should be instructed to advise you immediately if a patient indicates to them that they want to amend their consent in any way or if they ask any further questions about the procedure. While the dentist is ultimately responsible for ensuring that informed consent is obtained prior to treatment, their staff is considered part of the "health care team" and their actions are considered as part of the overall informed consent process.

*In **Keane v. Craig (2000)**, the patient had a Bartholin's cyst and gland removed from her vulva by a surgeon. She then underwent a further surgical procedure which was intended to be a reconstruction of the vagina. Before that surgery, a nurse gave the patient a consent form on which the procedure was described as a "vaginal reconstruction". The patient added the words "reattach labia" to the form. The nurse did not advise the doctor of the patient's amendment and the doctor cut off the patient's right labium. The Court found that the nurse had a duty of care to advise the doctor of the amended consent form and that her actions constituted negligence. The Court found that "the addition to the consent form should have raised a red flag" that the nurse should have immediately acted upon.*

Emergency Treatment

The requirements for informed consent outlined above do not necessarily apply in an emergency situation where the patient is unable to give consent. This could be due to a language barrier or a disability which prevents communication from taking place. However, in such circumstances, steps should be taken to try and find a practical way of communicating, provided that any delay does not prolong the suffering that the person is apparently experiencing, nor put the person at risk of sustaining serious bodily harm. However, if and when a dentist proceeds to provide treatment without a patient's consent in an emergency situation, the dentist should only do so if they have no reason to believe that the person does not want the treatment.

Form of Consent

Consent may be written or oral, as the law does not specifically state how consent should be obtained. Further, the form of the consent does not determine whether the consent is valid; the issue is whether the legal tests set out above have been met. While an executed written consent form provides evidence that the necessary information was given and the patient consented, it is not, in and of itself, determinative of informed consent. An executed consent form will not prove that informed consent was obtained if, in fact, the person consenting was not given the required information with respect to the treatment.

Written Consent

Where the appropriate information has been given by the dentist proposing the treatment, an executed written consent form will provide supporting evidence of a patient's consent. A sample consent form is set out at the end of this article. When using this or any consent form, you should also make detailed notes in the patient's chart, of the fulsome consent to treatment discussion you had with the patient. This will aid in establishing that the criteria for a valid consent have been met, if questioned in future. You should ensure that your records describe the information that was provided to the patient and any questions or concerns the patient raised. Accompanying the sample form is a list of issues you should review and discuss with the patient.

*In **Dickson v. Pinder (2010)**, an Alberta case involving chiropractor negligence, the Court noted that "informed consent is a process, not a form", and that medical practitioners should not rely only on a signed informed consent form. The medical practitioner should take reasonable steps to ensure that the patient understands and appreciates the nature of the procedure, as well as the contents of the form that the patient has signed. Furthermore, just because a patient has not asked questions about the contents of the form, this does not necessarily mean the medical practitioner can assume that the patient understands the various risks. This will be especially true in the case of an unsophisticated patient.*

Notes in the patient's chart detailing the contents and context of an informed consent discussion can be helpful in providing evidence of informed consent; conversely, a paucity of notes can severely weaken a medical practitioner's defence and can result in the drawing of an adverse inference from the lack of such notes. Under such circumstances, a medical practitioner could be hampered in re constructing events and he/she runs the risk of being met with a different account of what happened. In essence, their credibility can be called into question and the evidence of the patient preferred.

Despite the above, even if a medical practitioner has incomplete or inaccurate notes, this will not automatically result in a finding of negligence if the notes, or lack of them, were not a cause of the patient's injuries. A lack of appropriate charting alone will not necessarily result in an inference, in a civil malpractice claim, that the doctor failed in other duties to his patient. This distinguishes between a civil lawsuit and a regulatory College complaint or investigation

where a lack of appropriate charting on its own may be sufficient to warrant a finding of professional misconduct.

Oral Consent

In most cases of routine dental care, a written consent form may not be obtained. You should ensure that the patient has verbally given an informed consent to the treatment to be provided and that you have kept a detailed written record of your discussion with the patient and his/her verbal consent. In some cases, the patient's consent will not be specifically stated but will be implied from the patient's actions. For example, a patient who sits in your chair and opens his/her mouth is implicitly consenting to an examination. The difficulty with implied consent is that it can be difficult to prove exactly what was and was not agreed to. For example, did your patient consent to you cleaning their teeth as well as examining them or did the implied consent only include the examination? For anything more than very routine procedures, specific consent (oral or written) to the procedure or treatment you are recommending should be obtained and recorded in the chart.

An important aspect of obtaining informed consent is not how you convey the information to the patient, but that you can establish by your documentation that you covered all of the required elements of consent.

Consent to Treatment Form

A sample consent to treatment form developed by CDSPI is set out below. As part of CDSPI's loss prevention program, this form has been prepared by its counsel with input from a number of provincial dental associations.

The purpose of the form is to provide you with evidence of what information you have given your patient with respect to the proposed treatment. This evidence may be valuable if the patient subsequently alleges that you did not provide him/her with sufficient information on which to base a decision as to whether or not to undergo the treatment.

In order for a consent to treatment form to be valid, you must provide the patient with necessary information, as described in the form. As discussed above, a consent form will not necessarily prove that informed consent was obtained if the patient is subsequently able to convince a Court that the nature and/or potential risks of the procedure were not adequately described to him/her in advance of treatment. The form should be used in conjunction with the notes you normally record in the patient's chart or records. If you use a written consent form, your chart notes should describe the circumstances under which the signed written consent form was obtained from the patient.

The sample Consent to Treatment Form set out below provides a checklist for the information which should be included in your records as evidence that the patient was fully informed before he/she signed the form. **You should ensure that you maintain records which set out the advice you have given to the patient.**

When a consent form is used, it should be signed by:

- the patient
- if the patient is a minor and incapable of consenting to treatment or the law requires parental/guardian consent (see p.1 above), the patient's parent or legal guardian, or
- if the patient is mentally incapable of consenting to the treatment proposed, the patient's legal guardian or substitute decision maker.

In paragraph 1, you should insert a basic description of the proposed treatment or procedure, details of any anesthetic to be used and your name and the name of anyone who may assist you or replace you in performing the treatment or procedure.

Paragraph 5 is intended for use if you treat patients who live outside Canada, either on a continuing or an emergency basis. You should consider consulting your legal counsel to ensure that the form includes everything necessary in your jurisdiction for your type of practice. You may wish to customize the sample form to reflect your practice and various procedures you perform.

The form should be signed by the patient, parent or guardian, and/or substitute decision-maker (as required), witnessed by someone other than you and kept with the patient's records for future reference.

Sample Consent to Treatment Form

Name of Patient _____

Date _____ Expected Duration of Treatment _____

1. I authorize Dr. _____ , or whomever he/she may designate to perform on _____
(Name of patient - or myself)

the following procedure(s) and treatment:

1. _____
2. _____
3. _____
4. _____
5. _____

(State nature of procedure(s) and treatment and, if anesthetic is to administered, the type of anesthetic to be used)

If during the course of such treatment as described above, in Dr. _____'s opinion and judgment or whomever he/she may designate, any treatment or procedure different from that now contemplated should be indicated for which there is no reasonable opportunity for additional explanation and authorization, I further request and authorize Dr. _____ , or whomever he/she may designate, to do whatever they consider advisable.

2. The nature and purposes of the treatment, possible alternative methods of treatment, the risks involved and the possible complications have been fully explained to me by

_____
(Name(s) of dentist(s) explaining)

including the following information on alternative methods of treatment, including no treatment, risks and possible complications (insert information below):

_____

_____

3. I acknowledge that no guarantee or assurance has been made to me as to the results that may be obtained. The average life expectancy of the treatment(s) described in paragraph 1 has been provided.

4. I consent to the administration of the anesthetics named above (if any) or any such other anesthetics as may be considered necessary or advisable by the dentist(s) referred to in this consent.

5. I understand that this Consent to Treatment form and the treatment provided as described in paragraph 1 above will be governed by the laws of the Province of _____ and I consent to the Courts of the Province of _____ having exclusive jurisdiction to entertain any action, suit or proceeding in respect of, or in any way relating to, such treatment, whether based on alleged breach of contract or alleged negligence in providing such treatment or on any other grounds whatsoever, and whether against the dentist(s) named in paragraph 1 or against any of his/her partners, associates, employees or staff.

I undertake and agree to not commence any action relating to such treatment, whether based on alleged breach of contract or alleged negligence in providing such treatment, or on any other grounds whatsoever, in any other legal jurisdiction outside of the Province of whether or not I may have a right to do so.

I acknowledge and understand that Dr. _____ has agreed to provide professional services for me conditional on this undertaking being given and honoured by me with regard to my declaring that the Province of _____ has exclusive jurisdiction over any action, suit or proceeding and Dr. _____ has made it clear that without my making this undertaking, he would not have agreed to provide treatment for me.

6. I confirm that I have discussed the estimated cost, future costs and method and terms of payment for the treatment described in paragraph 1 with Dr. _____ and that I have agreed to make such payment on the terms we discussed.

BY INITIALING HERE " _____", I CERTIFY THAT I HAVE READ AND FULLY UNDERSTAND THE ABOVE CONSENT TO TREATMENT AND THAT THE EXPLANATIONS REFERRED TO WERE IN FACT MADE TO ME AND THAT THE FORM WAS FILLED IN PRIOR TO TREATMENT. I ALSO CERTIFY THAT I WAS GIVEN AN OPPORTUNITY TO ASK QUESTIONS AND ALL OF MY QUESTIONS HAVE BEEN SATISFACTORILY ANSWERED.

BY SIGNING BELOW, I ACKNOWLEDGE MY UNDERSTANDING OF THE INFORMATION ABOVE AND THAT I AGREE TO PROCEED WITH TREATMENT AS PROPOSED.

Signature of Patient _____

or

Signature of Parent of Guardian _____

(or other person authorized to consent for patient)

Relationship of Person Signing to Patient _____

Note: When a patient is a minor and/or is otherwise incapable of consenting to the treatment, the consent of a parent, guardian or substitute decision maker must be obtained.

Date: _____

Witness: In my opinion, the patient/parent/guardian appears able to understand the treatment proposed and the information provided concerning the treatment.

Signature of Witness _____

Date: _____