

Informed Consent Issues Including Communication with Minors and with Other Patients Who May Be Incapable of Providing Consent

The Practice Advisories of the Royal College of Dental Surgeons of Ontario (RCDSO) contain practice parameters which should be considered by all Ontario dentists in the care of their patients. It is important to note that these Practice Advisories may be considered by the College and its Committees in determining whether professional responsibilities have been maintained.

Informed Consent Issues

Dentists, like many other professionals in the field of health care, often struggle with issues regarding how to apply the ethical and legal concepts of informed consent into their daily practice and office routines.

Dentists must be mindful to ensure that they apply proper principles and judgment when seeking informed consent for treatment and for the collection, use and disclosure of personal information. In this day and age, the mere fact that someone sits down in a dental chair does not amount to giving consent. Obtaining informed consent involves a process of communication – a mere signed piece of paper may not suffice in the absence of a meaningful dialogue with the patient.

Any discussion about consent to treatment should take place before treatment. This discussion needs to include information about the expected benefits of treatment; risks and side effects; alternatives to the proposed treatment, including the likely result if no treatment is done; materials to be used; any unique personal circumstances of the patient; and fees to be charged. The dentist should ensure that he or she answers any questions the patient may have.



Informed Consent Issues (continued)

Dentists are advised that the more complicated or risky the treatment is, the more specific and detailed the consent and its documentation should be. This also applies to treatment undertaken for strictly cosmetic or aesthetic reasons.

Ontario's Health Care Consent Act, 1996, provides some guidance about the information to be communicated to and discussed with a patient prior to treatment. Discussions should include:

- nature of treatment proposed;
- expected benefits of treatment;
- material risks and side effects of treatment, taking into account the individual circumstances of the patient;
- alternatives, including other types of treatment including no treatment, and the likely consequences of declining the proposed treatment;
- answers to any questions the patient has regarding the proposed treatment or alternatives.

It is prudent to give the patient time to consider the options before proceeding, especially in cases where the proposed treatment is extensive or risky or elective or expensive in nature. The dentist should also be satisfied that the patient understands the information, giving consideration to the patient's age, condition, language skills etc. The dentist is well-advised to ensure that his or her notes of conversations regarding the nature and scope of the informed consent discussion are fully documented in the patient's chart.

Dentists are also reminded that proper consent should be obtained and documented for the collection, use and disclosure of patients' personal information, including personal health information. There is more information about this provided in College publications and in Ontario's Personal Health Information Protection Act, 2004.

Consent From Minors

The College receives many inquiries about how to properly obtain informed consent for treatment and for information collection, use and disclosure from minors. Understandably, this is an area of great concern for dentists as the determination of whether consent should be obtained from the minor or the parent is largely a judgment call by the dentist.

In making this determination, the dentist should consider factors including the age, maturity and comprehension of the child, and the type of treatment (emergency vs. necessary vs. elective). The dentist should attempt to ascertain whether the patient understands the risks/benefits of treatment or foregoing treatment and can make decisions in this regard.

Consent From Minors (continued)

While 18 is the age of majority in Ontario with respect to a person's legal ability to enter into contracts, there is no fixed "age of consent" for medical treatment. As a general rule, for patients under the age of about 12, consent should be obtained from the parent(s) or guardian(s) of the child. For patients aged 16 and above, the dentist should presume, in the absence of evidence to the contrary, that the minor can provide consent on his or her own behalf. The most difficult determination will be for patients between the ages of 12 and 15. For this age group, the dentist is advised to initiate a discussion with the patient and make an assessment as to whether the patient can give consent on his or her own. Of course, with the patient's permission, the parents can and should be involved in the decision and consent may be obtained from both the patient and the parent(s).

Also, if the minor patient is capable of providing consent on his or her own, you will need to consult the minor regarding the collection, use and disclosure of personal information. This includes information you may gather in the course of obtaining a medical history.

It is important to remember that, although a minor may be able to consent on his or her own behalf to treatment and information collection, use and disclosure, no person under the age of 18 can enter into a legally binding contract. That means that a payment arrangement entered into with a minor cannot be enforced. A patient's parent(s) or guardian(s) may, of course, enter into a binding contract with the dentist for the fees associated with the minor's dental care.

Consent From Incapable Adult Patients

With respect to adult patients, in some circumstances, a dentist may have reason to believe that a particular (adult) patient is not capable of providing or refusing consent, likely because she or he is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision with regard to treatment. In these circumstances, and provided that the Health Care Consent Act, 1996, is followed, the decision of another person can be relied upon. This other person is often referred to as a substitute decision-maker.

The College suggests that in any circumstance where it is determined that any adult is incapable, you should record the following in the patient record:

- the circumstances which gave rise to the forming of that view;
- the advice that was provided to the patient;
- the name and the relationship of the person whose consent was obtained in substitution for the consent of the patient;
- whether the substitute decision-maker has been given a power of attorney for personal care for the patient.

Conclusion

More detailed guidance about consent and substitute decision-makers is available in both the Health Care Consent Act, 1996 and the Personal Health Information Protection Act, 2004.

Under the Health Care Consent Act, a patient has the right to challenge a dentist's opinion about his or her capacity by requesting a review to the Consent and Capacity Board, within 48 hours. This is a right that patients should be made aware of. If the patient tells the dentist that he or she intends to challenge the opinion, unless it is an emergency, the dentist should refrain from treating the patient until the application is filed and determined. If the application is not filed within 48 hours, the dentist may rely on the consent of the substitute decision-maker and complete the treatment. More information about the Consent and Capacity Board is available at www.ccboard.on.ca.

It is important to remember that just because a patient may have designated another person as his or her power of attorney for personal care, it does not necessarily mean that the patient is incapable of making decisions him or herself. If consent can be obtained from the patient directly, it should be. If the patient is incapable, then the dentist should rely on the person with the power of attorney for personal care or on a substitute decision-maker.

This Practice Advisory is intended to assist members by providing guidance with respect to consent issues in dealings with minor patients and patients who are incapable of providing consent. It is not intended to provide a complete understanding of the legal requirements of the current legislation governing consent to treatment.



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